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Prefazione

ROSSELLA BORELLA

Direttrice

Care lettrici e cari lettori,

Che cosa accade quando il diritto è chiamato a dare nome e forma a fenomeni che, per lungo tempo, sono rimasti ai margini del discorso giuridico? E in che modo le categorie tradizionali del diritto riescono – o faticano – a leggere trasformazioni sociali sempre più complesse e stratificate?

I contributi raccolti nel Volume 7 Numero 2 della *Trento Student Law Review* si inseriscono proprio in questo spazio di interrogazione. Le riflessioni proposte affrontano temi di grande attualità, mettendo in luce la tensione costante tra violenza, protezione e accesso effettivo ai diritti, così come il ruolo delle istituzioni nel riconoscere, prevenire e rispondere a fenomeni che spesso vengono sottovalutati o letti attraverso categorie non più adeguate. In filigrana, emerge il rischio di una tutela selettiva, che non sempre riesce a garantire una protezione uniforme e tempestiva, e che solleva interrogativi profondi sul modo in cui il diritto opera come strumento di riconoscimento e di inclusione.

Senza offrire risposte definitive, gli articoli di questo numero contribuiscono ad alimentare uno spazio di riflessione critica che è, da sempre, vocazione della nostra rivista: uno spazio in cui il diritto non è solo oggetto di studio, ma linguaggio, dialogo continuo. È qui che la *Trento Student Law Review* trova la propria identità, valorizzando la pluralità degli sguardi e il confronto rigoroso tra

prospettive diverse, sempre nel solco della scientificità e della letteratura accademica.

Ricoprire un ruolo direttivo all'interno di una rivista giuridica universitaria, seppur nel suo contesto limitato, mi ha permesso di cogliere quanto anche gli spazi che si percepiscono come neutrali siano attraversati da strutture di potere spesso silenziose. Allo stesso tempo, il lavoro svolto insieme al Direttivo e a tutta la redazione ha dimostrato come tali schemi possano essere messi in discussione attraverso pratiche quotidiane di collaborazione, ascolto e sostegno reciproco. La nostra rivista è, in questo senso, un microcosmo che, nel suo piccolo, prova a offrire un contributo critico al dibattito giuridico, mostrando come il lavoro scientifico non sia mai un percorso individuale, ma il risultato di una macchina collettiva fatta di editor, revisori, visiting editors e collaboratori.

Desidero ringraziare tutte le autrici e tutti gli autori che hanno scelto di affidare i propri lavori alla nostra rivista, i revisori che ci accompagnano con competenza e disponibilità, e ogni editor che, con dedizione costante, rende possibile questo progetto. Un ringraziamento particolare va ai membri del Direttivo, per l'impegno e la responsabilità condivisa con cui affrontano le sfide quotidiane. In modo speciale, desidero ringraziare la Vice Direttrice, Emily Miraglia, per il sostegno, la presenza e il lavoro che va ben oltre la pubblicazione di questo numero: un contributo prezioso che dimostra come la costruzione di una comunità passi anche attraverso relazioni fondate sulla fiducia e sulla condivisione.

Concludendo questo percorso, rivolgo un augurio sincero al nuovo Direttivo e, in particolare, al nuovo Direttore, Emil Trigolo. A loro va il mio più sentito incoraggiamento a sentirsi liberi di sperimentare, di guardare oltre e di lasciare spazio alle proprie visioni, affinché la rivista possa continuare a crescere e a trasformarsi di generazione in generazione. Ogni comunità studentesca affronta

sfide e complessità diverse nel proprio tempo storico: l'auspicio è che queste vengano accolte senza sentirsi vincolati dal passato, ma come occasioni per far progredire la *Trento Student Law Review* nel segno della continuità, della fiducia e dell'apertura.

Con l'augurio che questo numero possa offrire spunti di riflessione, confronto e crescita, vi auguro una buona lettura.

Cordiali saluti,

Rossella Borella
Direttrice

Preface

ROSSELLA BORELLA

Editor-in-Chief

Dear Readers,

What occurs when the law is called upon to name and shape phenomena that have long remained at the margins of legal discourse? How do traditional legal categories succeed—or struggle—in making sense of increasingly complex and layered social transformations?

The contributions collected in Volume 7, Issue 2 of the *Trento Student Law Review* engage precisely with this critical space. The reflections presented address highly topical issues, illuminating the persistent tension between violence, protection, and effective access to rights, as well as the role of institutions in recognizing, preventing, and responding to phenomena that are often underestimated or interpreted through categories that have become inadequate. Beneath these analyses lies the risk of selective protection, which may fail to ensure consistent and timely safeguards, raising profound questions about how law functions as a tool for recognition and inclusion.

Without purporting to offer definitive answers, the articles in this issue contribute to a space of critical reflection—a central vocation of our journal. This is a space where law is not only an object of study but also a language, a continuous dialogue. Here, the *Trento Student Law Review* asserts its identity, valuing the plurality of perspectives and rigorous engagement among diverse viewpoints, all within the framework of scholarly rigor and academic discourse.

Serving in a leadership role within a university law journal, even within its limited scope, has made me acutely aware that even spaces perceived as neutral are shaped by often invisible structures of power. At the same time, the collaborative work carried out with the Editorial Board and the entire editorial team has shown how such structures can be challenged through daily practices of cooperation, attentive listening, and mutual support. In this sense, our journal functions as a microcosm that, in its small way, seeks to contribute critically to legal discourse, demonstrating that scholarly work is never an individual endeavor but the product of a collective effort comprising editors, reviewers, visiting editors, and contributors.

I wish to extend my sincere gratitude to all the authors who entrusted their work to our journal, to the reviewers who accompany us with expertise and generosity, and to every editor whose dedication makes this project possible. Special thanks go to the members of the Editorial Board for their commitment and shared responsibility in navigating the journal's daily challenges. I would also like to express particular appreciation to our Vice Editor-in-Chief, Emily Miraglia, for her unwavering support, presence, and contributions that extend far beyond the publication of this issue—a testament to how building a scholarly community is nurtured through relationships founded on trust and collaboration.

As I conclude my term, I offer my heartfelt best wishes to the new Editorial Board and, in particular, to the incoming Editor-in-Chief, Emil Trigolo. I encourage them to approach their roles with freedom to experiment, to look beyond established boundaries, and to embrace their own visions, so that the journal may continue to grow and evolve across generations. Every student community faces distinct challenges and complexities in its historical moment; my hope is that these are approached not as constraints imposed by the past, but as opportunities to advance the *Trento Student Law Review* in the spirit of continuity, trust, and openness.

With the hope that this issue may inspire reflection, dialogue, and intellectual growth, I wish you an engaging and thought-provoking reading experience.

Sincerely,

Rossella Borella
Editor-in-Chief

Asylum Amidst Crisis

The Evolution of Poland's Refugee Legislation in the Wake of the Ukrainian Exodus

MARTA DZIEMIANCZUK*

Abstract: The article examines Poland's legislative response to the sudden influx of Ukrainian refugees, caused by the Russian invasion of the country, with a focus on the Special Act as an implementative tool of the Temporary Protection Directive. Through a longitudinal analysis, it analyzes the way in which the Polish legal framework adapted to said sudden arrival of refugees, with particular attention to mechanisms such as access to employment, social support, and broader integration. The overall aim of the work, by using a doctrinal legal analysis of both national legislation and EU directives, is to evaluate the effectiveness and limitations of the dual protection established by the Polish Special Act. While this latter provided rapid solutions to the crisis, it also revealed both structural gaps in long-term integration and a systematic deservingness-based approach in the acceptance and inclusion of migrants coming into the State territory.

Keywords: Protection; Poland; Ukraine; Temporary Protection; Refugee Crisis.

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1. Introduction

In 2022, the Russian invasion of Ukraine precipitated the largest refugee crisis in Europe since World War II, with over six million¹ people fleeing their homeland in search of safety. This unprecedented influx of refugees crossing European borders posed significant challenges across the European Union (EU), both from a humanitarian and legal perspective. In response, the EU was compelled to enhance its already existing refugee protection framework, to cope with the evolving situation².

Poland's connection to the Ukrainian refugee crisis is particularly notable. The two countries not only share a border of over 500 kilometers, but also have deep historical, cultural, and social ties, which have fostered strong solidarity among them. As a result, Poland has become one of the primary destinations for Ukrainian refugees fleeing the conflict. By the end of February 2024, Poland had

¹ U.N. High Commissioner for Refugees, *Regional Refugee Response Plan for the Ukraine Situation 2024* (Jan. 15, 2024), <https://data.unhcr.org/en/documents/details/105903> (last visited November 28, 2025).

² Ewa Karska and Łukasz D. Dąbrowski, *Qualifying for International and National Protection under the Polish Legal Order: Some Remarks in the Context of the War in Ukraine*, 4 *Stosunki Międzynarodowe – International Relations* 4 (2024), available at <https://doi.org/10.12688/stomiedintrelat.17794.1> (last visited November 11, 2025).

granted temporary protection status to 957,200 Ukrainian nationals, making it one of the largest host countries for beneficiaries under the EU's temporary protection scheme, according to Eurostat data.

Yet, Poland's response to the Ukrainian refugee crisis represents a striking paradox. On one hand, it demonstrated that large-scale, rapid refugee protection is both politically and administratively feasible: the government established streamlined registration systems, granted immediate labour market access, and mobilised unprecedented civil support, with 77% of Polish households participating in refugee assistance³. On the other hand, this response stands in stark contrast to Poland's historically restrictive asylum policies – where only 1-2% of applications were approved and just 2,771 refugees were recognized in 2020⁴ – and its treatment of other refugee populations – most notably during the 2021 Belarus border crisis, where systematic pushbacks and a militarised exclusion zone prevented asylum seekers from entering Polish territory⁵. This selective generosity raises fundamental questions about the nature of refugee protection in contemporary Europe: who deserves protection, under what conditions, and through which legal mechanisms?

This article argues that Poland's legislative response to the Ukrainian crisis, while demonstrating administrative capacity for mass protection, has created a hierarchical protection regime –

³ *Ibid.*

⁴ Franck Düvell and Iryna Lapshyna, *On war in Ukraine, double standards and the epistemological ignoring of the global east*, 60(4) International Migration 209 (2022), available at <https://doi.org/10.1111/imig.13038> (last visited December 10, 2025).

⁵ Elisa Sandri and Sarian Jarosz, *A Tale of Two Borders: Double Humanitarian Standards in Refugee Reception: The Case of Poland*, Humanitarian Leadership Academy (Save the Children) and Konsorcjum Migracyjne (April 2025), available at https://konsorcjum.org.pl/wp-content/uploads/2025/05/TALE_of_TWO_BORDERS_DEF_B.pdf (last visited November 28, 2025).

stratified along criteria such as nationality, legal pathways, and associated rights – that reveals tensions between emergency solidarity and sustainable and equitable asylum governance. Through the implementation of the Temporary Protection Directive⁶ (hereinafter referred to interchangeably as TPD) – activated for the first time since its adoption in 2001⁷ – Poland constructed a dual legal framework, treating different categories of displaced persons unequally and raises fundamental questions about temporary protection as a crisis management instrument.

In this sense, three interconnected questions guide the conducted analysis: how did Poland's pre-existing asylum framework shape its capacity to respond to mass displacement? To what extent does Poland's dual protection system align with TPD requirements? What do the contradictions in Poland's response reveal about temporary protection's long-term viability?

Prior to 2022, Poland maintained one of the most restrictive asylum systems in the European Union, characterized by low refugee recognition rates, extensive detention use, and inadequate procedural safeguards. The TPD's activation in March 2022 marked an unprecedented shift, yet Poland's implementation through the "Special Act" reveals selective compliance with EU standards. The response operates through a dual system: enhanced "special" protection for Ukrainian nationals under the 2022 Act, and "general" protection under existing legislation for other TPD beneficiaries such as third-country nationals who held protection status in Ukraine. This dualism creates differential treatment and critical gaps, most notably the complete absence of family reunification provisions, which directly contravenes the Directive's requirements.

⁶ Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States, 2001 OJ L 212/12.

⁷ The activation of the TPD has been proposed in various refugee crises before the Ukrainian one (ex. 2011 Libyan Civil War, 2015 Syrian Refugee Crisis), but the activation was formally triggered only in 2022.

To achieve its objective, this article proceeds in two sections. The first one (see §2) analyzes Poland's asylum framework prior to the Ukrainian crisis, highlighting its structural limitations and restrictive practices prior to 2022. The second one (see §3), subsequently, evaluates Poland's legislative response to the Ukrainian crisis, examining the TPD's activation, the Special Act's provisions, and specific implementation measures. Drawing on EU legislation, national legal instruments, and assessments from international organizations, this analysis demonstrates that, while Poland implemented certain aspects of temporary protection – such as, amongst others, access to employment – efficiently, its selective approach created protection hierarchies that are inconsistent with EU obligations and evolved into a semi-permanent arrangement that strains the conceptual foundations of "temporary" protection.

Poland's response serves as an example of broader European asylum governance challenges. The Ukrainian crisis demonstrated that when political will exists, Member States can mobilize rapid, large-scale protection. Yet, the selective nature of this solidarity – extended to Ukrainian nationals while denied to other displaced populations – exposes hierarchies of "deservingness" that undermine the universalist principles of refugee law.

2. Right of Asylum in Poland

The foundation of the EU's refugee protection policies lies in the 1951 Geneva Convention Relating to the Status of Refugees, a landmark treaty that provides a comprehensive legal definition of who qualifies as a refugee. For the purpose of this article, particular attention is given to Article 1 of the Convention, which outlines the conditions for obtaining refugee status under international law. According to Article 1.2, a refugee is defined as a person who "owing to a well-founded fear of being persecuted on account of race, religion, nationality, membership of a particular social group, or

political opinion, is outside the country of his nationality and is unable or unwilling to avail himself of the protection of that country”⁸.

All EU Member States are signatories to the Convention and its 1967 Protocol, which eliminated the original temporal and geographical restrictions of the Convention. As a result, Member States are bound by the Convention’s core principles, especially the *non-refoulement* principle, which prohibits the return of refugees to territories where their life or freedom would be threatened. Poland’s integration and engagement with this international framework – along with its subsequent implementation into domestic law – forms the basis of the asylum system analysed in this section.

Throughout the twentieth century, Poland was predominantly perceived as a country of emigration rather than a destination for refugees⁹. This perspective began to shift significantly in 1991, when Poland, in the midst of transitioning from a socialist regime to a democratic State, became integrated into said international refugee protection framework. The accession to the Geneva Convention and its 1967 Protocol – dated 1991 – marked a shifting moment in Poland’s transformation, demonstrating a broader commitment to democratic values and international legal obligations. Since then, Poland’s engagement with global refugee law has undergone a gradual evolution, creating an increasingly aligned relationship between its domestic legal system and the values and obligations set by international and European standards¹⁰.

⁸ United Nations, *Convention Relating to the Status of Refugees*, 189 U.N.T.S. 137, art. 1(2) (April 22, 1954).

⁹ Janusz Kryszak, *O historycznej i kulturowej roli współczesnej emigracji polskiej*, 1 Archiwum Emigracji: studia, szkice, dokumenty 7 (1998).

¹⁰ Justyna Nakonieczna-Bartosiewicz and Dorota Heidrich, *How Do States Challenge International Regimes? The Case Study of Poland and the International Refugee Regime*, 63(4) Problemy Polityki Społecznej 43 (December 27, 2023), available at <https://doi.org/10.31971/paps/176256> (last visited November 28, 2025).

Poland officially became a member of the European Union in 2004¹¹, following an extended application process that necessitated comprehensive legislative reforms. Despite these formal developments, prior to the significant influx of Ukrainian refugees precipitated by Russia's invasion, Poland's historical stance toward refugee acceptance was marked by considerable reluctance¹². This hesitation placed the country among the least institutionally prepared within Europe to effectively manage large-scale migratory movements¹³, as documented by successive reports from international monitoring bodies throughout the 2010s.

In this sense, since its initial ratification of the Geneva Convention, Poland's national refugee legislation has undergone relatively few substantial updates, reflecting a static approach to the dynamic challenges of contemporary refugee governance.

2.1. National Legislation on Asylum

Poland's approach to asylum and refugee protection is shaped and governed primarily by three key legislative instruments:

¹¹ European Union, Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, Annex XII, 2003 OJ L 236/17 (September 23, 2003).

¹² Jennifer Rankin, *EU Court Rules Three Countries Broke Law over Refugee Quotas*, The Guardian (April 2, 2020), available at <https://www.theguardian.com/law/2020/apr/02/eu-court-rules-three-countries-czech-republic-hungary-poland-broke-law-over-refugee-quotas> (last visited November 28, 2025).

¹³ European Migration Network (EMN), *Annual Report on Migration and Asylum in Poland 2022* (July 2003).

- a) Article 56 of the Constitution of the Republic of Poland, which establishes the right to asylum and delineates the conditions for granting refugee status¹⁴;
- b) The Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland (2003), which provides a comprehensive legal framework for refugee and subsidiary protection¹⁵;
- c) The Act on Foreigners (2013), which regulates the entry, stay, and removal of foreigners from Polish territory¹⁶.

Collectively, these legal sources form the foundation of the Polish asylum system, reflecting the interaction between constitutional guarantees and the country's international and European legal obligations.

2.1.1. *Constitution of the Republic of Poland: Article 56*

On April 2, 1997, the Republic of Poland adopted a new Constitution (*Konstytucja Rzeczypospolitej Polskiej*), introducing significant legal reforms, with a particular emphasis on human rights and the protection of foreign nationals. Chapter II, titled "Freedoms, Rights, and Obligations of Man and Citizen"¹⁷, addresses the rights of non-citizens, with Article 56 serving as the constitutional basis for Poland's refugee and asylum framework. This provision integrates asylum seekers and refugees into the domestic legal order, stipulating that "foreign nationals may seek asylum in Poland under conditions specified by relevant legislation; and individuals fleeing persecution

¹⁴ *Konstytucja Rzeczypospolitej Polskiej*, art 56, Dz.U. 1997 nr 78 poz. 483.

¹⁵ Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej [Act on Granting Protection to Foreigners in the Territory of the Republic of Poland of June 13, 2003], Dz.U. 2003 nr 128 poz. 1176.

¹⁶ Ustawa z dnia 12 grudnia 2013 r. o cudzoziemcach [Act on Foreigners of December 12, 2013], Dz.U. 2013 poz. 1650.

¹⁷ *Konstytucja Rzeczypospolitej Polskiej*, art. 56 (cited in note 14).

may be granted refugee status in accordance with binding international agreements¹⁸”.

The structure of the Article demonstrates a direct connection between national provisions and the broader regulatory frameworks of both international and regional bodies, including the European Union. This continuity between domestic law and these frameworks reflects Poland’s commitment to harmonising its legal system with universally recognised principles and values¹⁹.

The defining characteristic of Article 56 lies in its *qualified* nature. Unlike absolute constitutional rights, the right to asylum is subject to the legislative clause “according to principles specified by statute” (*w zakresie określonym w ustawie*)²⁰. This specific nuance grants the Polish Parliament significant discretion, allowing it to define the procedural and substantive framework within which the right to asylum may be exercised²¹. Consequently, judicial and administrative bodies must interpret and enforce Article 56 in accordance with implementing statutes and regulations, ensuring consistency with the scope of domestic legislation.

The article further establishes a dual protection system, reflected in its two distinct paragraphs. The first paragraph recognises asylum as a sovereign prerogative, granting the Polish State discretionary authority over its conferral. Conversely, the second paragraph grounds refugee status within binding international obligations, most notably the already mentioned 1951 Geneva Convention. This duality creates two parallel but distinct legal pathways: asylum, primarily governed by national law, and refugee protection, which operates within the framework of international treaties.

¹⁸ *Ibid.*

¹⁹ Leszek Garlicki and Marek Zubik, *Konstytucja Rzeczypospolitej Polskiej: Komentarz*, 2 Wydawnictwo Sejmowe (2016).

²⁰ *Konstytucja Rzeczypospolitej Polskiej*, art. 56 (cited in note 14).

²¹ *Ibid.*

As the constitutional foundation of Poland's asylum system, Article 56 underpins the Act on Granting Protection to Foreigners²², and provides a basis for both administrative processes and judicial oversight. While affirming protection as a constitutional value, it also delegates the detailed regulation of procedures and criteria to statutory law, international agreements, and administrative rules²³.

The protection afforded under Article 56 applies broadly to foreigners (*cudzoziemcy*), encompassing all non-citizens, regardless of their mode of entry²⁴. The rights guaranteed include the ability to apply for protection, to have claims duly considered, and to remain on Polish territory during the procedure. However, it is fundamental to note that the provision of said article guarantees the right to seek protection, but it does not provide an unconditional entitlement to receive it²⁵.

In the modern legal landscape, the interpretation and application of Article 56 must be situated within the broader context of European Union law. Therefore, it must comply with the EU asylum *acquis*, the Common European Asylum System, and jurisprudence of the Court of Justice of the European Union (CJEU)²⁶. The result is a multi-tiered framework, in which constitutional norms provide foundational principles, EU law prescribes detailed standards, and national legislation implements both, while ensuring consistency with international obligations.

²² Act on Granting Protection to Foreigners, Dz.U. 2003 nr 128 poz. 1176 (cited in note 15).

²³ Garlicki and Zubik, *Konstytucja Rzeczypospolitej Polskiej: Komentarz* (cited in note 19).

²⁴ Aleksandra Grzymała-Kazłowska and Renata Stefańska, *Cudzoziemcy korzystający z ochrony w Polsce* [Foreigners under Protection in Poland], 4(40) *Studia Bas* 197, 206-209 (2014).

²⁵ Barbara Kowalczyk, *Polski System Azylowy*, 52 e-Monografie (University of Wrocław), 250-251 (2014).

²⁶ See, for example, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 2013 OJ L180/60.

2.1.2. Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland

The Act on Granting Protection to Foreigners Within the Territory of the Republic of Poland²⁷ of June 13, 2003 (*Ustawa z dnia 13 czerwca 2003 r. o udzielaniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej*) marks the culmination of decades of incremental reforms in Polish migration law. Poland's initial legislative framework – based on the 1963 *Aliens Act*²⁸ – quickly proved inadequate in addressing the growing complexities of modern migratory challenges. As mentioned above, a critical turning point is represented by the State's accession to the 1951 Geneva Convention Relating to the Status of Refugees and the 1967 New York Protocol, which introduced the legal concept of refugee status and the formal establishment of provisions granting asylum²⁹. Over the following decade, Poland's refugee protection framework gradually developed, ultimately resulting in the enactment of the 2003 Act.

Rooted in the principles of the aforementioned Refugee Convention and New York Protocol³⁰, the Act of June 13, 2003³¹ defines the conditions, procedures, and institutional competencies related to granting protection to foreign nationals within Poland's jurisdiction. The foundational provisions (Articles 1–2) introduce key definitions, including:

²⁷ Act on Foreigners, Dz.U. 2003 no. 128, item 1175.

²⁸ Aliens Act 1963, Dz.U. 1963 no. 15, item 77.

²⁹ Grzegorz Tutak, Legal and Institutional System of Refugee Protection and Support in Poland After 1989, 16(1) *Teka Komisji Prawniczej PAN Oddział w Lublinie* 301, 302-206 (2023), available at <https://doi.org/10.32084/tkp.5588> (last visited November 28, 2025).

³⁰ United Nations, Convention Relating to the Status of Refugees, 189 U.N.T.S. (cited in note 8); United Nations, Protocol Relating to the Status of Refugees, 606 U.N.T.S. 267.

³¹ Act on Granting Protection to Foreigners (cited in note 15).

- a) Safe country of origin: a state that establishes robust legal protection against persecution;
- b) Safe third country: a country providing effective protection, including access to refugee status determination procedures;
- c) Alien: any individual who is not a citizen of Poland³².

At its core, the Act outlines a detailed range of protection mechanisms, including refugee status, subsidiary protection and temporary protection. Article 13(1) directly incorporates the Geneva Convention's criteria for refugee recognition, stipulating that refugee status may be granted to any foreigner who meets the Convention's definitional requirements³³. The legislation governs the entire protection process – from initial application to final status determination – with a strong emphasis on procedural practices and their adaptability to evolving protection needs.

From a structural perspective, the Act establishes a hierarchical system of protection, regulating several distinct forms of protection – each governed by different eligibility criteria and legal effects. The primary categories of protection include refugee status, subsidiary protection, asylum, and temporary protection – each serving a unique purpose within the broader framework³⁴.

Refugee status requires a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership in a particular social group. These grounds are strictly defined by the Act, drawing on both international jurisprudence and domestic legal interpretation. Subsidiary protection applies to individuals facing serious threats such as torture, the death penalty, or dangers arising

³² *Id.*, arts. 1-2.

³³ *Id.*, art. 13(1).

³⁴ Aleksandra Grzymała-Kazłowska and Renata Stefańska, *Cudzoziemcy korzystający z ochrony w Polsce [Foreigners under Protection in Poland]*, 4(40) *Studia Bas* 197, 209-212 (2014) (cited in note 24).

from armed conflict³⁵. The additional statuses of asylum – granted on humanitarian or state-interest grounds – and of temporary protection – characterised by time-limited and collective mechanisms – extend the Act's scope, establishing the previously mentioned differential rights and procedural guarantees.

Procedural regulations are outlined in Chapter II. Article 24(1) designates the Head of the Office for Foreigners as the competent authority for processing applications³⁶, while Article 89(p) entrusts the Refugee Board's with appellate jurisdiction³⁷. The Act sets out procedural timeframes for status determination, with standard procedures requiring resolution within six months, allowing extensions in complex cases. It also establishes evidentiary standards, including both documentary and testimonial evidence, with detailed criteria for assessing credibility. Key procedural safeguards include the right to fair hearings, mandatory interpretation services, confidentiality guarantees, and gender-sensitive interview protocols³⁸.

The Act further delineates the administrative competencies of relevant institutions. The Head of the Office for Foreigners is vested with extensive investigatory powers, including document verification, background checks and information requests from other state bodies. The Refugee Board holds jurisdiction for both factual and legal reviews, with the power to amend decisions or remand cases for re-evaluation.

Provisions concerning reception conditions and access to social rights reflect the Act's comprehensive approach. Applicants for international protection are entitled to accommodation in reception centres, financial assistance determined by statutory criteria, and

³⁵ *Id.*, art. 15.

³⁶ *Id.*, art. 24(1).

³⁷ *Id.*, art. 89 (p).

³⁸ *Id.*, Chapter II.

access to healthcare services, as regulated by separate legislation³⁹. Additionally, the Act outlines eligibility requirements for legal aid mechanisms, ensuring access to free legal assistance and related support services.

2.1.3. *Act on Foreigners (2013)*

The Act on Foreigners (*Ustawa o cudzoziemcach*) of December 12, 2013⁴⁰ establishes a comprehensive legal framework governing the entry, stay, and departure of foreign nationals within the Polish territory. As outlined in Article 1, the scope of the Act does not include diplomatic personnel, European Union citizens and their family members, with both categories being subject to separate legal regulations⁴¹. By integrating key European Union directives on migration, family reunification⁴² and the return of third-country nationals⁴³, the Act ensures compliance with EU standards and contributes to the harmonisation of national law within the broader context of European migration policy.

Articles 23 to 26 set the requirements for crossing Polish borders⁴⁴. Foreign nationals must possess a valid travel document and an appropriate visa, unless exemptions apply under bilateral agreements or EU regulations⁴⁵. Additionally, entry is contingent upon proof of health insurance and sufficient financial means to

³⁹ *Id.*, arts. 70–75 and related implementing legislation.

⁴⁰ Act on Foreigners, Dz.U. 2013 poz. 1650 (cited in note 16).

⁴¹ *Id.*, art 1.

⁴² See, for example, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, 2003 OJ L 251/12.

⁴³ See, for example, Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 OJ L348/98.

⁴⁴ Act on Foreigners (n 1), arts. 23–26 (cited in note 16)

⁴⁵ See, for example, Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), 2016 OJ L77/1.

support one's living and return expenses. The Act, moreover, grants border control authorities discretionary power to refuse entry for reasons such as inadequate documentation, potential threats to public security, or public health concerns. These provisions, therefore, reflect a legislative balance between national security considerations and the facilitation of lawful mobility.

The Act delineates three primary categories of residence permits:

- a) Temporary residence permits, issued for specific purposes such as employment, education, family reunification, or humanitarian reasons;
- b) Permanent residence permits, available to long-term residents with established ties to Poland;
- c) Long-term residence permits, granted to individuals who have legally and continuously resided in Poland for a minimum period and meet additional integration requirements⁴⁶.

The regulatory framework for temporary residence permits is particularly complex, as it categorizes permits based on distinct migration drivers. Employment-based permits, for instance, are designed to meet labour market demands, addressing professional needs while protecting domestic employment interests. Educational permits, on the other hand, prioritize academic integrity by mandating verification of academic intentions of the individual, through proof of institutional affiliation and enrollment⁴⁷. Similarly, family reunification provisions, governed by Articles 159 to 165 and harmonised with EU Directive 2003/86/EC, allow the admission of spouses, minor children, and dependent relatives, subject to stringent

⁴⁶ Act on Foreigners (n 1) arts 35–44, 195–211 (cited in note 16).

⁴⁷ Kowalczyk, *Polski System Azylowy* (cited in note 25).

verification of the familial relationship and compliance with residency conditions⁴⁸.

From a policy perspective, the Act provides for rigorous border control measures and administrative requirements. While these mechanisms aim to regulate and manage migratory flows effectively, they may also function as significant barriers to entry, potentially limiting the influx of economic migrants and asylum seekers unable to meet the prescribed conditions⁴⁹.

2.2. Impact of National Legislation According to Supranational Entities

Since 2013, the Asylum Information Database (AIDA), managed by the European Council on Refugees and Exiles (ECRE), has published country reports on Poland, with the objective of monitoring and assessing the national asylum framework⁵⁰. AIDA aims to provide up-to-date and comprehensive data on asylum procedures, reception conditions and detention practices across European States, promoting the implementation of high standards of protection in line with EU and international human rights obligations.

The inaugural 2013 report revealed a policy environment characterised by a restrictive and security-driven approach to migration governance, often prioritising state control at the expense of individual rights⁵¹. Among the identified measures were the extensive and systematic use of detention, intensified border surveillance and stringent entry limitations, particularly targeting applicants from conflict-affected regions⁵². The report, moreover, noted considerable deficiencies in implementation practices, resource

⁴⁸ Council Directive 2003/86/EC (n 3) (cited in note 42); Act on Foreigners (n 1), arts. 159–165 (cited in note 16).

⁴⁹ Act on Foreigners arts 159–165 (cited in note 16).

⁵⁰ ECRE and AIDA, *Country Report: Poland* (2013–2023).

⁵¹ AIDA, *Poland: Country Report 2013*, 7–12.

⁵² *Ibid.*

allocation, and procedural fairness – all contributing to systemic vulnerabilities⁵³. Of critical concern was the extensive use of detention for asylum seekers, which contravenes both Polish and EU legislative standards designating detention as a measure that should be employed only as a last resort⁵⁴. In practice, however, data reveal that detention is frequently applied as a default measure, rather than an exception⁵⁵.

The United Nations High Commissioner for Refugees (UNHCR) and Polish authorities cooperated in an effort to improve asylum procedures⁵⁶. In 2009, the Office for Foreigners established an internal quality audit mechanism to enhance refugee status determination (RSD). This initiative was further strengthened by a 2011 Cooperation Agreement between UNHCR and the Office for Foreigners, which introduced regular joint audits of RSD interviews, case files, and decisions, with findings exchanged on a monthly basis⁵⁷. Despite these measures, more recent assessments by ECRE, the Belgian Refugee Council and the Transnational Dublin Project have highlighted persistent weaknesses in decision-making standards, pointing to inconsistent quality and inadequate reasoning in asylum determinations, raising concerns about decision-making standards⁵⁸.

⁵³ *Ibid.*

⁵⁴ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 2013 OJ L180/96, art. 8.

⁵⁵ ECRE and AIDA, *Country Report: Poland (2013–2023)* (cited in note 50).

⁵⁶ UNHCR, *Further Developing Asylum Quality in the EU (FDQ): Summary Project Report* (2011), <https://www.refworld.org/docid/4e85b41f2.html>. (last visited November 28, 2025).

⁵⁷ *Ibid.*

⁵⁸ European Council on Refugees and Exiles (ECRE), *Asylum Systems in Flux: Assessing Quality* (2018); Belgian Refugee Council, *Country Practices: Poland* (2019); Transnational Dublin Project, *Final Report* (2014).

Legal assistance for asylum seekers was particularly deemed as a critical issue, as, over time, access to legal aid in Poland has seen little improvement⁵⁹. While free legal aid is formally available, it is neither state-sponsored nor guaranteed by law⁶⁰. The majority of legal assistance has historically been provided by non-governmental organisations (NGOs), often reliant on external funding, notably the European Refugee Fund (ERF)⁶¹. By 2019, the situation had further deteriorated due to funding gaps following the suspension of the Asylum, Migration and Integration Fund (AMIF). Although calls for proposals resumed in 2019, many NGOs had reduced capacity or ceased operations altogether. In contrast, countries such as Germany and the Netherlands provide more robust state-funded legal aid systems, ensuring broader and more consistent access to professional representation, thus revealing significant disparities in regional asylum systems⁶².

Geographical and logistical barriers worsen the issue. Reception centers are often located in remote areas, whereas most NGOs offices are based in main urban centers within the voivodeships of Mazowieckie, Małopolskie, Podlaskie, and Lubelskie – such as Warsaw and Białystok – thus impeding asylum seekers' access to legal counsel⁶³.

Regarding vulnerable asylum seekers, Polish law mandates a mechanism for the identification of vulnerable individuals requiring special procedural safeguards, due to experienced violence, disability or trauma⁶⁴. Such identification mechanism depends on self-reporting, with the burden placed on asylum applicants to disclose experiences warranting special protection. Once a claim is made, the

⁵⁹ AIDA, *Country Report: Poland 2019*, 45–47.

⁶⁰ *Ibid.*

⁶¹ European Commission, *Ex-post Evaluation of the European Refugee Fund 2011-2013* (2018), available at <https://doi.org/10.2837/888592> (last visited November 28, 2025).

⁶² Kowalczyk, *Polski system azylowy* (cited in note 25).

⁶³ ECRE and AIDA, *Country Report: Poland (2013–2023)* (cited in note 50).

⁶⁴ Act on Granting Protection to Foreigners, art. 68.

Head of the Office for Foreigners is responsible for arranging medical or psychological assessments to determine necessary procedural adjustments, including the provision of interpreters of a specific gender, or the presence of mental health professionals during interviews⁶⁵. Despite these legal provisions, the absence of a proactive and systematic screening process leaves the majority of vulnerable applicants under-identified⁶⁶.

Criticism from UNHCR and NGOs has pointed out the limited reach of these safeguards, and the lack of institutionalised mechanisms for early detection⁶⁷. Although the relevant legal provisions are in place, the current identification methods are proven to be insufficient. As a response, Poland has joined the UNHCR Regional Representation for Central Europe project – called “Responding to Vulnerability in Asylum” and launched in 2012⁶⁸. The aim of the project is to gather data on vulnerable applicants across the EU, ensuring effective and proper identification, as well as the development for timely and appropriate support. Despite this engagement, the domestic legal framework remains limited in scope⁶⁹. Indeed, certain categories of vulnerability – such as victims of rape, trafficking, and sexual violence – are not explicitly addressed in existing legislation⁷⁰. The absence of actively tailored safeguards may hinder the fair evaluation of claims and may result in erroneous

⁶⁵ *Ibid.*

⁶⁶ ECRE and AIDA, *Country Report: Poland* (2013–2023) (cited in note 50).

⁶⁷ European Union Agency for Asylum, *Guidance on Vulnerability in Asylum and Reception: Operational Standards and Indicators* (May 2024), <https://euaa.europa.eu/publications/guidance-vulnerability-operational-standards-and-indicators> (last visited November 27, 2025).

⁶⁸ Chrystalla Katsapaou, *Response to Vulnerability in Asylum - Project Report*, UN High Commissioner for Refugees (2013), <https://www.refworld.org/reference/research/unhcr/2013/en/108986> (last visited November 27, 2025).

⁶⁹ *Ibid.*

⁷⁰ ECRE and AIDA, *Country Report: Poland* (2013–2023) (cited in note 50).

rejections, refoulement or prolonged uncertainty for affected individuals.

Furthermore, national legislation foresees provisions for accelerated procedures for asylum applicants originating from designated safe countries of origin⁷¹. This provision, however, results in being inapplicable in practice. The European Commission proposed the establishment of a common EU-wide list of safe countries in 2015, as part of efforts to harmonise asylum policies. Yet, due to persistent divergences among Member States, no consensus was reached, leaving the designation of safe countries to the discretion of national authorities⁷².

3. *From Crisis to Legal Reform: the Response to the Ukrainian Refugee Crisis*

3.1. *Simplified Procedures for Asylum and Temporary Protection: the Activation of the TPD*

Adopted on July 20, 2001, Council Directive 2001/55/EC – commonly referred to as the Temporary Protection Directive, or TPD – was introduced as a legislative response to the need for a harmonised and coordinated EU approach to sudden and large-scale arrivals of displaced persons. It aims at the establishment of a set of minimum standards of temporary protection in the event of a so-called *mass influx*, and to promote solidarity and burden-sharing among EU Member States⁷³.

The TPD was the first legislative measure in the area of international protection within the European Union, following the entry into force of the Amsterdam Treaty in 1999. It emerged as a direct response to the refugee crises caused by the Yugoslav Wars of the 1990s, which exposed the EU's lack of coordinated mechanisms

⁷¹ *Ibid.*

⁷² European Commission, *Proposal for an EU Common List of Safe Countries* (COM(2015) 452 final).

⁷³ Council Directive 2001/55/EC (cited in note 6).

on the matter. In this sense, the Directive represented a significant shift in EU asylum governance, establishing a framework that balanced the newfound competencies in Justice and Home Affairs with Member States' traditional sovereignty over immigration matters⁷⁴.

Notwithstanding its early adoption, the TPD was never actually activated as a response to other major crises – such as those arising from the Arab Spring in 2011, the Syrian refugee crisis in 2015, or the 2021 evacuation of Afghans following the Taliban's return to power⁷⁵. During the 2015-2016 Syrian refugee crisis, for instance, despite calls from scholars and human rights organisations for TPD activation, member states pursued fragmented national responses and externalisation strategies, most notably through the controversial EU-Turkey deal⁷⁶. This selective non-implementation – which results to be mostly political in nature – stemmed from multiple factors, such as concerns about creating migration “pull factors”, disagreements over fair distribution of protection seekers, and, according to many scholars, the political ascendance of anti-immigration sentiments across the whole continent⁷⁷.

Russia's invasion of Ukraine on February 24, 2022, triggered one of the largest refugee movements in Europe since the Second

⁷⁴ Christian Kaunert and Sarah Léonard, *The Development of the EU Asylum Policy: Venue-Shopping in Perspective*, 19(9) *Journal of European Public Policy* 1396, (2012).

⁷⁵ Meltem Ineli Ciger, *Time to Activate the Temporary Protection Directive: Why the Directive Can Play a Key Role in Solving the Migration Crisis in Europe*, 18(1) *European Journal of Migration and Law* 1 (2016).

⁷⁶ Elspeth Guild, Cathryn Costello, Madeline Garlick and Violeta Moreno-Lax, *The 2015 Refugee Crisis in the European Union*, 332 CEPS Policy Brief (2015) (intended to curb irregular migration to Europe through Turkey, the Deal has been widely criticised for potentially breaching both the prohibition of collective expulsions and the non-refoulment principle).

⁷⁷ Hanne Beirens, Sheila Maas, Salvatore Petronella, Maurice van der Velden, *Study on the Temporary Protection Directive: Final Report*, European Commission, Directorate-General for Migration and Home Affairs (2016).

World War⁷⁸. The scale and timing of this displacement crisis were unprecedented in modern European history, with over one million refugees crossing external borders within the first week alone and many following in the subsequent months⁷⁹. As of February 2025, the UNHCR has documented approximately 6.9 million Ukrainian refugees globally, with an additional 3.7 million people internally displaced within Ukraine's territories⁸⁰.

The unprecedented influx of refugees precipitated a strong institutional response from the European Union – demonstrating a remarkable political consensus, rarely witnessed in EU migration governance⁸¹. On February 27, 2022 – just three days after Russia's invasion – the Justice and Home Affairs Council convened an emergency meeting, which resulted in the unanimous endorsement of the Commission's intent to propose the activation of the TPD, bypassing a typically protracted consultative process⁸². The Commission formally presented its proposal on March 2, 2022, invoking Article 5 of the Directive, which requires the establishment of "the existence of a mass influx of displaced persons" through a detailed assessment against predefined threshold criteria⁸³. Within 48 hours, the Council achieved unanimous approval, leading to the

⁷⁸ UNHCR, *Ukraine Refugee Situation: Operational Data Portal*, United Nations High Commissioner for Refugees (2025).

⁷⁹ International Organization for Migration, *Ukraine Internal Displacement Report: General Population Survey Round 12* (2023).

⁸⁰ European Commission, *Temporary Protection for Persons Fleeing Ukraine: Three Years Report*, Directorate-General for Migration and Home Affairs (2024).

⁸¹ Steve Peers, *Temporary means temporary? The Commission proposes the extension – and the phase-out – of temporary protection*, EU Law Analysis (June 4, 2025), available at <https://eulawanalysis.blogspot.com/2025/06/temporary-means-temporary-commission.html> (last visited December 12, 2025).

⁸² Council of the European Union, Press Release 6916/22: *Outcome of the Justice and Home Affairs Council*, (February 27, 2022).

⁸³ European Commission, Proposal for a Council Implementing Decision Establishing the Existence of a Mass Influx of Displaced Persons from Ukraine within the Meaning of Article 5 of Council Directive 2001/55/EC (COM(2022) 91 final) (2022).

Adoption of Council Implementing Decision (EU) 2022/382 on March 4, 2022⁸⁴.

The rapid activation process of the TPD goes against the Directive's built-in safeguards, which usually require a qualified majority voting, prior consultation with UNHCR, and extensive gathering of evidence to establish the factual existence of mass influx conditions⁸⁵. Nonetheless, the urgency of the Ukrainian crisis generated political will sufficient to override procedural caution.

The Temporary Protection Directive was originally grounded in Article 63(2)(a) and (b) of the EC Treaty, which authorised the adoption of minimum standards in asylum matters. Following the Lisbon Treaty's institutional reforms, however, the Directive must now be interpreted within the legal framework of Articles 78(1) and 78(2)(c) and (g) TFEU, which call for a common asylum policy and for the establishment of a uniform protection system, with expanded competences for EU institutions⁸⁶. This evolving treaty foundation required significant interpretive adaptation, as the Commission had to reconcile pre-Lisbon terminology with post-Lisbon institutional arrangements – a legal exercise that was accomplished through the implementation of supplementary guidelines issued on March 21, 2022⁸⁷.

Despite its partially outdated foundation and structure, the Temporary Protection Directive proved nonetheless to be adaptable

⁸⁴ Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine, 2022 OJ L71/1.

⁸⁵ Meltem Ineli-Ciger, *5 Reasons Why: Understanding the Reasons behind the Activation of the Temporary Protection Directive in 2022*, EU Immigration and Asylum Law and Policy Blog, Odysseus Network, 2022

⁸⁶ Consolidated Version of the Treaty on the Functioning of the European Union, 2012 OJ C326/47, arts. 78(1) and 78(2)(c) and (g).

⁸⁷ European Commission, *Communication from the Commission on Operational Guidelines for the Implementation of Council Implementing Decision 2022/382 (COM(2022) 631 final) (2022)*.

to modern migratory issues and emergencies, constituting – together with the Council Implementing Decision and subsequent operational guidelines – the fundamental framework for the response to the Ukrainian displacement crisis.

3.2. Poland's Legislative Response

As of December 31, 2024, Poland hosted 998,070 Ukrainian refugees – constituting the sixth largest refugee population globally, according to the United Nations High Commissioner for Refugees (UNHCR)⁸⁸. Such a quota is key in understanding the central position that Poland has had – and still, to this day, has – in the Ukrainian refugee crisis.

Poland's position as the epicentre of the 2022 refugee crisis – which stems from its direct border with Ukraine and the deep cultural, economic and historical ties shared between the two countries – not only transformed the policy landscape, but also the demographic composition and societal dynamics of the country. Indeed, especially in the first phase of the conflict, Poland became the main recipient of displaced persons coming from Ukraine, welcoming approximately 1.5 million refugees – the equivalent of 3.9% of the total Polish population⁸⁹.

What makes this response quite interesting is the historical context. As stated in the first section of this article, prior to 2022, Poland had among the lowest refugee recognition rates in the European Union and had demonstrated a particularly restrictive approach to migration. A key example in this regard is the Polish response to the 2021 Belarus-EU border crisis, made primarily of controversial pushback policies against asylum seekers attempting to

⁸⁸ UNHCR, *Refugee Data Finder: Poland Country Profile*, United Nations High Commissioner for Refugees Global Statistics Database (2025).

⁸⁹ UNHCR, *Ukraine Refugee Situation: Poland*, United Nations High Commissioner for Refugees Operational Data Portal (2023).

cross the border⁹⁰ – an approach that was totally in line with the anti-immigration policies of the Law and Justice Party, which was in rule at that time. As a matter of fact, the initial policy of the Polish government at the time was mainly centred on physical and legal fortification of the eastern border. In September 2021, Polish authorities declared a state of emergency in the concerned area, establishing a so-called exclusion zone, that significantly restricted access for humanitarian organisations, independent observers and media representatives⁹¹. A further response was the deployment of approximately 12,000 military personnel and border guards with the aim of preventing unauthorised crossing⁹². Concerning the aforementioned systematic pushbacks, in October 2021 the Polish legislative body formalised the forced return into Belarusian territory of individuals who had crossed the border irregularly, without individual assessment of their protection claims⁹³ – framing the migratory movements as a “hybrid attack” orchestrated by the Belarusian government with Russian support, rather than a refugee crisis.

The Polish public’s response to the Ukrainian exodus was also remarkable. According to data provided by the Journal of Immigrant and Refugee Studies, around 77% of Polish households participated

⁹⁰ Grażyna Baranowska, *A Tale of Two Borders: Poland’s continued illegal actions at its border with Belarus*, Verfassungsblog (2022), available at <https://verfassungsblog.de/a-tale-of-two-borders/> (last visited November 28, 2025).

⁹¹ Helsinki Foundation for Human Rights, *Humanitarian Crisis at the Polish-Belarusian Border: Background, Current Situation and Recommendations* (2022).

⁹² Polish Ministry of Defense, *Annual Report on Border Security Operations 2021–2022*, MOD Publications (2022).

⁹³ Katarzyna Czarnota and Marta Górczyńska, *The Lawless Zone: Polish-Belarusian Border Monitoring* (Helsinki Foundation for Human Rights (June 2022), <https://hfhr.pl/upload/2023/09/the-lawless-zone.pdf> (last visited November 28, 2025).

in at least some form of refugee assistance during the first months of the crisis⁹⁴.

Housing proved to be one of the greatest challenges in the reception of asylum seekers. Poland, unlike many other European countries, had no pre-existing accommodation infrastructure. Also, in this case, a remarkable display of private solidarity was the key in finding a solution: approximately 600,000 Polish households took Ukrainian refugees into their homes during the first phase of the crisis⁹⁵.

3.2.1. *The Polish Temporary Protection System: a Dual Approach*

Within the broader European Union Framework on temporary protection, Poland enacted the Act of March 12, 2022 on Assistance to Ukrainian Nationals⁹⁶. This Act – generally referred to as Special Act – serves as the domestic implementation mechanism for the Council Implementing Decision (EU) 2022/382⁹⁷. Just as for the Temporary Protection Directive, the primary aim of the Special Act is to establish rapid procedural ways for conferring temporary protection status upon individuals who have been displaced by the conflict in Ukraine, thereby facilitating their access not only to their legal recognition within Polish territory, but also their access to essential services and social benefits.

While the Special Act constitutes Poland's implementation of the Temporary Protection Directive, it must be noted that there are significant disparities in the respective scopes of application. The Special Act does not extend temporary protection to all categories of

⁹⁴ Karolina Sobczak-Szelc et al., *From Reception to Integration of Asylum Seekers and Refugees in Poland*, Routledge (2023), available at <https://doi.org/10.4324/9781003196327> (last visited November 28, 2025).

⁹⁵ Nils Bloch & Zbigniew Szmyt, *Beyond refugee camps: housing solutions for war refugees from Ukraine in Poland*, 83(1) *Crime, Law & Social Change* 59 (2025) at 4 – 6, available at <https://doi.org/10.1007/s10611-025-10239-0> (last visited December 11, 2025).

⁹⁶ Act on Assistance to Ukrainian Nationals, Dz.U. 2022 poz. 583.

⁹⁷ Council Implementing Decision (EU) 2022/382 (cited in note 84).

individuals described in Article 2 of Council Implementing Decision (EU) 2022/382⁹⁸. Whereas the Council Implementing Decision encompasses all Ukrainian nationals residing in Ukraine before February 24, 2022, Poland adopts – yet again – a more restrictive approach to eligibility criteria regarding stateless persons, nationals of third countries who enjoyed international protection in Ukraine prior to that date, and their family members.

The Special Act, in Article 1, circumscribes temporary protection to three specific groups⁹⁹:

1. Ukrainian citizens who entered Polish territory directly from Ukraine on or after February 24, 2022, and who formally declare their intention to remain within the territory,
2. Non-Ukrainian spouses of the aforementioned Ukrainian citizens, provided they arrived within Polish territory accompanied by their Ukrainian spouse;
3. Children and dependent family members under guardianship, irrespective of citizenship, who resided with Ukrainian citizens and within the Ukrainian territory before February 24, 2022.

Individuals excluded from the scope of the Special Act, yet deemed as possible beneficiaries under the Temporary Protection Directive, fall within the jurisdiction of the Polish pre-existing framework, especially under the Act on Granting Protection to Foreigners within the Territory of the Republic of Poland of 2003 (hereinafter, Protection Act)¹⁰⁰. This Act – analysed in the first section

⁹⁸ Maja Lysienia, *Following the EU Response to the Russian Invasion of Ukraine? The Implementation of the Temporary Protection Directive in Poland*, 12(1) Central and Eastern European Migration Review 180 (2023).

⁹⁹ Act on Assistance to Ukrainian Nationals, art. 1(1–3) (cited in note 96).

¹⁰⁰ Act on Granting Protection to Foreigners, Dz.U. 2003 nr 128 poz. 1176 (cited in note 15).

of this article – provides for what may be defined, within the Polish legislative framework, as “general” temporary protection.

In this sense, the Polish response to the Ukrainian displacement crisis is employed through a dual system comprising two distinct legal mechanisms:

1. the “special” protection regime, established under the Act on Assistance to Ukrainian Nationals, and tailored specifically for Ukrainian nationals and immediate family members;
2. the “general” protection regime, governed by the 2003 Protection Act, applying to beneficiaries of international protection in Ukraine, their family members, and holders of permanent residence permits in Ukraine¹⁰¹.

Both laws are meant to transpose the provisions of the Temporary Protection Directive and of Council Implementing Decision (EU) 2022/382 within Poland’s national legal framework, although through different procedural and substantive approaches.

While the 2003 Protection Act was immediately invoked following the Russian invasion of Ukraine, it was deemed necessary, by the Polish legislator, to provide enhanced protection measures and more effective and rapid administrative procedures, specifically for Ukrainian nationals entering Polish territory¹⁰².

Paradoxically, despite the restrictive scope of the 2022 Special Act, this latter transcends the minimum standards prescribed by the Directive in terms of both substantive and procedural provisions, therefore reflecting Poland’s specific policy approach toward

¹⁰¹ Nils Bloch and Zbigniew Szmyt, *Beyond refugee camps: housing solutions for war refugees from Ukraine in Poland*, 83(1) *Crime, Law & Social Change* 59, 4-6 (2025), available at <https://doi.org/10.1007/s10611-025-10239-0> (last visited December 11, 2025).

¹⁰² Explanatory Memorandum to the *Act of 12 March 2022 on Assistance to Ukrainian Nationals in Connection with the Armed Conflict on the Territory of Ukraine*, Parliamentary Print No. 2147, Sejm of the Republic of Poland, IX Term.

Ukrainian displacement¹⁰³. This asymmetric implementation creates what scholars have defined as “hierarchical protection regime”, whereby Ukrainian nationals have received and still receive comparatively enhanced protection measures in relation to other categories fleeing very similar conflict circumstances, as previously seen¹⁰⁴.

The coexistence of two distinct legal frameworks for temporary protection inevitably gives rise to significant administrative complexities and coordination challenges. Such dualism may potentially compromise the coherent application of protection standards, thereby going to undermine the harmonised implementation of EU asylum acquis within the national context. Moreover, the differentiated treatment between categories of displaced persons may infringe the Directive’s underlying objective of promoting a balanced distribution of protection responsibilities among Member States through uniform implementation standards.¹⁰⁵

3.2.2. *Reception of Ukrainians Fleeing Ukraine: the PESEL UKR Tool*

A fundamental aspect of the 2022 Special Act is the establishment of a specialised adaptation of Poland’s Universal

¹⁰³ Lucie Macková et al., *Temporary Protection for Ukrainian Refugees in the Czech Republic and Poland*, Nationalities Papers, First View (2024), available at <https://doi.org/10.1017/nps.2024.61> (last visited December 11, 2025).

¹⁰⁴ Diego Caballero-Vélez, *Contesting Migration Crises in Central Eastern Europe: A Political Economy Approach to Poland’s Responses Towards Refugee Protection Provision* at 91-97 (Palgrave Macmillan, Cham, 2023), available at https://doi.org/10.1007/978-3-031-44037-3_5 (last visited December 11, 2025).

¹⁰⁵ European Union Agency for Fundamental Rights, *Legal Pathways to Protection in the EU: Comparative Analysis of Implementation of Temporary Protection Following the Ukrainian Displacement Crisis*, Publications Office of the European Union, 45-47 (2023).

Electronic System for Registration of the Population¹⁰⁶ – known as PESEL UKR and specifically designated to Ukrainian refugees – which functions as the primary administrative tool through which Ukrainian beneficiaries can access the rights and benefits provided by the protective framework¹⁰⁷. Article 4 of the Special Act delineates the structure of this element, establishing that eligible individuals may submit applications at any municipal office (*gmina*) within Polish territory, irrespective of their actual place of residence¹⁰⁸. This flexible registration procedure is meant to accommodate the spread settlement patterns of displaced Ukrainians and to mitigate administrative restrictions in border regions and metropolitan centres experiencing major concentration of arrivals¹⁰⁹.

The PESEL UKR registration process includes biometric data collection, requiring the applicant to provide fingerprints (with the exclusion of children under twelve and individuals with physical impediments) and standardised photographic identification¹¹⁰. Additionally, applicants must provide comprehensive personal data – including full legal name, date and country of birth, citizenship status, and gender identification – alongside a declaration of residential address, if available. The registration automatically generates a so-called “trusted profile” (*profil zaufany*), a digital

¹⁰⁶ Initially designed by the Communist government of the Polish People’s Republic, it is the Polish national identification number, mandatory for all permanent Polish residents.

¹⁰⁷ Act on Assistance to Ukrainian Nationals, art. 4(1-19) (cited in note 96).

¹⁰⁸ Regulation of the Minister of Digitization of 21 March 2022 on the Specific Procedure for Submission and Processing of Applications for a PESEL Number by Ukrainian Citizens, Dz. U. 2022, item 653.

¹⁰⁹ Agata Górny, Paweł Kaczmarczyk, and Monika Szulecka, *Administrative Innovation in Emergency Context: Analysis of the PESEL UKR System*, Centre of Migration Research, University of Warsaw, CMR Working Papers 136/194, 14–22 (2023).

¹¹⁰ Office of the Commissioner for Human Rights, *Implementation of the Act on Assistance to Ukrainian Nationals in the Context of Biometric Data Collection*, Report 11/2023, 31–37 (2023).

authentication that enables secure electronic access to Polish public administration platforms and e-government services¹¹¹. In this way, beneficiaries are allowed to access remotely social welfare services, thus reducing administrative burdens on birth beneficiaries and institutions¹¹².

The establishment of the PESEL UKR registration system constitutes Poland's implementation of specific documentation obligations mandated by the Temporary Protection Directive. Article 8(1) of the Directive explicitly requires Member States to issue "residence permits for the entire duration of the protection" to beneficiaries of temporary protection¹¹³. This obligation entails the provision of physical documentation attesting to the individual's protected legal status and corresponding right to stay within the territory of the receiving state.

Furthermore, Article 9 of the Directive imposes a procedural transparency obligation, requiring Member States to provide beneficiaries with documentation "in a language likely to be understood by them, in which the provisions relating to temporary protection and which are relevant to them are clearly set out"¹¹⁴. The PESEL UKR system addresses this requirement through its integration with the *profil zaufany* digital interface, which provides Ukrainian-language access to comprehensive information regarding

¹¹¹ Ministry of Digital Affairs, *Digital Integration of Temporary Protection Beneficiaries: Technical Documentation for the PESEL UKR System*, Technical Report MCA/TPD/2022/4, 8–17 (2022).

¹¹² Marta Jaroszewicz and Jan Grzyski, *Technocracy Revisited: The Polish Security Dispositif and Ukrainian Migration to Poland*, 17(2) *Journal of Contemporary European Research* 258–280 (2021).

¹¹³ Council Directive 2001/55/EC, art. 8(1) (cited in note 6).

¹¹⁴ *Id.*, art. 9.

entitled benefits, administrative procedures and institutional contact information¹¹⁵.

The European Commission's assessment of Member State's implementation measures has acknowledged that, while the PESEL UKR system deviates from conventional documentation approaches envisioned in the 2001 Directive, it nevertheless satisfies the substantive requirements of Articles 8 and 9 through its provision of secure digital verification of protected status and multilingual information access¹¹⁶.

3.2.3. Access to Employment

Regarding employment access, the Polish Special Act of 2022 establishes a notably liberal labour market access regime that partly deviates from the discretionary framework outlined in the Temporary Protection Directive¹¹⁷. Article 22 of the Act grants beneficiaries an unconditional right to engage in employment or self-employment without requiring prior work permits, subject only to a post-commencement notification requirement whereby employers must inform the relevant district Labour Office (*Powiatowy Urząd Pracy*) within seven days¹¹⁸. This legislative approach contrasts with Article 12(1) of the TPD, which merely permits – rather than mandating – Member States to authorise such access¹¹⁹.

The discretionary nature of the Temporary Protection Directive framework is evident in its provision that Member States “shall provide beneficiaries [...] the opportunity to engage in employed or

¹¹⁵ Polish Ministry of Digital Affairs, *Multilingual Information Access for Beneficiaries of Temporary Protection: Implementation Report*, Technical Implementation Report MCA/TPD/2022/7, 12–18 (2022).

¹¹⁶ European Commission, Report on the Implementation of the Temporary Protection Directive in Member States: Innovation in Documentation and Information Provision, COM(2023) 319 final, 28–32 (May 17, 2023).

¹¹⁷ Act on Assistance to Ukrainian Nationals, (cited in note 96).

¹¹⁸ *Id.*, art 22.

¹¹⁹ Council Directive 2001/55/EC, art. 12(1) (cited in note 6).

self-employed activities”, while explicitly retaining discretion to impose restrictive measures including work permit requirements, EU citizens prioritisation mechanisms, or sectoral limitations¹²⁰. Conversely, Article 22 of the Polish Special Act establishes immediate and unrestricted access to the Polish labour market for all eligible Ukrainian nationals, eliminating both prior work permit requirements and labour market tests¹²¹.

From a procedural perspective, this provision substantially reduces bureaucratic barriers and establishes a state of quasi-parity between Ukrainian beneficiaries and Polish nationals regarding labour market access. The notification mechanism operates through an online platform (praca.gov.pl) and requires submission of essential employment details – including work type, hours, and remuneration – within seven days of employment commencement¹²². This system ensures basic regulatory oversight, while also avoiding prohibitive administrative delays. Significantly, the employment relationship attains legal validity retroactively from the first working day, contingent upon timely notification compliance¹²³.

The Act allocates administrative responsibility exclusively to employers, thus shielding Ukrainian nationals from sanctions arising from procedural non-compliance¹²⁴. This protective system aims to safeguard vulnerable workers from potential exploitation or penalisation resulting from employer negligence. Moreover, the legislation mandates adherence to Polish minimum wage standards

¹²⁰ *Ibid.*

¹²¹ Polish Special Act (March 12, 2022), art.1 art. 22(1)-(2).

¹²² *Id.*, art 22(3).

¹²³ *Id.*, art 22(4).

¹²⁴ *Id.*, art 22(5); see also *Ukrainian Citizens May Not Be Punished for Employers' Mistakes*, Stowarzyszenie Interwencji Prawnej (April 8, 2024), available at <https://interwencjaprawna.pl/en/ukrainian-citizens-may-not-be-punished-for-employers-mistakes/> (last visited December 12, 2025).

and prohibits any derogation in remuneration or working conditions, thus ensuring an equitable treatment¹²⁵.

This employment framework deviates from the standard procedures that are still applied to other third-country nationals staying and seeking work within the Polish territory, who still remain subject to other work permit regimes or “declaration on entrusting work” (*oświadczenie o powierzeniu pracy*) procedures – both requiring prior authorisation and involving processing delays¹²⁶. The conventional mechanisms additionally impose temporal and sectoral restrictions that are absent from the framework dedicated to Ukrainian refugees.

3.2.4. Access to Accommodation

The Temporary Protection Directive establishes obligations regarding accommodation for temporary protection beneficiaries, requiring Member States, under Article 13(1), to provide “suitable accommodation” or, alternatively, the necessary means to secure independent housing¹²⁷. Article 13(3) allows Member States to adjust support levels according to beneficiaries’ capacity to meet their own accommodation needs, especially in cases in which said individuals have secured employment or established self-employment¹²⁸.

While Poland extends accommodation access to both categories of temporary protection beneficiaries, the implementation framework exhibits significant deviations from the Directive’s mandatory standards. Under the initial framework – preceding amendments made in January 2023 – Article 12(7) of the Ukrainian Assistance Act imposed a statutory obligation upon regional governments (*województwa*) to provide accommodation for a minimum two-month

¹²⁵ Polish Special Act, (n 1) art. 22(6) (cited in note 121).

¹²⁶ Polska, Act of 20 April 2004 on Employment Promotion and Labour Market Institutions, Dz. U. 2004, no. 99, item 1001, as amended.

¹²⁷ Council Directive 2001/55/EC, art. 13(1) (cited in note 6).

¹²⁸ *Id.*, art 13(3).

period from beneficiaries' initial entry into Polish territory, albeit subject to public fund availability¹²⁹. Parallel provisions were incorporated into the Protection of Foreigners Act through article 111(1a)¹³⁰. These provisions effectively allowed domestic authorities to limit accommodation duration based on budgetary limitations – a conditional approach that is incompatible with the non-discretionary obligations established under the TPD.

Moreover, the revised Articles 12(17-17f) of the Special Act conferred extensive discretionary powers upon Polish authorities on accommodation provisions for special temporary protection beneficiaries¹³¹. This revision eliminated the previously guaranteed statutory obligation to provide housing, thus also repealing the earlier two-month minimum guarantee. Under the current framework, accommodation may be provided without charge for a maximum of 120 days, after which beneficiaries are required to financially contribute to accommodation costs¹³² – with limited exceptions for vulnerable persons and individuals experiencing particularly challenging personal circumstances.

3.2.5. *Lack of Family Reunification*

An important gap in Poland's implementation of the Temporary Protection Directive concerns the right to family reunification. While Article 15 of the Temporary Protection Directive establishes mandatory provisions for family reunification, requiring

¹²⁹ Act on Assistance to Ukrainian Nationals, art. 12(17) (cited in note 96).

¹³⁰ Act on Granting Protection to Foreigners, art. 111(1a) (cited in note 15).

¹³¹ Act on Assistance to Ukrainian Nationals, art. 12(17–17f) (as amended) (cited in note 96).

¹³² *Id.*, art 12(17b).

Member States to facilitate the reunification process ¹³³, the 2022 Special Act contains no provisions addressing such a right¹³⁴.

Unlike beneficiaries under conventional temporary protection, Ukrainian nationals cannot invoke statutory rights to reunite with family members residing either in other EU Member States or in Ukraine itself (Act of 12 March 2022 (n 2)). Furthermore, the Act provides no appellate systems to challenge decisions on family separation, thus actively denying procedural safeguards that typically accompany fundamental rights.

In contrast, the Protection of Foreigners Act establishes explicit family reunification provisions for beneficiaries of “general” temporary protection. Article 117 of the Act mandates that the Head of the Office for Foreigners shall act towards the reunification between individuals residing in Polish territory and their spouses or children located outside Poland¹³⁵. Those provisions apply in particular to close relatives who, prior to displacement, lived together as a single-family unit and had either partial or complete dependency relations with the temporary protection beneficiary¹³⁶. That being said, the Protection Act is characterized by implementation deficiencies. Indeed, Article 117 fails to specify the concrete measures that the Head of the Office for Foreigners must undertake to act on family reunification.

4. *Conclusions*

As the Ukrainian war enters its fourth year, with no resolution in sight, Poland’s legislative response to the crisis has revealed a fundamental paradox at the heart of European refugee protection: the capacity for swift, large-scale humanitarian action exists, yet its activation remains selective, conditional, and increasingly

¹³³ Council Directive 2001/55/EC, art. 15 (cited in note 6).

¹³⁴ Act on Assistance to Ukrainian Nationals (cited in note 96).

¹³⁵ Act on Granting Protection to Foreigners, art. 117(1) (cited in note 15).

¹³⁶ *Id.*, art 117(2).

unsustainable. What began as an unprecedented solidarity momentum has evolved into a complex case study that exposes the fragility of crisis-driven policymaking and the enduring inequalities embedded within both Polish and EU asylum systems.

The contradictions within Poland's migration framework are particularly revealing. The swift activation of the TPD in March 2022 (used for the first time since its adoption in 2001) and the enactment of the Special Act demonstrated that Member States can implement comprehensive protection mechanisms when political will aligns with public sentiment. Ukrainian nationals and their families gained immediate access to residence, healthcare, employment, and social benefits through measures that stood in stark contrast with Poland's historically restrictive approach and the legal and administrative barriers that asylum seekers had previously encountered under existing legislation. Yet, this very contrast raises uncomfortable questions about implicit hierarchies of "deservingness" among refugee groups fleeing into Polish territory. The differential treatment of those seeking protection reveals that the willingness to provide comprehensive support is not universal, but rather contingent upon factors that extend beyond the humanitarian imperatives enshrined in international protection frameworks.

The evolution of temporary protection from a transitional instrument into what has effectively become a semi-permanent settlement mechanism underscores deeper structural weaknesses. The repeated prolongation of both the TPD and the Special Act – measures originally designed as short-term responses – points to the absence of viable pathways for long-term integration or return. This development inevitably raises critical questions about the sustainability of it all: temporary protection, when indefinitely extended, becomes neither temporary nor a comprehensive solution, but rather an intermediate status that risks creating prolonged legal and social precarity for those it ostensibly protects.

Beyond Poland's borders, this case serves as a demonstration of broader dynamics within the European Union's approach to refugee reception. The Ukrainian crisis has demonstrated that large-scale protection is indeed possible when Member States commit to solidarity, yet it has simultaneously exposed the selective nature of policy implementation in the field. The activation of the TPD can be interpreted both as a landmark moment in the European asylum framework and as a warning about the reluctance of Member States to implement shared mechanisms without carrying out differential treatment of refugee groups. Poland's response thus reflects the broader EU conduct, highlighting how solidarity remains fragile and conditional, rather than constituting a stable foundation for a common asylum system.

The matter of temporary protection and its practical application has been understudied by legal doctrine. This article does not aim to fill the gap that has been unavoidably perpetuated over the decades. It may rather be seen as a starting point for further inquiry and more in-depth research on the possible implications of mechanisms such as temporary protection, and on the necessary pathways for their development. The Polish case, therefore, suggests that future research must address not only the technical implementation of protection instruments, but also the underlying political and social factors that determine their selective activation.

Addressing these tensions will be crucial not only for the further development of migration governance in Poland, but also for the integrity of refugee protection in Europe as a whole. The Ukrainian refugee crisis has laid bare the distance between the EU's stated commitments to universal protection principles, and the reality of its selective, crisis-reactive implementation. Moving forward requires confronting these contradictions directly: developing sustainable alternatives to indefinitely prolonged temporary protection, establishing more equitable criteria for protection that transcend hierarchies of deservingness, and building solidarity

mechanisms that function as consistent policy, rather than exceptional responses. Only through such reforms can the lessons of Poland's response to the Ukrainian crisis contribute to a more coherent and just European asylum system.

Beyond Positive Law

Women's Condition and Role within the Patriarchal Structure

MARTINA PERSENICO*

Abstract: Women's suffering and resistance within the well-known patriarchal structure have existed since time immemorial.

This will be demonstrated by starting from the concept of the victim from a broader perspective, touching on its meaning, the prejudices related to it, and the difficulties encountered by victims within the adversarial justice system, finally concluding with the need to seek help and the related challenges.

An example of a victim is surely the woman within the above-mentioned structure, mainly because of the roles she is forced to perform. It is difficult for her to be coerced into being a virgin, which is a hurtful anatomical myth and a cage. Even more demanding is the role of motherhood, which is a source of joy for some, yet a burden. While maternity might be fulfilling, it still exposes women to significant physical, psychological, and social disadvantages. Enjoyment does not erase the structural costs imposed on women's bodies and lives.

Finally, what most call "sex work" – but is indeed brutal, non-consensual sex, thus rape – will be examined, and the legislative models used to regulate or tackle it will be considered, together with some unpopular critiques of the prostitution debate.

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After analyzing what is already hard for women living “free” yet within a hierarchical and oppressive structure, it will appear even less painful when compared to the lives of incarcerated women.

Cases, acts, and various examples will be provided to prove that the three above-mentioned roles make women’s existence a burden. Nonetheless, solutions, insights, and considerations will be offered so as to give hope for change.

Keywords: Victim; Virginity; Motherhood; Prostitution; Prison System.

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1. *Introduction*

To this day, gender-based violence is still insufficiently addressed both nationally and internationally.

In order to consider this still-present phenomenon, this paper will start from the concept of the “victim”, consequently focusing on the woman as a victim within the patriarchal structure.

First, an overview will be provided, using victimology as the most appropriate field of study to expand on the above-mentioned concept, related prejudices, and the hard step of disclosure. Consequently, the institutions typical of the adversarial justice system, which make life harder for victims, will be briefly outlined.

Subsequently, the paper will shed light on women’s role as victims within the patriarchal structure, then focusing on the three main roles a woman is brought to perform: the virgin, the mother, and the whore.

Hence, the paper will consider the case of virginity testing in countries where either the law (e.g., in the U.K.) or the judiciary (e.g., in India) have dealt with this issue.

As for the second role, namely “the mother”, the paper will take as examples the Irish referendum on Articles 41.2.1° and 41.2.2° of the Constitution, concerning the “duty” of women in the home. Subsequently, another interesting example to reflect on women’s role as mothers, namely the refusal to undergo medical treatment while pregnant, will be provided.

The third role, that is to say the “whore”, will be examined from both a legal and a sociological perspective, giving space to the liberal and radical feminist points of view on prostitution and, respectively, to the regulative and abolitionist models. However, the main argument will be to deconstruct prostitution as society’s tool to oppress mainly disadvantaged women for the sake of men’s pleasure.

Finally, after considering women’s suffering within the patriarchal structure, the lives of women behind bars will be

examined. Thus, light will be shed on the ways that distinctly female nuisances (e.g., the menstrual phase) make life even harder for them in an institution built by men, for men: prison.

In conclusion, by providing cases and examples, this paper aims to give meaning to gender-based violence in a deep and comprehensive way.

Comparing various legal systems will be pivotal to do so, because when a legal system fails or stumbles, there might be an answer in some other country – or perhaps in some other discipline, victimology for one.

2. Victimology as One of the Lenses to Look at Women's Victimization within the Patriarchal Structure

2.1. The Victim: Prejudice v. Reality

Law is fertile soil for other research areas and often intersects with such fields. Among others, victimology is useful to look at contemporary legal issues.

Within a patriarchal framework, the complexity of victimization inevitably deepens, making it essential to reflect on how this label is used. Simplistic narratives may satisfy the media's need for immediacy, yet they ultimately damage critical thought and collective wellbeing.

A deeper analysis of what it means to be a victim – and of how victimization operates in contemporary patriarchal and capitalist societies – helps avoid this reductionist trap. A proper understanding of the label can also benefit the victims themselves, enabling them to navigate legal and psychological support more effectively. It is equally relevant for the offender and their relationship with society, contributing to both prevention and re-education.

After a critical reflection on the notion of "victim," the next step is to provide further argumentation and examples, narrowing the focus to contemporary patriarchal society and one of its direct

outcomes: victim blaming. The analysis of victimization is complicated by the inconsistency of the legal and social definition.

While the first one is easily accessible through the consultation of the law, the second one can be deceptive and leads to the “ideal and non-ideal victim” dichotomy. So, certain characteristics, such as being “weak” and victimized by the stereotypical “big and bad” unknown man, encourage society to acknowledge somebody as a crime victim and react accordingly while less stereotypical behaviors and traits have the opposite effect¹.

Additionally, the response the victim has stresses this fallacy even more, making unacceptable what draws away from the fight or flight duo². Yet even when fitting perfectly into that stereotype, a victim can still look at themselves in the mirror and prefer to stay blind before their shattered self. Sure enough, sexual violence interferes both in the short and long run with their health, holistically considered: from their physical to their mental status, along with their emotions and sexuality. Thus, they may not only experience anger, fear and shame but also develop mental illnesses³.

Considering the victims of sexual violence, scholars underline both how the aftermath of the event is exacerbated by victim blaming pervasively spread by rape culture, and the fact that the act of rape is not about the perpetrator’s sexual pleasure, rather concerns patriarchal power dynamics⁴.

¹ Ciaran McCullagh, *‘Respectable’ Victims and Safe Solutions: The Hidden Politics of Victimology?*, 68 Northern Ireland Legal Quarterly 539 (2017).

² Hillary Hurst, *Women, the Law, and Sexual Assault: Why the Model Penal Code’s Ordinary Resolution Standard Furthers Victim Blaming*, 59 Tulsa Law Review 573 (2024).

³ Sheena Norton, *The Place of Victims in the Criminal Justice System*, 4.1 Irish Probation Journal 63 (2007).

⁴ Jericho Hockett, et al., *Rape Myth Consistency and Gender Differences in Perceiving Rape Victims: A Meta-Analysis*, 22.2 Violence Against Women 139 (2016); Prachi Bhuptani and Terri Messman, *Role of Blame and Rape-Related Shame in Distress among Rape Victims*, 15.4 Psychological Trauma: Theory, Research, Practice, and Policy 557 (2023).

In this regard, when it comes to the connection between rape acknowledgement and victim's mental health, evidence showed how minimizing sexual violence is a direct consequence of the internalization and acceptance of both gendered roles and the "ideal rape/victim" standard⁵.

Denial might indeed protect the individual in the short term, but it is damaging in the long run, dissuading victims from reaching out for support⁶.

Furthermore, particular attention must be paid to marginalized victims, whose experiences often reveal additional layers of vulnerability and exclusion.

Adolescents, being in a developmental stage, have limited coping skills and resources, finding themselves caged in an even darker hole when considering disclosure⁷.

A recent study also shows that people living with intellectual disabilities often fear both disbelief and the loss of those on whom they depend⁸.

Victims hospitalized in psychiatric institutions face similar biases, as their diagnoses are frequently used against them to dismiss their credibility⁹.

⁵ Laura Wilson, et al., *Examining the Psychological Effect of Rape Acknowledgment: The Interaction of Acknowledgment Status and Ambivalent Sexism*, 73.7 *Journal of Clinical Psychology* 864 (2017).

⁶ Nicole Maiorano, Aine Travers and Frédérique Vallières, *The Relationship between Rape Myths, Revictimization by Law Enforcement, and Well-Being for Victims of Sexual Assault*, 29.14 *Violence Against Women* 2873 (2023).

⁷ Yewande Oshodi, et al., *Immediate and Long-Term Mental Health Outcomes in Adolescent Female Rape Survivors*, 35.1-2 *Journal of Interpersonal Violence* 252 (2020).

⁸ Nechama Sammet Moring, et al., *After Disclosure: A Research Protocol to Respond to Disclosures of Abuse and Sexual Violence in Research with Adults with Intellectual Disabilities*, 16.4 *Journal of Policy and Practice in Intellectual Disabilities* 254 (2019).

⁹ Angela Sweeney, et al., *Out of the Silence: Towards Grassroots and Trauma-Informed Support for People Who Have Experienced Sexual Violence and Abuse*, 28.6 *Epidemiology and Psychiatric Sciences* 598 (2019).

Finally, LGBTQIA+ victims experience a dual stigma at the intersection of sexual or gender identity and victimization¹⁰.

2.2. Challenges Faced by Victims in the Adversarial Justice System

In addition to the challenges previously outlined, notwithstanding national and international legal improvements, within adversarial justice systems, victims are far from playing a dignified role. Certainly, many institutions make life harder for them: “lawyer-led questioning, observation of the demeanor of a witness, the curtailment of free-flowing witness narrative, confrontation and robust cross-examination”¹¹.

Moreover, in adversarial systems, the prosecutor represents the State, and the victim – who, as in any criminal proceeding, is not a formal party but merely a witness – does not benefit from the procedural protection granted to formal parties. In the U.K. for example, the Crown Prosecution Service can drop private prosecutions of some or all charges, irrespective of the victim’s interests¹². Hence, it is far from being victim centered: victim’s voice matters as long as it serves the interests of justice.

Consequently, victims’ claims are frequently and abruptly challenged during cross-examination, never mind the risk of secondary victimization, generally defined as the victim’s exposure to situations that evoke the traumatic experience, as long as the

¹⁰ Katie Edwards, et al., *Disclosure of Sexual Assault among Sexual and Gender Minorities: A Systematic Literature Review*, 24.3 Trauma, Violence, & Abuse 1608 (2023); Sarah Koon-Magnin and Corina Schulze, *Providing and Receiving Sexual Assault Disclosures: Findings from a Sexually Diverse Sample of Young Adults*, 34.2 Journal of Interpersonal Violence 416 (2019).

¹¹ Shane Kilcommins and Luke Moffett, *The Inclusion and Juridification of Victims on the Island of Ireland*, in Yvonne Daly et al. (eds), *The Routledge Handbook of Irish Criminology* at 11 (Routledge 2015).

¹² Samantha Fairclough and Imogen Jones, *The Victim in Court*, in Sandra Walklate (eds), *Handbook of Victims and Victimology* (Routledge 2017).

person remains the vessel for facts and truths. Certainly, they cannot opt out of testifying, as the defendant can¹³.

In addition to that, during cross-examination the defendant's lawyer will carry on a tireless struggle to make the witness seem less credible, at the cost of the victim's mental health, neglecting the consequences of secondary victimization. The opposing counsel may object, and the trial judge has the power to intervene but there is no official guidance the lawyer has to respect during this delicate stage. Evidently, the Bar Standards Board Handbook does not mention precise rules against unduly belligerent cross-examination in order to treat the victim sensitively¹⁴.

Still, it should be clarified how most legal systems are not fully adversarial or inquisitorial but present both tendencies, which might compensate the edges of these diverse models¹⁵.

Moreover, the number of special measures is rising, which, undoubtedly, carries a relevant wind of change in victim's wellbeing within adversarial systems. For instance, the Toolkits made by Advocate's Gateway shed light on planning the questions for those with learning disabilities and other kinds of potential difficulties.

Another example in the U.K. is the Youth Justice and Criminal Evidence Act, which allowed to give evidence from behind electronic devices, pre-trial, or with the assistance of professional aid¹⁶.

Also, within the Italian legal system, the criminal procedure code has been amended, incorporating articles dedicated to vulnerable victims, such as people subjected to sexual abuse who are

¹³ Lily Thacker, *Rape Culture, Victim Blaming, and the Role of Media in the Criminal Justice System*, 1 Kentucky Journal of Undergraduate Scholarship 8 (2017).

¹⁴ Fairclough and Jones, *The Victim in Court* (cited in note 12).

¹⁵ *Ibid.*

¹⁶ Roger Nield, et al., *The Youth Justice and Criminal Evidence Act 1999 and the Interviewing of Vulnerable Groups: A Practitioner's Perspective*, 8.2 Legal and Criminological Psychology 223 (2003).

kept away from the accused and surrounded with professional figures such as psychologists¹⁷.

Further improvement occurred. Among others, the Criminal Justice (Victims of Crime) Act 2017, which gives legislative substance to European Union Directive 2012/29/EU.

Also, the European Court of Human Rights contributed, for instance, through *Doorson v. The Netherlands* interpreting article 6 of the ECHR accordingly to the rights of vulnerable witnesses and victims¹⁸.

Moreover, recognition of victims' needs is supported by the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which establishes the right to be referred to support services and to be treated with respect¹⁹.

On a narrower level, new instruments have been adopted: for instance, the Council of Europe's Framework Decision on the Standing of Victims in Criminal Proceedings, which, among others, include the right to access relevant information. Subsequently, in 2004 the Council adopted the Directive on Compensation to Crime Victims. In addition to that, the European Commission's draft addresses the "tripartite dimensions of information, participation and protection"²⁰.

Still, the adversarial system's institutions (e.g., cross-examination) are both the offender's guarantees and source of secondary victimization.

¹⁷ Giovanni Conso and Vittorio Grevi, *Compendio di Procedura Penale* (CEDAM 2003).

¹⁸ Ciaran McCullagh, 'Respectable' Victims and Safe Solutions: *The Hidden Politics of Victimology?*, 68 Northern Ireland Legal Quarterly 539 (2017).

¹⁹ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, United Nations General Assembly Res 40/34 (29 November 1985) UN Doc A/RES/40/34.

²⁰ Kilcommins and Moffett, *The Inclusion and Juridification of Victims on the Island of Ireland* at 381 (cited in note 11).

2.3. *A Hard Step: Disclosing the Victim Status*

After examining the weaknesses of the adversarial justice system, it is appropriate to look beyond legal institutions to find the support offered by other stakeholders and resources (e.g., Victim's Charter, helpline, restorative justice projects...).

In this regard, the victims' decision to give voice to their struggle either formally or informally is handled, among others, by centers like the Dublin Rape Crisis Centre (D.R.C.C.). Worldwide, non-profit organizations, universities, and scholars emphasize the behaviors that ought to be observed when a victim comes forward, as such interactions can be either healing or deeply harmful for both the discloser and the listener. The D.R.C.C. is among the institutions highlighting these principles.

Among other universities, the Canadian Vanier College has been concerned with contrasting the high percentages of sexual violence occurring in colleges, raising awareness and providing support²¹. Three core themes carefully underlined are: to listen, believe and empower²². This means providing a safe and comfortable space, and engaging in active listening by preferring thoughtful affirmations (e.g., "I believe you"), rather than probing questions²³.

²¹ Valerie Halstead, Jessica Williams and Rosa Gonzalez-Guarda, *Sexual Violence in the College Population: A Systematic Review of Disclosure and Campus Resources and Services*, 26.15-16 *Journal of Clinical Nursing* 2137 (2017).

²² Lindsay Cuncins, *Responding to Disclosures of Sexual Violence* (EDUQ Info Online, 2020), available at <https://eduq.info/xmlui/bitstream/handle/11515/37861/cuncins-VAV-3-1-2020.pdf?sequence=2> (last visited November 8, 2025).

²³ Rachel Caswell, et al., *Providing a Supportive Environment for Disclosure of Sexual Violence and Abuse in a Sexual and Reproductive Healthcare Setting: A Realist Review*, 24.4 *Trauma, Violence, & Abuse* 2661 (2023); Stephanie Lanthier, Janice Du Mont and Robin Mason, *Responding to Delayed Disclosure of Sexual Assault in Health Settings: A Systematic Review*, 19.3 *Trauma, Violence, & Abuse* 251 (2018); Ashley Valanzola, *Student Disclosure: The Aftermath of Teaching about Sexual Violence in the Classroom*, 43.2 *Review of Education, Pedagogy, and Cultural Studies* 185 (2021).

Moreover, in the case of informal disclosure, the epilogue to hope for is a gentle referral to health, social and legal services in order to better address the victim's needs. Other scholars enriched this perspective considering a trauma-informed approach²⁴. The preliminary need to debunk biases and rape myths is particularly stressed, contemplating how, in order to raise awareness, recent feminist movements (e.g., #MeToo) create a mindful environment, facilitating victim's disclosure.

Further studies, on one hand, confirmed the benefits of formal disclosure given the knowledge and abilities of professionals; on the other, shed light on mutual disclosure's benefits, which enabled not only heartfelt responses and validation from attentive listeners but also to expand victims' network²⁵. Nonetheless, other scholars advocated for wider change, needed to corroborate deeper educational programmes designed to change "the social and institutional cultures around sexual violence"²⁶.

Moreover, together with broad considerations on victims' needs during disclosure, the D.R.C.C. (2020) reminds a few immediate safeguards: to stay grounded and assure victim's safety but also not to force them to report, rather informing and not imposing on them what should be considered an anchor (e.g.,

²⁴ Susan Rees, et al., *Believe#MeToo: Sexual Violence and Interpersonal Disclosure Experiences among Women Attending a Sexual Assault Service in Australia: A Mixed-Methods Study*, 9 *BMJ Open* (2019), available at <https://pubmed.ncbi.nlm.nih.gov/31366639/> (last visited November 30, 2025).

²⁵ Eunsuhk Choi, et al., *How Do Victims of Sexual Violence Benefit from Mutual Disclosure? An Exploratory Study of Women in South Korea*, 36.9-10 *Journal of Interpersonal Violence* 4641 (2021).

²⁶ Charlotte Jones, Anne Chappell and Pam Alldred, *Feminist Education for University Staff Responding to Disclosures of Sexual Violence: A Critique of the Dominant Model of Staff Development*, 33.2 *Gender and Education* 121 (2021).

support services, SATU etc)²⁷. This enhances their advocacy and power, which have been violated during the event.

A final core theme when discussing victim's disclosure turns the spotlight from the victim to the listener. Evidently, their account can be shattering, thus, it is both complex and necessary to avoid vicarious traumatization. In this regard, studies clarified how repeated exposure to traumatic narratives might not only damage health holistically considered but even affect the listeners' worldview, piercing through the typical cognitive schemas (i.e., "world as safe and predictable; people as benevolent")²⁸. Moreover, it might lead to misdiagnosis, revictimization of patients and "disengaging from advocacy work"²⁹. For these reasons, both the D.R.C.C. and other stakeholders, stress the importance of self-care after welcoming victims' emotions and worries³⁰.

From a therapist's perspective, a recent study suggested how to look after physical and mental health, especially as professionals, constantly dealing with a patient's trauma. It focused not only on ensuring basic needs (e.g., sleep, nutrition) but also on journaling, engaging in social relationships, mindfulness and counselling³¹. An example of this approach is provided by the regenerative supervision

²⁷ Dublin Rape Crisis Centre (DRCC), *Vicarious Traumatization – DRCC Resource* (October 2020), available at https://www.drcc.ie/assets/files/pdf/_drcc_resource_vicarious_traumatization.pdf (last visited November 8, 2025).

²⁸ Anita Padmanabhanunni and Nondumiso Gqomfa, "The Ugliness of It Seeps into Me": Experiences of Vicarious Trauma among Female Psychologists Treating Survivors of Sexual Assault, 19.7 *International Journal of Environmental Research and Public Health* 3925, 2 (2022), available at <https://pubmed.ncbi.nlm.nih.gov/35409607/> (last visited November 30, 2025).

²⁹ LaDonna Long, *Rape Medical Advocates' Experiences with Vicarious Trauma, Burnout and Self-Care*, 29.4 *Journal of Aggression, Maltreatment & Trauma* 421, 423 (2020).

³⁰ *Ibid.*

³¹ Jaclyn Houston-Kolnik, Charlynn Odahl-Ruan and Megan R. Greeson, *Who Helps the Helpers? Social Support for Rape Crisis Advocates*, 36.1-2 *Journal of interpersonal violence* 406, (2021).

model, which enables the so-called post-traumatic growth³². In a nutshell, through trauma sensitive peer supervision, and thanks to creative activities (e.g., visual or written creative expressions) it is possible to “facilitate counsellor growth, meaning-making, and empowerment”³³. Among others, one aspect emerges: the imperfection of the above-mentioned recommendations when put into practice. Certainly, what scholars call “good soldiering” surfaces, meaning the wish to relieve victims of their suffering even when it means trumping the beholder’s mental health.

In addition to that, despite the hours of training and experience of the individual, a tendency to override victim’s unwillingness to report, might come into play³⁴.

Moreover, the delicate balance between providing support and experiencing harm underscores the intersection of formal and informal disclosure, which can result in personal growth for those who witness or assist victims (so-called post-vicarious growth), though not without emotional cost³⁵. This concept permits drawing ahead an individualistic approach to mental health, staying grounded and resilient enough to support both the victim and ourselves.

In addition to that, a broader meaning of self-care is explored by Audre Lorde when contesting the Reagan administration in xenophobic and capitalistic America. Looking at black, queer and disabled women she affirms “caring for myself is not self-indulgence,

³² Sarah Ullman, *Correlates of Social Reactions to Victims’ Disclosures of Sexual Assault and Intimate Partner Violence: A Systematic Review*, 24.1 *Trauma, Violence, & Abuse* 29, (2023).

³³ Rhonda Neswald-Potter and Robyn Trippany Simmons, *Regenerative supervision: A restorative approach for counsellors impacted by vicarious trauma*, 50.1 *Canadian Journal of Counselling and Psychotherapy* 79, (2016).

³⁴ Long, *Rape Medical Advocates’ Experiences* at 436 (cited in note 29).

³⁵ *Ibid.*

it is self-preservation, and that is an act of political warfare”³⁶. Consequently, she adds how it has to be integrated into one’s life, avoiding making recovery separated from one’s daily existence.

Finally, while capitalism dismisses it as “individual personal time”, self-care means on-going engagement with the self, the other and often entire marginalized categories, for instance, victimized women in the patriarchal system. Hence, “the self for Lorde was never about the individual, bounded body, but about how the self exists in relation to and in support of other bodies”³⁷.

These considerations allow us to imagine a rather diverse society, based on communication, which encourages piercing through trauma, with the appropriate resources and professional help, rather than barricading behind a façade of “capitalistic” self-care.

2.4. A Gendered Concept: Women as Victims within the Patriarchy. Some Generic but Significant Examples

To sum it up using Professor MacKinnon’s wisdom: considering male as the standard, women are not simply different, they are dominated and consequently systematically subjugated³⁸. More precisely, she argues that neither gender neutrality nor gender difference theories fit well within feminist critique of the patriarchal structure. Indeed, in the first case feminine would not be the same as masculine and as close as it gets it would still be inferior. In the second

³⁶ Audre Lorde, *A Burst of Light: and Other Essays* at 130 (Courier Dover Publications 2017).

³⁷ Jina Kim and Sami Schalk, *Reclaiming the Radical Politics of Self-Care: A Crip-of-Color Critique*, 120.2 *South Atlantic Quarterly* 325, at 11 (2021).

³⁸ Catherine Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press 1st ed. 1987).

case, special protection clauses trap women within the “Other” and keep them far from equality³⁹.

Hence, her point is prior to the epilogue of these two theories and considers that, within the patriarchy, difference means systematic dominance.

In order to uproot that, “equality” would still be weighted according to the male standard. Thus, liberation from patriarchal oppression is preferable in order to consider women not as inferior but as fully human⁴⁰.

An example of MacKinnon’s effort into contrasting gender violence goes as follows. After listening to the victimization of porn actresses such as Linda Boreman, and being appointed by Minnesota city council, MacKinnon and the feminist activist Andrea Dworkin drafted antipornography ordinances⁴¹. Albeit the U.S. 7th Circuit Court in *American Booksellers Association, Inc. v. Hudnut*, 771 F.2d 323 (1985), struck down the final ordinance, their standing certainty made a difference.

She argued against the argument that the Constitution protects pornography as a form of speech⁴². Moreover, MacKinnon was partly responsible for sexual harassment being considered an offence under U.S. law and she definitely played a prominent role in the women’s antiporn movement in the 1980s⁴³.

³⁹ Simone de Beauvoir, *The Second Sex in Classic and Contemporary Readings in Sociology* (Routledge 2014).

⁴⁰ *Ibid.*

⁴¹ Amanda Cawston, *The feminist case against pornography: A review and re-evaluation*, 62.6 Inquiry 624 (2019);

Péter Szil, *Men, Pornography and Prostitution: The Trap of Pornography as Sexual Education*, paper presented at Second Global Conference on The Erotic, Budapest, Hungary (2005).

⁴² Catharine MacKinnon, *Pornography as Trafficking*, 26 Michigan Journal of International Law 993 (2004).

⁴³ Katharine Bartlett, *MacKinnon’s Feminism: Power on Whose Terms*, 75.4 California Law Review 1559 (1987);

Surely, their contribution to feminist literature inspired the radical feminist movement in pondering over what the liberals put aside: the sexual victimization of women in the heteronormative society.

Another step forward which sustained women's liberation opposing their societal victimization, consists in their increasing presence in the workforce⁴⁴.

As men left to fight at the front, women covered those positions left unfilled, demonstrating their abilities and soon after gaining what for many centuries had been exclusively men's rights (e.g., right to vote).

This went hand in hand with the possibility to control their fertility, thereby avoiding being stuck with offspring either inside them or around them⁴⁵.

Still, the chains which kept women victimized within the patriarchal society were not loose enough. Thus, every one of the four waves of feminism contributed to enhancing their status; each one with their peculiarities: from universal suffrage to the #MeToo era.

Some changes have been remarkable, such as the inclusion of sex as a ground for discrimination within Title VII of the Civil Rights Act (1964); while others have been less so. For instance, the cumbersome path of Italian law toward women's emancipation within the home: while under the civil code reform of 1975 women could, for example, decide not to follow their husband's domicile; only in 1996 rape was considered an offence against the person and not against morality.

Emily Jackson, *Catherine MacKinnon and feminist jurisprudence: A critical appraisal*, 19.2 *Journal of Law and Society* 195 (1992).

⁴⁴ Adrienne Rich, *Of Woman Born: Motherhood As Experience and Institution* (WW Norton & Company, 2021).

⁴⁵ Germaine Greer, *The Female Eunuch* (Harper Collins Publishers, 2006).

2.5. Ever-Present Victim Blaming

It is now appropriate to consider, through the discussion of some cases, the practical outcome of this framework. Although they differ in their historical and factual details, they share a common thread: both exemplify the phenomenon of secondary victimization, showing how victims of sexual violence are subjected to further harm through judicial procedures, societal attitudes, or media scrutiny. This conceptual link underscores a persistent pattern in which the focus shifts from the offender to the survivor.

The Irish system provides a brilliant yet miserable example of female victims' role within the patriarchal structure, with the so-called Cork Rape Trial.

Apart from the incident itself, what sounds alarming are the words pronounced by the defence barrister: O'Connell. Sure enough, during the hard-fought cross-examination O'Connell demanded that the victim's underwear be considered as proof of consent. Her words show how an item of clothing can speak for the victim, not only undermining the very content of consent in general but also a very specific and indisputable characteristic of it: revocability⁴⁶.

Other legal systems were and – woefully – still are not far⁴⁷.

In Italy, in 1979, a young woman endured a gang rape episode and during the trial is subjected to “judicial rape”⁴⁸. Through invasive questions, the defence belittled the event as the linear outcome of women's decision to be anything but the “angel of the hearth”.

⁴⁶ Jennifer O'Connell, *Lawyers concerned over public backlash after underwear comments in rape trial*, (Irish Times Online, November 24, 2018), available at <https://www.irishtimes.com/news/social-affairs/lawyers-concerned-over-public-backlash-after-underwear-comments-in-rape-trial-1.3708111> (last visited November 9, 2025).

⁴⁷ Yvonne Marie Daly, *Knowledge or Belief Concerning Consent in Rape Law: Recommendations for Change in Ireland*, 6 Criminal Law Review 478, (2020).

⁴⁸ Sue Lees, *Judicial rape*, 16 Women's Studies International Forum 11 (1993); Samantha Fairclough and Imogen Jones, *The victim in court*, (Routledge 2nd ed. 2017).

Brilliantly, her lawyer recalled how when it is about rape, on the dock unjustly stands the victim and not the offender.

Close enough, both chronologically and symbolically, stands the Circeo Massacre and especially what came after that: the umpteenth example of secondary victimization. Outside the courtroom, this time, the interviewer asked Donatella Colasanti (the survivor), without fear or hesitation, what had been the main cause of her suffering: physical pain or moral humiliation. The woman answered: "neither", claiming that what really bothered her was the exploitation of the incident and, secondly, the way in which the courtrooms were occupied. To support her, there were only women. Embittered, Colasanti stated that what happened to her went beyond rape and did not only concern women⁴⁹.

This also emerged in another interview conducted by Tommaso Ferrari in which the first piece of information provided to the press was not Colasanti's physical or mental health, the consequences for rapists or in general broader reflections on rape as systematic. Rather, they spoke of "virginity". About that, Colasanti's lawyer, Tina Bassi, underlined a "widespread discourse in the current mentality". She recalled that an event occurred in the previous years in which the victim of a ferocious gang rape episode was awarded a very high sum of money. This was not to compensate for damage to her health and integrity. Bassi expressed bitterness in reporting the sentence's reasoning: since a girl who was raped could not find adequate economic accommodation in marriage, then damage compensation should have given her the possibility to be independent outside marriage⁵⁰.

This keeps women stuck within the archaic condition wherein economic stability is only found in marriage: the husband supports

⁴⁹ *Donatella Colasanti intervistata da Enzo Biagi* (1983), available at <https://www.youtube.com/watch?v=lauqwLfS1wI> (last visited November 30, 2025)

⁵⁰ *Tina Lagostena Bassi intervistata da Enzo Biagi* (1983), available at <https://www.youtube.com/watch?v=nRJytn1HQqc> (last visited November 30, 2025).

the wife and she, in exchange, is obliged to provide offspring and nurturance.

In 2021, another Italian gang-rape case was brought before the ECtHR, considering the interference with article 8 of the Convention. The Court itself contests the invasion of the victim's most intimate self (from her sexual orientation to her career) in order to weaken her claim. Inevitably, the ECtHR denounces the exposure of the woman to "secondary victimization by making guilt-inducing and judgmental comments", demanding that the furtherance of sexist stereotypes in judicial decisions be avoided⁵¹.

As a matter of fact, the Court of Appeal of Florence unfairly perpetrated misogynistic secondary victimization, forgetting about the offender and committing judicial rape.

Some references, heavily criticized by the ECtHR, are worth mentioning.

Clearly, the allusion to "her relationships, her sexual orientation or her clothing choices, and the subject matter of her artistic and cultural activities" was considered irrelevant when evaluating her credibility⁵².

The provided examples are the inevitable handling of victim status within the patriarchal structure and also demonstrate the importance of critical thinking about the inadequate use of the victim label.

To inspire further research about it, some considerations should be provided.

Certainly, acknowledging victim blaming goes hand in hand with debunking the perilous stereotypes recurrent within the rape narrative⁵³. It is not about how the victim appears or takes up space;

⁵¹ *J.L. v. Italy*, ECHR 5671/16 (2021).

⁵² *Id.*

⁵³ Hillary Hurst, *Women, the Law, and Sexual Assault: Why the Model Penal Code's Ordinary Resolution Standard Furthers Victim Blaming*, 59.2-3 *Tulsa Law Review* 573, (2024).

it is about how society educates its rapists, who, for the record, are not “exceptions” (or monstrous) but often fit the “boy next door” stereotype⁵⁴.

An enlightening yet tragic example of this absurdity is the Italian Cecchettin case, in which a young woman was the victim of a femicide by the hand of her ex-boyfriend. He was described by the media as a well-behaved young man and images were shared showing a “cheerful couple” completely neglecting appropriate reflections. Quoting the spot-on words of the victim’s sister, it must be stated that “monsters are healthy sons of the patriarchy”⁵⁵.

Both the education and health systems *ex ante*, and courts and the media *ex post*, can make the difference in how victims are depicted and therefore treated, within a broader necessity to uproot the patriarchal structure⁵⁶. As a matter of fact, one in three women has been subjected to sexual violence. Every day 137 women are killed by a family member as stated by the U.N. Women in 2019. Between 1996 and 2024, among the 267 women who died violently in the Republic of Ireland, 55% were killed by an ex-partner or current partner, of the resolved cases⁵⁷. Among these femicides, 9 out of 10 victims knew the perpetrator⁵⁸. Hence, it is important to frame these issues within gender violence considering how it is deeply systematic⁵⁹.

⁵⁴ Thacker, *Rape Culture* (cited in note 13).

⁵⁵ Sofia Bettiza, *Giulia Cecchettin’s killing sparks Italian reckoning over femicide*, (BBC Online, November 24, 2023), available at <https://www.bbc.com/news/world-europe-67514334/> (last visited November 9, 2025).

⁵⁶ Louisa Pauline Witte and Aleya Flechsenhar, “It’s Your Own Fault”: *Factors Influencing Victim Blaming*, 40.9-10 *Journal of Interpersonal Violence* 2356, (2025).

⁵⁷ Women’s aid, *Femicide Watch* (November 19, 2025), available at <https://www.womensaid.ie/get-informed/campaigns-and-partnerships/femicide-watch/> (last visited November 9, 2025).

⁵⁸ *Ibid.*

⁵⁹ See Andrea Michele Sonnen and Joedeman Brown, *Rape and victim-blaming: A critical examination of the tendency to blame victims and exonerate perpetrators in cases of rape*, *Prized Writing* 75, 84-109 (2012).

However, underreporting is as persistent as gender violence and it can be seen how both female children and adult women, at least most of them, do not report sexual violence to the police⁶⁰. In other common law countries, the data are very much alike.

In the U.S., for example, despite the high prevalence of sex-related crimes, they are the most underreported: less than 5% of such crimes are reported, mainly because of fear of victim blaming⁶¹.

In Australia, the Australian Institute of Health and Welfare affirms that out of 1 in 6 women, who went through sexual violence more than 50% did not report, haunted by the same fear: victim blaming⁶².

In England and Wales, the Independent Office for Police Conduct shed light on recurrent episodes of victim blaming within the Criminal Justice System such as carrying out the investigation only in the cases in which the victim seemed credible enough, and so focusing on a vague and biased criterion⁶³.

This has to stop.

⁶⁰ Central Statistics Office, *Sexual Violence Survey* (2022), available at <https://www.cso.ie/en/statistics/crimeandjustice/sexualviolencesurvey/> (last visited 12/11/2025).

⁶¹ Jodie Murphy-Oikonen et al., *Unfounded sexual assault: Women's experiences of not being believed by the police*, 37(11-12) *Journal of interpersonal violence* (2022).

⁶² Australian Institute of Health and Welfare, *FDSV summary* (July 30, 2025), available at <https://www.aihw.gov.au/family-domestic-and-sexual-violence/resources/fdsv-summary>. (last visited November 30, 2025).

⁶³ Independent Office for Police Conduct, *Ending victim blaming in the context of violence against women and girls* (2024), available at <https://www.policeconduct.gov.uk/sites/default/files/documents/IOPC-ending-victim-blaming-guidance-Feb-2024.pdf> (last visited November 12, 2025).

3. *Victim Blaming in Practice. Women as Virgins: the Case of Virginity Testing*

3.1. *Virginity Testing in India*

As already mentioned, victim blaming is a burden for women worldwide.

Among others, the Indian legal system and its tortuous handling of the role of victims within rape trials shed light on a handful of instances.

Since the 1990s nevertheless, gradual but profound criticism has built up both in the legal field and the social conscience, challenging what for centuries has been considered an indisputable truth but is just an anatomical myth: women's virginity⁶⁴.

At this point a short explanation is necessary given that this thin rim of tissue is unknown to most while being legally relevant, as the Indian case will demonstrate.

In *The Wonder Down Under* (2017) Brochmann and Dahl, two passionate physicians, explain how the hymen is a heterogeneous and elastic rim of tissue surrounding the vaginal opening, a leftover from the embryonic existence. Thus, it has many shapes and, rarely, can be absent:

Different configurations of the hymen exist, and include, most commonly: annular (also known as circumferential), crescentic, and fimbriated (with finger-like projections). Less common hymen configurations are: sleeve-like, septate (in which there are two openings with a band of tissue between them), cribriform (with multiple openings), micro-perforate (in which the hymenal orifice

⁶⁴ See generally Nina Brochmann and Ellen Støkken Dahl, *The Wonder Down Under* (Yellow Kite 2017).

is extremely small), and imperforate (in which there is no hymenal opening at all)⁶⁵.

Moreover, when it covers the whole opening, it is handled by surgeons within a few days from birth, otherwise it would cause excruciating pain once the young girl reaches puberty⁶⁶.

The consequence from a legal perspective is that the expert witness, for example, cannot tell if a woman has had sex by examining her genitalia through a so-called virginity test.

This was confirmed by the World Health Organization in 2018 through an Interagency Statement, which aimed to raise awareness about the harmful consequences of virginity testing and to protect women and girls from its dangerous repercussions. The Statement emphasized that virginity testing has no scientific validity, constitutes a form of gender-based violence, and violates human rights. Indeed, it facilitates the dissemination of sexually transmitted infections (STIs), when it is carried out with insanitary tools, and also harms women's mental health, causing post-traumatic stress disorder (PTSD), suicide attempts and eventually honor killings⁶⁷.

⁶⁵ Ranit Mishori et al., *The little tissue that couldn't—dispelling myths about the Hymen's role in determining sexual history and assault*, 16.1 Reproductive health (2019).

⁶⁶ Abbey Berenson, Astrid Heger and Sally Andrews, *Appearance of the hymen in newborns*, 87.4 Pediatrics 458-465 (1991); Carole Jenny, *Congenital absence of the hymen only a rumor?*, 82.4 Pediatrics 679-680 (1988); Amanda M. Jacobs and Elizabeth M. Alderman, *Gynecologic examination of the prepubertal girl*, 35.3 Pediatrics in Review 97 (2014).

⁶⁷ W.H.O., *Eliminating Virginity Testing: An Interagency Statement* (October 16, 2018), available at <https://www.who.int/publications/i/item/WHO-RHR-18.15> (last visited November 12, 2025).

Moreover, virginity testing has not only been used in rape trials but has also been carried out by officials during custody, in jurisdictions where adultery and prostitution are crimes⁶⁸.

Nonetheless, there is no doubt in the scientific community, even more so since the W.H.O. itself clarified its unreliability.

Still, physicians find themselves trapped in a medical dilemma: to hand over a fallacious certificate in order to save, in the short term, a pressured young girl; or to deny it in the name of scientific accuracy, and so to educate the ones who ask for the test in the long term⁶⁹.

Researchers such as Delgross recommend denying the continuation of virginity testing and, at the same time, letting the victim and her parents know about its negative consequences and unscientific basis⁷⁰.

Reverting to the Indian legal system, for centuries, the defence in rape trials relied on the proof of women being “habitual/habituated to sex” to pierce through the victim status. Then, the horrific Nirbhaya case (2012) and its arctic wind of change led to the establishment of the Verma Committee and, consequently, to the approval of the Criminal Law Amendment (2013) and the Health Minister’s guidelines (2014).

Before that, many court decisions emerged and shed light on this pervasive issue.

Back in 2003, in *State Of Punjab vs Ramdev Singh*, the Supreme Court focused on honor, dignity and chastity when considering the rights undermined in rape cases. Still, one year later, in *State of U.P. vs Pappu @ Yunus And Anr*, the Court stepped back from the

⁶⁸ Marcia L. Pearson, *A blemish on the modern face of Turkey: The historical background and social, legal, and international implications of virginity testing in Turkey*, 28 North Carolina Journal of International Law 663 (2002).

⁶⁹ Niklas Juth and Niels Lynøe, *Zero tolerance against patriarchal norms? A cross-sectional study of Swedish physicians’ attitudes towards young females requesting virginity certificates or hymen restoration*, 41.3 Journal of Medical Ethics 215 (2015).

⁷⁰ Savannah Delgross, *The Mythological role of the hymen in virginity testing*, 24.1 Articulãte 4 (2019).

assumption that the victim's sexual history might weaken her claim: "even assuming that the victim was previously accustomed sexual intercourse, that is not a determinative question"⁷¹.

Also, in *Sukhdev Anand v. State of Himachal Pradesh* (2005) the Supreme Court highlighted the arbitrary and unscientific nature of this examination calling its outcome hypothetical and based on opinion. In *State of U.P. vs Munshi & Etc.* (2008), the judges reaffirmed the irrelevance of being "habituated to sex" and qualified as "legally unattainable" the outcome of the two-finger test⁷².

In these and similar court cases, the Human Rights Watch highlighted that often the victim's consent was either totally lacking or vitiated by external pressure.

Finally, the Human Rights Watch (H.R.W.) suggested to ban the use of virginity testing given its lack of scientific reliability and the harm it causes.

Together with a legal ban, it was highly recommended strengthening the education of both medical professionals and police officials in order to provide appropriate support to rape victims, thus avoiding useless and detrimental exams⁷³.

In the following years the Court treatment of similar cases improved. For instance, in *Phool Singh vs The State of Madhya Pradesh* (2021), the lower jurisdictions did not use the expression "habituated to sexual intercourse" anymore. Besides, in considering those cases, it was made clear that courts cannot "sit in an ivory tower" losing sight of the above-mentioned pivotal considerations⁷⁴.

⁷¹ *State Of U.P v. Pappu @ Yunus And Anr*, (Supreme Court of India 2004).

⁷² *Sukhdev Anand v. State of Himachal Pradesh* (Himachal Pradesh High Court 2005); *State Of U.P v. Munshi & Etc* (Allahabad High Court 2008).

⁷³ H.R.W., *Dignity on Trial India's Need for Sound Standards for Conducting and Interpreting Forensic Examinations of Rape Survivors* (September 6, 2010), available at <https://www.hrw.org/report/2010/09/06/dignity-trial/indias-need-sound-standards-conducting-and-interpreting-forensic>. (last visited November 12, 2025).

⁷⁴ *Mukesh & Anr v. State for Nct of Delhi & Ors* (Supreme Court of India 2017).

Additionally, in *Vijay v. State of M.P.* (2023), the court recognized the victim as such, rather than implying that they were somehow responsible for or complicit in their own victimization⁷⁵. Moreover, the Court clarified that the absence of physical harm does not deem the accused as innocent, and neither does a delay in the victim's report considering the sense of shame and fear, which is still common among rape victims.

However, between the H.R.W. report and these recent cases, one event in particular shaped Indian handling of rape cases: the Nirbhaya case, which involved a brutal gang rape which eventually led to her death; the victim was still able to report it and narrate the events.

The Court's decision underscores that neither delays in reporting nor the absence of detail in the First Information Report should affect the assessment of the case. Moreover, the judges stressed the importance and sensitivity of the injured witness' declaration, giving proper weight to the mental, physical and emotional status while releasing it. So even though this was not the first gang rape case in India, "this time, the government was compelled to take measures which it had not taken before"⁷⁶.

Sure enough, a committee under the leadership of Justice Verma was created to suggest changes in criminal law, which were soon implemented⁷⁷.

More specifically, the Committee encouraged proper amendments in order to make rape trials more efficient, quicker and to increase punishments in rape cases. Moreover, it clearly recommended avoiding what, back in 2010, the H.R.W. focused on: virginity testing.

⁷⁵ *Vijay v. State of M.P.* (Supreme Court of India 2023), last visited November 30, 2025).

⁷⁶ Akshay Bhatnagar, et al., *Sparking the #MeToo revolution in India: The 'Nirbhaya' case in Delhi*, 6 AEI Paper & Studies 1, 9 (2019).

⁷⁷ Ashish Verma, *Test Identification Parade's Purpose And Evidentiary Value Under Indian Law*, 7 Research Ambition: An International Multidisciplinary e-Journal 1, 1-2 (2022).

Consequently, in 2013, a massive change occurred in Indian law: with the Criminal Law Amendment Act, Section 53A was inserted into the Evidence Act, which now specifies: “In a prosecution for [sexual violence and similar offences] (...) evidence of the character of the victim’s previous sexual experience shall not be relevant on the issue of such consent or the quality of consent”⁷⁸.

In the same year the Supreme Court, in *Lillu @ Rajesh & Anr vs State Of Haryana*, declared virginity testing to be unconstitutional. Indeed, the Court held that this examination violates “the ‘right of rape survivors to privacy, physical and mental integrity and dignity’”⁷⁹.

Changes in the medical practice followed: in 2018 one of the main textbooks of medical jurisprudence was revised (*A Textbook of Medical Jurisprudence and Toxicology*), underlining the lack of scientific basis behind the two-finger test⁸⁰.

More recently, the 2013 Court decision was reinforced by a more concrete and precise one (*Supreme Court in the State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai*, 2022) which gave practical guidelines in order to translate the declaration of unconstitutionality into practice. Certainly, it reaffirms that “the so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. Nothing could be further from the truth – a woman’s sexual history is wholly immaterial while adjudicating whether the accused raped her”⁸¹. Hence, it confirms that virginity testing harms more dimensions: privacy, physical and mental integrity and dignity.

⁷⁸ Criminal Law Amendment Act (2013), Section 53A.

⁷⁹ *Lillu @ Rajesh & ANR v. State of Haryana* (2013), <https://indiankanoon.org/>, at 5.

⁸⁰ Sumedha Sen, *The ‘Virtue’Vertigo: Case of the Paradoxical Virginity Test in Rape Cases* (2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861810 (last visited November 12, 2025).

⁸¹ *State of Jharkhand v Shailendra Kumar Rai @ Pandav Rai*, para 16 (Supreme Court of India 2022).

The Court replicated not only how this “exam” lacks scientific basis and qualifies as misconduct but also how it “re-traumatizes” the victim, shifting the spotlight on what is defined as wholly immaterial: women’s sexual history.

More specifically, the Court asserts that “the so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. (...) It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active”⁸².

Also, it turns directly to the Government asking to properly apply the Ministry of Health and Family Welfare guidelines, for medical examination and for the protection of victims of sexual violence, approved in 2014 but not fully implemented.

Moreover, close enough to what the W.H.O. recommended in 2018, the Indian Supreme Court shed light on the importance of conducting workshops on the matter.

Finally, it demanded to review curricula in medical schools in order to give proper space not to female anatomy in general but more specifically to the two-finger test, classifying it as a procedure to avoid when taking care of rape victims. About that last point, in 2024 the National Medical Commission revised medical curriculum for undergraduate students, qualifying virginity testing as unscientific and inhumane⁸³.

⁸² *Id.* para18.

⁸³ Megha Chowdhury, *NMC Reintroduces MBBS CBME Curriculum, Talks About Informed Consent & Removes 'Virginity Test'* (The Free Press Journal Online, September 13, 2024), available at <https://www.freepressjournal.in/education/nmc-reintroduces-mbbs-cbme-curriculum-talks-about-informed-consent-removes-virginity-test> (last visited 12/11/2025).

3.2. *Virginity Testing in the U.K.*

Not only India recently handled the umpteenth example of secondary victimization, namely virginity testing. In 2022, the U.K. took comparable action, though through legislative measures rather than a court decision. It is now severely punished in England, Scotland, Wales and Northern Ireland to “carry out, offer or aid and abet virginity testing or hymenoplasty”⁸⁴.

The law meticulously defines each relevant term starting with “virginity testing” and “hymenoplasty”. This procedure aims to manipulate the hymen in order for it to look like a “virginal hymen” whatever that might signify. Clearly, researchers pondered over the validity of this operation considering that, as yet clarified, hymens come in various shapes and such thing as a “virginal” hymen does not exist⁸⁵.

Moreover, the W.H.O. classified it among the four types of female genital mutilation (WHO, 2018); qualification which was adopted by other relevant institutions such as: the Royal College of Obstetricians and Gynecologists, the American College of Obstetricians and Gynaecologists and the International Society for the Study of Vulvovaginal Disease⁸⁶.

⁸⁴ Health and Care Act of 2022 §§ 136 – 148.

⁸⁵ Brian D. Earp, *Hymen ‘restoration’ in cultures of oppression: how can physicians promote individual patient welfare without becoming complicit in the perpetuation of unjust social norms?*, 40.6 *Journal of Medical Ethics* 431 (2014).

⁸⁶ R.C.O.G., *Royal College of Obstetricians and Gynaecologists position statement Virginity testing and hymenoplasty* (August 2021), available at <https://www.rcog.org.uk/media/qlxh3wro/rcog-virginity-testing-hymenoplasty-position-statement-august-2021.pdf> (last visited November 12, 2025); A.C.O.G., *Elective Female Genital Cosmetic Surgery* (January 2020), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2020/01/elective-female-genital-cosmetic-surgery> (last visited November 12, 2025); Pedro Vieira-Baptista, et al., *International society for the study of vulvovaginal disease recommendations regarding female cosmetic genital surgery*, 22.4 *Journal of lower genital tract disease* 415 (2018).

It has been recommended that physicians refuse to carry out such practices and rather to ponder over the reasons behind the request, establish a safe and enriching dialogue with the patient in order to explain the negative consequences of the procedure, as well as the anatomical myth in question⁸⁷.

In addition to that, it is relevant to underline how the previous set of legal rules was not sufficient to condemn such practices. Therefore, it cannot be considered a battery or an assault, and virginity testing, specifically, does not fall under the definition of female genital mutilation. Consequently the 2022 amendment of the Health Care Act was necessary to contrast these two practices.

Moreover, this legal provision covers the definition, sanctions a wide range of conduct other than “carry out” and it also extends the possibility of punishment beyond national borders.

The *ratio* behind this wide coverage lies in the consistent reference, when a service is prohibited in the Country of origin, to other States. This happens among the so-called procreative tourism but also the horrid scenario of sexual tourism. To avoid this epilogue in the U.K., the legislator preferred to extend its scope of punishment to the point of “following” not so much the accused but the injured party even outside the United Kingdom. Therefore, the will to enhance the universality of the protected fundamental rights does not end in a single country. Rather it remains worthy of protection wherever the person is. Among these rights, there certainly are life, health, psychophysical integrity and sexual freedom.

Thus, the multi-agency guidance clearly states: “there is a risk that women and girls may be taken abroad and subjected to virginity testing and hymenoplasty (as is often seen with so-called ‘honor-

⁸⁷ Bianca R. Van Moorst, et al., *Backgrounds of women applying for hymen reconstruction, the effects of counselling on myths and misunderstandings about virginity, and the results of hymen reconstruction*, 17.2 The European Journal of Contraception & Reproductive Health Care 93 (2012);

Venkatachalam Raveenthiran, *Surgery of the hymen: from myth to modernisation*, 71(4) The Indian journal of surgery 224 (2009).

based' abuse offences, such as female genital mutilation or forced marriage). The offences, therefore, carry extra-territorial jurisdiction"⁸⁸.

4. *If not Virgins, then Mothers*

4.1. *Motherhood, Marriage and Heterosexuality through the Lenses of (Radical) Feminist Constitutionalism*

In her work, Ruth Rubio-Marín deals with the preoccupying relationship between motherhood and the State. Conveniently enough, the capitalistic structure recognizes the value of social reproduction, embedding motherhood, as an institution, within the confining domestic walls. Although particularly harsh in the past, the dichotomy between the private and public spheres, apparently, faded as a result of second wave feminism's efforts⁸⁹.

Still, this massive change was not secluded in the streets, far away from the law: inevitably it influenced the legal field too, corroborating the struggle endured by the above-mentioned movements. Nonetheless, within some 20th-century democratic constitutions, together with equality, maternity clauses emerged. They were considered by those very female voices who, for instance, in Germany contributed to constitution-making. However, if in Europe the accommodationist model recognized gender differences and dealt with them; in the U.S., as stated by Rubio-Marín, gender neutrality thrived within the assimilationist model⁹⁰. The first model

⁸⁸ U.K. Government, *Virginity testing and hymenoplasty: multi-agency guidance* (2022), available at <https://www.gov.uk/government/publications/virginity-testing-and-hymenoplasty-multi-agency-guidance/virginity-testing-and-hymenoplasty-multi-agency-guidance> (last visited November 12, 2025).

⁸⁹ Ruth Rubio-Marín, *The (Dis)Establishment of Gender: Care and Gender Roles in the Family as a Constitutional Matter*, Vol. no. 13 *International Journal of Constitutional Law*, 787 (2015).

⁹⁰ *Ibid.*

acknowledges the biological differences between women and men and supports women without undermining those differences, while the second model treats men as the standard to which women must conform in order to secure their rights.

Both models are intrinsically weak. In the U.S., gender neutrality proved the argument of dominance feminism: within the patriarchal structure, difference means inferiority, while pretending that a male-tailored system can fit women's existence⁹¹.

Through the analysis offered by another noteworthy author, Julie Suk, the fallacies of normative motherhood, for example in Germany, are plain. On the one hand, it is crucial to translate constitutional maternity clauses into ordinary law (e.g., with pregnancy and maternity leave); on the other hand, their gendered basis brings the employer, within the capitalistic system, to prefer men (the "ideal worker") to women⁹².

Hence, Rubio-Marín's proposal to de-gender "maternity" clauses is spot on. In particular, the author encourages both to cherish the importance of social reproduction and to expand its boundaries to a gender-neutral version of those guarantees. By providing parental leave the aforementioned accommodationist model's fallacy can be overcome⁹³.

Nonetheless, a closer look is essential to ponder over a long-term solution.

Among the others, Jennifer Nedelsky's argument comes to the rescue: not only is institutional change much needed (i.e., parental leave, part-time work in the first years of the child's life etc.), but also, a "change in desire" is crucial. That is to say the need to establish pervasive forums within many fields (from education to work

⁹¹ Mackinnon, *Feminism Unmodified* (cited in note 38).

⁹² Julie Suk, *Gender Equality and the Protection of Motherhood in Global Constitutionalism*, 12 *The Law & Ethics of Human Rights* 151 (2018).

⁹³ Rubio-Marín, *The (Dis)Establishment of Gender* at 787 (cited in note 89).

including religious institutions), in order to discuss and challenge the gendered division of labor⁹⁴.

According to Nedelsky, this would nudge men inside the private sphere, reaping major benefits, for example bonding with their children more consistently. At the same time, women would be freed from the never-ending burden of internal and external work.

A further argument to improve Nedelsky's point could be outlined. Evidently, when discussing and addressing a "change in desire," it is essential to examine desire itself. Although far from the pronatalist ideals of the 20th century – which equated the family with a heterosexual, reproductive union – such notions still persist. In these forums, therefore, and with the aim of promoting holistic health, the very wish to become a parent should be carefully considered, allowing individuals to explore their unique identities, whether aligned with a parental project or a childfree life⁹⁵.

At this point it is possible to refer to the normalization of one family ideal: the heteronormative one. The obsession for reproduction is intertwined with the romanticization of a woman's prison: marriage.

Only one union is convenient for the patriarchal and capitalistic system and that is the one which permits new workforce to multiply. (Heterosexual) marriage breeds the achievement of social reproduction, fostering the sex-dichotomy which depicts the man as the breadwinner and the woman as, necessarily, the caring and nurturing mother.

Among other examples, this obsession with marriage becomes vibrant through the words of John Mee, who clarified: "the constitutional right to marry may preclude measures that render it

⁹⁴ Beverly Baines, Daphne Barak-Erez and Tsvi Kahana, *Feminist Constitutionalism: Global Perspectives* at 15 (Cambridge University Press [1st ed. 2012]).

⁹⁵ Amy Blackstone, *Childfree by Choice: The Movement Redefining Family and Creating a New Age of Independence* (Penguin Random House 2019).

unduly difficult to exit a failed civil partnership where one of the partners wishes to marry a person of the opposite sex”⁹⁶.

Accordingly, institutions like motherhood and marriage can be understood as clear examples of how gendered oppression is embedded and maintained within legal and social structures.

In particular, considering marriage, Rubio-Marín states: “constitutionalism was built on the assumption of women’s relegation to, and subordination within, the private sphere”. Consequently, marriage equals “women freely ‘contracting into’ an institution that secured patriarchy and affirmed their obedience to men”⁹⁷.

Bringing this argument to its core makes it inevitable to question the very basis of women’s heterosexual relationships, eventually culminating into marriage, within the patriarchy. Thus, by “placing sexuality in the construction of women’s definition and status, they act as if women can be ‘persons’ by interpretation, as if the concept is not, in every socially real way, defined by and in terms of and reserved for men and as if sexuality is not itself a construct of male power”⁹⁸.

4.2. *A Clear Example: on One Side a Person, on the Other, not One Yet*

The struggle between women-centered necessities and institutionalized patriarchal needs is often brushed off as second-rank tantrums. However, they are definitely not when a pregnant person is carrying a fetus inside them and a pivotal decision has to be made

⁹⁶ Fergus Ryan, *Out of the Shadow of the Constitution: Civil Partnership, Cohabitation and the Constitutional Family*, 48 Irish Jurist 201 (2012).

⁹⁷ Rubio-Marín, *The (Dis)Establishment of Gender* at 790 (cited in note 89). See also Leslie Francis and Patricia Smith, *Feminist Philosophy of Law* (Stanford Encyclopedia of Philosophy, March 5, 2025), available at <https://plato.stanford.edu/entries/feminism-law/> (last visited November 11, 2025).

⁹⁸ MacKinnon, *Feminism Unmodified* at 344 (cited in note 38).

(e.g., about blood transfusion, HIV or syphilis treatment, Caesarean section, etc.)⁹⁹.

Legally speaking, courts have grounds for ordering forced treatment, when, in the same jurisdiction, next to the right to refuse (in Ireland, for example, before the 2018 Constitutional amendment), the rights of the unborn are guaranteed. Nevertheless, even before 2018, Irish case law proved to be skeptical of coerced treatments for pregnant persons (*Health Service Executive v. B and Anor*)¹⁰⁰.

This is confirmed when considering competent patients, even after the High Court President imposed a C-section on a woman affected by a mental health disorder¹⁰¹.

After 2018, in Ireland, neither the Constitution nor other norms provide a decisive answer when considering the courts' intervention against a competent pregnant person's refusal of treatment¹⁰². Consequently, it is appropriate to interpret this vacuum through ethical lenses.

Authors shed light on the different interests at stake: those of the foetus and those of the pregnant person; except, when considering the latter, it is not about interests, it is about rights.

⁹⁹ R.C.O.G., *Blood transfusion, pregnancy and birth* (2015), available at <https://tinyurl.com/3bprprkm> (last visited November 11, 2025).

¹⁰⁰ Mairead Enright and Deirdre Duffy, *Law and childbirth in Ireland after the 8th Amendment: notes on women's legal consciousness*, 49 *Journal of Law and Society* 753 (2022); See also *Health Service Executive v. B*, IEHC 605 (2016).

¹⁰¹ High Court reporters, *High Court approves hospital's plan to carry out elective C-section on woman against her will*, (BN, July 5, 2023) available at <https://www.breakingnews.ie/ireland/high-court-approves-hospitals-plan-to-carry-out-elective-c-section-on-woman-against-her-will-1498242.html> (last visited November 30, 2025).

¹⁰² Maeve Taylor, Alison Spillane and Sabaratnam Arulkumaran, *The Irish Journey: Removing the shackles of abortion restrictions in Ireland*, 62 *Best Practice & Research Clinical Obstetrics & Gynaecology* 36 (2020).

Problems emerge when men and women are considered as entirely distinct individuals with inherently different roles¹⁰³. Nevertheless, it remains clear that no separate spheres truly exist¹⁰⁴.

It must be emphasized that this is a gendered issue, encompassing not only the right to privacy and bodily integrity, but also broader forms of gender discrimination¹⁰⁵. Evidently, it is people with a uterus who, by virtue of their reproductive capacity, are disproportionately subjected to rights violations and treated as “second-class citizens”¹⁰⁶. Within a patriarchal and capitalistic society, the deviation from the male standard of bodily function systematically oppresses these individuals and undermines their rights¹⁰⁷. Far from the “ideal worker”, who can be productive seven days a week, they are second-class citizens: the fact that there is still room for disagreement on their right to choose treatment refusal when pregnant, proves so¹⁰⁸. The “ideal worker” model inherently assumes a male body, unconstrained by pregnancy or reproductive care. By contrast, people with a uterus are systemically positioned as “second-class citizens” precisely because their reproductive capacity is used to justify restrictions on bodily autonomy, including the right to refuse medical treatments during pregnancy. In this sense, the critique of the “ideal worker” is not tangential but directly illustrates how societal and institutional norms intersect with reproductive rights.

¹⁰³ Lawrence J. Nelson, Brian P. Buggy and Carol J. Weil, *Forced medical treatment of pregnant women: Compelling each to live as seems good to the rest*, 37 *Hastings LJ* 703 (1985).

¹⁰⁴ Anne Drapkin Lyster, Margaret Olivia Little and Ruth R. Faden, *A critique of the ‘fetus as patient’*, 8 *The American journal of bioethics* 42 (2008).

¹⁰⁵ Lisa H. Harris, *Rethinking maternal-fetal conflict: gender and equality in perinatal ethics*, 96.5 (Part 1) *Obstetrics & Gynecology* 786 (2000).

¹⁰⁶ Michael Ulrich, *With Child, without Rights: Restoring a Pregnant Woman’s Right to Refuse Medical Treatment through the HIV Lens*, 24 *Yale JL & Feminism* 303 (2012).

¹⁰⁷ MacKinnon, *Feminism Unmodified* (cited in note 38).

¹⁰⁸ Beverly Baines, Daphne Barak-Erez and Tsvi Kahana, *Feminist Constitutionalism: Global Perspectives* at 15 (cited in note 94).

Furthermore, the right to life (for those who consider the foetus a separate entity) 'does not entail using another person's body to secure that right'¹⁰⁹.

Thus, rivers of ink on 'when life begins' should be spared. "Life" could start at conception according to one's moral or religious view, but it would not be relevant.

Indeed, Thomson and other authors' point is that if one has a duty to protect the other, and above all that parents have a duty to protect their child, this should not be hypocritically reduced to an abortion ban¹¹⁰. Instead, it should include organ donation. Both have permanent effects and in the case of birth, not only emerges the duty to raise a person but also the damage to physical, sexual and mental health and potentially life¹¹¹.

In response to the argument that another donor could be found, while the foetus is "stuck" within one's body, it can be said that no human being could be forced to donate¹¹². One is an omission while

¹⁰⁹ Devora Shapiro and Jeffrey Pannekoek, *Another Defense of Abortion: What Transplant Ethics Tells Us about the Ethics of Abortion after Dobbs*, 54 Hastings Center Report 34 (2024).

¹¹⁰ Judith Jarvis Thomson, *A defense of abortion*, 1 Philosophy & Public Affairs 47 (2004); See also Emily Carroll and Parker Crutchfield, *The duty to protect, abortion, and organ donation*, 31 Cambridge quarterly of Healthcare Ethics 333 (2022).

¹¹¹ Jessian L. Muñoz, *Physical Changes During Pregnancy* (MSD Manual, September 2024), available at <https://www.msdmanuals.com/home/women-s-health-issues/normal-pregnancy/physical-changes-during-pregnancy> (last visited November 11, 2025); Natalie O. Rosen, et al., *Trajectories of dyspareunia from pregnancy to 24 months postpartum*, 139 Obstetrics & Gynecology 391 (2022); *Supports for postnatal depression*, (Citizen Information Online, February 26, 2025), available at <https://www.citizensinformation.ie/en/birth-family-relationships/after-your-baby-is-born/supports-for-postnatal-depression/> (last visited November 11, 2025); *Maternal Mortality* (National Center For Health Statistics Online, April 20, 2022), available at <https://www.cdc.gov/nchs/maternal-mortality/index.htm> (last visited November 11, 2025).

¹¹² Shapiro and Pannekoek, *Another Defense of Abortion* (cited in note 109).

the other is an action, but the duty of protection can be equally violated by both conduct, forcing to abandon that distinction¹¹³.

Therefore, if one cannot be obliged to undergo such an intrusion, no competent pregnant person can be coerced into unwanted treatment in the light of foetus rights' protection¹¹⁴.

There is further motive to oppose a court order against competent pregnant persons' treatment refusal.

As clarified by the A.C.O.G., person-centered care is the foundation of twenty-first-century health care system and so should be for pregnancy-related treatments¹¹⁵.

Thus, informed consent arises, described as an 'ongoing process' between physicians and patients, within an "open, non-judgmental and continued dialogue"¹¹⁶.

Therefore, the former should, first of all, provide clear and complete information on the available treatments and alternatives, including risks and benefits of each.

Secondly, they should listen without interrupting and empathically understand the potential patient's refusal. This should be addressed in order to avoid negative side effects on the mother and the foetus. Still, any type of coercion (as in *South Western Area*

¹¹³ Elizabeth Latham, *Vulnerability Ethics, Abortion, and Organ Donation*, 33 *Cambridge Quarterly of Healthcare Ethics* 306 (2024); See also Carroll and Crutchfield, *The duty to protect* (cited in note 110).

¹¹⁴ Shapiro and Pannekoek, *Another Defense of Abortion* (cited in note 109).

¹¹⁵ Committee Opinion by the American College of Obstetricians and Gynecologists' Committee on Ethics, *Informed Consent and Shared Decision Making in Obstetrics and Gynecology* (American College of Obstetricians and Gynecologists, February 2021), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/02/informed-consent-and-shared-decision-making-in-obstetrics-and-gynecology> (last visited November 11, 2025).

¹¹⁶ Committee Opinion was developed by the American College of Obstetricians and Gynecologists' Committee on Ethics, *Refusal of Medically Recommended Treatment During Pregnancy* (American College of Obstetricians and Gynecologists, June 2016), available at <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/06/refusal-of-medically-recommended-treatment-during-pregnancy> (last visited November 11, 2025).

Health Board v. K & Anor (19 July 2002) (HC)) is opposed by the A.C.O.G., who wisely suggests that once dismantled, the person's trust in physicians and the health care system can hardly be restored¹¹⁷.

This is an issue for those very theorists who deeply care about the foetus, because coercion discourages antenatal and post-natal care. Also, it is indicated, in the case of HIV treatment for example, how this poses a threat to public health, too¹¹⁸. Moreover, "in almost one third of cases in which court orders were sought, the medical judgment, in retrospect, was incorrect"¹¹⁹.

Most importantly coercion should be avoided since, according to the A.C.O.G., it can be prevented. This is possible thanks to effective communication skills within a respectful dialogue between patients and physicians, and through an interdisciplinary team which includes nurses, social workers, ethical counsellors, etc.

Other theorists suggest the use of a Personalized Alternative Care and Treatment framework "for documentation and communication with the goal of supporting women"; in order to sustain informed choices and possible refusal¹²⁰.

Thus, "pregnancy is not an exception to the right to refuse", neither legally nor ethically¹²¹.

Clearly, pregnant persons and fetuses are not to be regarded as occupying separate spheres.

¹¹⁷ *Ibid.*

¹¹⁸ Michael Ulrich, *With Child, without Rights: Restoring a Pregnant Woman's Right to Refuse Medical Treatment through the HIV Lens*, 24 Yale JL & Feminism 303, (2012).

¹¹⁹ Veronika Kolder, Janet Gallagher and Michael Parsons, *Court-ordered obstetrical interventions*, 43.1 Obstetrical & Gynecological Survey at 41-43 (New England Medical Journal [1st ed. 1988]).

¹²⁰ Bec Jenkinson, Sue Kruske and Sue Kildea, *Refusal of recommended maternity care: Time to make a pact with women?*, 31 Women and Birth 433, 433-441 (2018).

¹²¹ Committee Opinion by the American College of Obstetrician and Gynecologist, *Refusal of Medically Recommended Treatment* (cited in note 115).

What firmly stands on both legal and ethical grounds is one person, who is entitled to respect of their right to health, life and privacy; so as to balance the benefits and side effects of the proposed treatment.

Most importantly, what is considered, but is not, a conflict between equal beings, can be avoided through person-centered care in which treatment is offered; still, how the pregnant person answers is their choice.

4.3. Another Clear Example: Women in the Home. The Case of the Irish Referendum

Article 41 of the Irish Constitution:

(...)

2 1° In particular, the State recognizes that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

2° The State shall, therefore, endeavor to ensure that mothers shall not be obliged by economic necessity to engage in labor to the neglect of their duties in the home.

On 8th March 2024 Irish citizens had to vote in what has been called a “confused” referendum, modifying the Irish Constitution by expanding the definition of family to durable relationship and by substituting articles 41.2.1° and 41.2.2° with a genderless provision¹²².

Not only did the government, in the final phrasing of the Family Bill and the Care Bill, neglect what had emerged from the Citizens’ Assembly, but the campaign also confused the citizens failing to make clear the outcome of these amendments.

¹²² Sophie Treacy, *Constitutional Confusion: Ireland’s Failed Referendum on Care and the Family* (Oxford Human Rights Hub Online, April 29, 2024), available at <https://ohrh.law.ox.ac.uk/constitutional-confusion-irelands-failed-referendum-on-care-and-the-family/> (last visited November 30, 2025).

Thus, disinformation viciously spread, undermining every possibility for this necessary change to thrive, with the opposition of respectively 67.69% and 73.93% of Irish citizens.

However, the vague wording made the outcome of the Care Bill plausible¹²³. Indeed, it deteriorated the condition of people with disability, for instance by making State's support optional.

Behind these critiques lies a broader one: the voter turnout sheds light both on the general uncertainty and indifference caused by the government's handling of the issue; and on scarce and uninformative campaigning about the Constitutional amendments¹²⁴.

Nevertheless, in order to assess, from a feminist constitutionalism perspective, whether the referendum was ultimately a failure, a brief account on the variety of feminist perspectives has to be recalled.

A premise is needed: despite differences there surely is common ground, which can be summarized as follows: women are systematically oppressed; thus, it is pivotal to wonder why that is so and how to change it¹²⁵.

However, sameness, difference and dominance feminism underline various perspectives about the status quo¹²⁶.

Evidently, the priorities of the first wave feminists, who focused on the right to vote, are entrenched in and explained by that context.

¹²³ *Irish referendums: Voters reject changes to family and care definition* (BBC Online, March 9, 2024), available at <https://www.bbc.com/news/world-europe-68484651> (last visited November 30, 2025).

¹²⁴ *Id.* at 119.

¹²⁵ Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 *Berkley Journal of Gender, Law and Justice* 1 (1987); Tracy A Thomas, *The Long History of Feminist Legal Theory*, in Deborah L. Brake, Martha Chamallas and Verna L. Williams (eds), *The Oxford Handbook of Feminism and Law in the United States* (November 30, 2020), available at <https://ssrn.com/abstract=3740082> or <http://dx.doi.org/10.2139/ssrn.3740082> (last visited November 30, 2025).

¹²⁶ Chris Beasley, *What is feminism? An introduction to feminist theory* (Sage Publications Ltd 1999).

Undoubtedly, faced with absolute carelessness, white and middle-class women settled for formal equality vaguely demanding “admission to all the rights and privileges which belong to them as citizens”¹²⁷.

So-called “sameness feminism” lingered for a while, surfacing through the voices of many movements mainly preoccupied with the right to vote (NWSA, WCTU, NWP, etc.). This was evident in the example of the British suffragettes, whose push for universal suffrage overlapped with the outcome of World War I: women had to substitute for men in their everyday jobs to actually “deserve” rights within the male status quo¹²⁸.

Most scholars acknowledge it as the first wave of feminism; one thing is certain: the right to vote was only one of the first steps; the victimization of the female body and sexuality came right after. In particular, within the patriarchy, how can women be considered citizens, or even fully human, if they do not have control over the first thing that belongs to them, namely their bodies?

Within the ongoing pronatalist demands, the stance of second wave feminists misaligned with the understanding of women as mothers at all costs¹²⁹.

Evidently, these various approaches are vivid in feminist legal literature and so in notorious acts (e.g., E.R.A, Fair Labor Standards Act in the U.S.).

Theory and norms on those issues deserve deeper clarification in order to understand, within the above-mentioned frame, both the roots and the epilogue of the Irish Family and Care Referendums.

¹²⁷ Elizabeth Cady Stanton, Susan B. Anthony and Matilda Joslyn Gage, *The Declaration of Sentiments and Resolutions, A History of Woman Suffrage*, (Rochester, N.Y.: Fowler and Wells 1889).

¹²⁸ Francis and Smith, *Feminist Philosophy of Law* (cited in note 97).

¹²⁹ *Ibid.*

Engaging with feminist legal theory is fundamental to consider activity and inquiry in relation to the legal system. This research area considers the law as both the venom and the antidote¹³⁰.

Sure enough, law is soaked with patriarchal influence, as well demonstrated by many examples. From the reasonable person (once “man”) standard, to testimony, as well as in marriage, reproduction and the actions against gender violence; together with economic norms.

Among these many examples two are the most relevant: the institution of marriage and reproduction, together with the data on poverty affecting women.

Here the so-called maternal wall comes into play: women will be either uncommitted workers or bad mothers, but will not have time to worry considering the tedious burden of external and domestic work, forever pestering them¹³¹.

Reproduction and marriage, employment and economic rights are clearly intertwined: women are exiled in the private sphere, taking care of re-producing the work force, as their husband’s property, duly belonging to the home (as the Irish Constitution confirms).

They are not equal citizens, nor fully human and will not be until home labor is genderless. On this specific point, Nedelsky states that to cherish substantial equality, other rights have to be guaranteed: education, work, health, etc¹³². Still, those are far from being recognized if women remain utensils within the domestic walls.

Additionally, the difference dilemma and so “how to acknowledge differences without entrenching stereotypes”, becomes

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Jennifer Nedelsky, *The Gendered Division of Household Labor: An Issue of Constitutional Rights* at 15-47 (Cambridge University Press 2012).

vivid and urgent within the bond between equality and motherhood clauses, particularly present in inter-war constitutions.

Two models emerge: the assimilationist (e.g., in the U.S.) and the accommodationist (widely spread in Europe). In the first one, norms could not recognize sexual differences without being declared unconstitutional. Still, this apparent gender neutrality is instead the male standard; and negatively affects women¹³³.

In the second one, measures are provided to facilitate employment (often underpaid and part-time) and unpaid care labor. Here, the above-mentioned framework comes into play: these measures might now be unwanted and fiercely criticized but were advocated by the 1970s movements.

Evidently, in many European Countries, women had to make their way into gender equality also through maternity clauses. For instance, in Germany women who engaged with the constitution-making process, brought “attention to the challenge of social reproduction”, requiring for their “role” – or better burden – to be constitutionally recognized and thus managed¹³⁴.

To be fair, the World Economic Forum’s annual report points out how the presence or absence of maternity clauses or even of gender equality in the Constitution does not say much about the condition of women in a certain jurisdiction. So, the answer lies in the overall condition of women in such countries and in the legal and political system¹³⁵. In Germany, the translation of maternity clauses into legal guarantees has been a crucial step. Yet, by targeting these protections exclusively at women, it has contributed to a significant problem of female unemployment, for instance through the effects of paid maternity leave¹³⁶. Thus, it is fundamental, within the patriarchal and capitalist system, to open those clauses to both genders. Surely,

¹³³ Rubio-Marín, *The (Dis)Establishment of Gender* (cited in note 89).

¹³⁴ Suk, *Gender Equality* at 154 (cited in note 92).

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

care and home duties, if gendered, do cause precariousness and poverty at women's expense.

Finally, there is no short answer to the question of whether the epilogue of the Irish referendum specifies what a failure was. Nonetheless, some points can be affirmed.

First of all, the final phrasing was problematic, mainly because it did not take good care of disabled people, both neglecting care outside the home and making State assistance discretionary.

Nevertheless, the need for a substantial change to the article in question must not be put aside. Undoubtedly, it is misogynistic and concretely harms women.

Evidently, by considering care and home labor as gendered, the destiny of women is predetermined and so is their economic condition and mental health. Article 41 of the Irish Constitution does not leave room for choice or debates: home duties are on women's back. Moreover, by making guarantees such as parental leave or the adjustments of the work schedule (e.g., part-time) gendered, unemployment is likely¹³⁷. As Nedelsky reminds us, this does not go without serious consequences¹³⁸.

Indeed, keeping those clauses means stripping women's ambition, along with damaging their economic condition, right to leisure, and health.

5. Neither Virgins nor Mothers, Inevitably Whores. Women Pressured by Capitalism; Men Empowered by Patriarchy. Deconstructing Prostitution

Being subjected to constant rape, beaten to stay, prevented from looking into other options, sustaining the trauma of a war zone or a

¹³⁷ Sandra Fredman, *Care as a Constitutional Value*, 22 International Journal of Constitutional Law 741 (2024).

¹³⁸ Nedelsky, *The Gendered Division of Household Labor* (cited in note 132).

torture chamber, needing drugs to keep doing it – is this what you mean by employment?¹³⁹

5.1. *Prostitution Harms Women: the Solution is to Keep It. Spain, Germany and New Zealand as Three Notorious Examples*

Behind the decriminalization of prostitution lies the liberal feminist legal theory, which conceives women as oppressed within the patriarchal structure, and considers the path toward the liberal feminist's goal, namely equality, to be a sex-positive one¹⁴⁰.

Consequently, the sex industry is not described as a threat to women's rights but rather as an opportunity to exercise their "agency", free from shame and "moralized" views of sexuality¹⁴¹.

Regarding prostitution, liberal feminist legal theory recognizes the current risks and harms that prostitutes face and asserts that these are worsened by the abolitionist approach.

Rather, maintaining prostitution means drawing a line between the direct coercion of women into paid sex, and women who are not forced into this. Finally, liberal feminists assert that the condition of the latter should be safeguarded through legislation¹⁴².

This has been considered by some local governments in Spain.

Evidently, sex trafficking is prohibited under Article 188 of the Criminal Code (LO 11/2003)¹⁴³. Different approaches are adopted

¹³⁹ Catharine A. MacKinnon, *Trafficking, prostitution, and inequality*, 46 Harvard Civil Rights - Civil Liberties Law Review 271 (2009).

¹⁴⁰ Beaslet, *What is feminism?* (cited in note 126); Robert Jensen, *Getting radical: Feminism, patriarchy, and the sexual-exploitation industries*, 6 Dignity: a journal of analysis of exploitation and violence (2021).

¹⁴¹ Beaslet, *id.*; Jane Dodsworth, *What Influences or Displaces Perceptions of Agency?, Realising justice for sex workers: An agenda for change*, at 61 (Bloomsbury Publishing, 2018); Jane Scoular and Sharron FitzGerald, *Why decriminalise prostitution?: Because law and justice aren't always the same*, 10 International Journal for crime, Justice and social democracy 56 (2021).

¹⁴² Chris Beasley, *What is feminism?* (cited in note 126).

¹⁴³ Helena Bonache, et al., *Prostitution policies and attitudes toward prostitutes*, 50 Archives of sexual behavior 1991 (2021).

depending on local governments, with Valencia and Barcelona criminalizing both prostitutes and clients; Seville opposing prostitution (criminalizing only the client); Córdoba and Tenerife neither banning nor regulating it¹⁴⁴. Therefore, the Spanish approach to prostitution is regarded as fragmented, and consequently harmful toward prostitutes, worsening their condition¹⁴⁵.

Much less criticized, but still flawed, is the German approach, which, with the intention to improve prostitutes' socio-economic conditions and combat criminal organizations, regulated prostitution in 2001 (*Prostitutionsgesetz*) and in 2016 (*Prostituiertenschutzgesetz*). This legislative framework outlines the requirements to legitimately engage in prostitution, for example, mandating medical checks (Art. 10), the use of condoms (Art. 32), and anti-violence alarms within every restroom (Art. 18)¹⁴⁶.

Nonetheless, the German model has faced criticism for its registration procedures (Articles 3–6), which verify voluntariness. In practice, this requirement can prevent vulnerable populations – such as economically disadvantaged individuals, or those lacking adequate support networks – who may not be able to demonstrate full autonomy, from engaging in lawful prostitution, forcing them into illegality and undermining their basic rights, including safety and healthcare¹⁴⁷.

Instead, New Zealand is recurrently appreciated in the literature, and its advantages regarding prostitutes' conditions are repeatedly referred to, both as the consequence of the Prostitution

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Carlotta Rigotti, *When the Law Meets Feminisms: The Shortcomings of Contemporary Prostitution Policies across the European Union*, 86 *Women's Studies International Forum* (2021).

¹⁴⁷ *Ibid.*

Reform Act (PRA) 2003 itself, which decriminalised prostitution, and of its enforcement¹⁴⁸.

The PRA protects prostitutes, for instance, by criminalizing “compelling someone to sell sexual services” (section 16), and impeding underage prostitution (sections 20 and 22). Its aim is to care for their health and safety, as stated in section 3¹⁴⁹. This is implemented by sections 8 and 9 which, for example, mandate the use of condoms, provide prostitutes and clients with health information and impose sexually transmitted infection (STIs) preventive measures¹⁵⁰.

However, even New Zealand’s approach to prostitution has been contested. More specifically, it has been reported that little has changed regarding the number of underage sex workers¹⁵¹. Moreover, even though it became easier for prostitutes to deny sex, exploitative employment conditions remained, as well as violence and public stigma¹⁵².

In addition to that, in-house prostitution, meticulously regulated by the PRA, is still regarded as “the lesser of two evils in the sex industry”, confirming the economic pressure behind it rather than “love of the work”¹⁵³.

Furthermore, although street prostitution remained more dangerous, in-house services were still described as “psychologically

¹⁴⁸ Billie Lister, *The Impact of Criminalisation on Indoor Sex Workers in England and Wales and the Need for Legislative Change*, in Sharron Fitzgerald and Kathryn McGarry, *Realising Justice for Sex Workers: An Agenda for Change* (Rowman & Littlefield 2018).

¹⁴⁹ Holly O’Callaghan, *Sex Work in Ireland*, 17 Centre for Criminal Justice and Human Rights Working Paper (2022).

¹⁵⁰ *Ibid.*

¹⁵¹ Pantea Farvid and Lauren Glass, “It Isn’t Prostitution as You Normally Think of It. It’s Survival Sex”: *Media Representations of Adult and Child Prostitution in New Zealand*, 28.1 Women’s Studies Journal 47 (2014).

¹⁵² *Ibid.*

¹⁵³ *Id.* at 58.

risky” and “detrimental to [prostitutes’] emotionality and relationships outside of work”¹⁵⁴.

5.2. *Prostitution Harms Women: the Solution is to Ban It. The Nordic Model*

Behind the so-called Nordic Model lies radical feminist legal theory.

Far from sterile paternalism, radical feminism, as the adjective itself indicates, looks at the root of the patriarchal structures and so at its consequences¹⁵⁵. Women are considered one – although diverse – class, oppressed within the aforementioned structure¹⁵⁶.

The institutions built within it are themselves patriarchal and cannot offer women the space they need to thrive and see their fundamental rights respected¹⁵⁷.

The sex industry itself (i.e., prostitution, pornography, lap-dancing, etc.) exploits women in favor of men’s pleasure, not leaving space for agency. “Sex positivity” is influenced by the male gaze, oppressing women who are pushed into the industry because of

¹⁵⁴ *Ibid.*

¹⁵⁵ Victoria Robinson, *Radical Revisionings? The Theorizing of Masculinity and (Radical) Feminist Theory*, 26 *Women’s Studies International Forum* (2003); Breanne Fahs, *The Urgent Need for Radical Feminism Today*, 49 *Signs: Journal of Women in Culture and Society* 479, 497 (2024); Denise Thompson, *Radical Feminism Today* (SAGE Publications Ltd 2001); Dianne Bell and Renata Klein, *Radically Speaking: Feminism Reclaimed* (Zed Books Ltd 1996).

¹⁵⁶ Joan Cassell, *Group Called Women: Sisterhood and Symbolism in the Feminist Movement* (Waveland Press Inc 1989); Voichita Nachescu, *Radical Feminism and the Nation: History and Space in the Political Imagination of Second-Wave Feminism*, 3 *Journal for the Study of Radicalism* 29 (2009); Kate Grosser and Meagan Tyler, *Sexual Harassment, Sexual Violence and CSR: Radical Feminist Theory and a Human Rights Perspective*, 177 *Journal of Business Ethics* 217 (2022).

¹⁵⁷ Denise Thompson, *Radical Feminism Today* (cited in note 152); Bell and Klein, *Radically Speaking* (cited in note 156).

ethnicity, class, and/or their economic condition.¹⁵⁸ Indeed: “The economic class of a prostitute ranges from the stereotypical street prostitute (with or without a pimp) to the most upscale escort or call girl but, unsurprisingly, the vast majority of prostitutes are poor women”¹⁵⁹.

Therefore, radical feminist legal theory does not support the regulation of prostitution, but rather demands that it be banned¹⁶⁰.

However, it is relevant to underline that the Nordic model was not originally inspired by the noble purpose of radical feminism, namely women’s liberation¹⁶¹. Rather, as plainly explained in literature, it was motivated by morality and public safety¹⁶².

In particular it is claimed that when the Swedish legal system criminalised prostitution, it aimed to “cleanse the public space”, respond to the HIV panic and racistly “get rid of” immigration, fearing “foreign people, foreign ideas, and foreign values”¹⁶³.

¹⁵⁸Andrea Dworkin, *Why Women Must Get Out of Men’s Laps*, The Herald Online (2002), available at <https://prostitutionresearch.com/wp-content/uploads/2021/03/Andrea-Dworkin-Lapdancing-2002.pdf> (last visited November 17, 2025); Jensen, *Getting Radical* (cited in note 140); Samantha Majic, *Feminists, Step Back! (Re)centring and Supporting Sex Workers’ Political Projects*, in Sharron A. Fitzgerald and Kathryn McGarry, *Realising Justice for Sex Workers: An Agenda for Change* (Rowman & Littlefield 2018); Meredith Brooke Beloso, *Sex, Work, and the Feminist Erasure of Class*, 38 Signs: Journal of Women in Culture and Society 47 (2012).

¹⁵⁹ Katie Beran, *Revisiting the Prostitution Debate: Uniting Liberal and Radical Feminism in Pursuit of Policy Reform*, 30 Law & Inequality 19 (2012).

¹⁶⁰ Thompson, *Radical Feminism Today* (cited in note 152); Finn Mackay, *Political Not Generational: Getting Real about Contemporary UK Radical Feminism*, 14 Social Movement Studies 427 (2015).

¹⁶¹ Nachescu, *Radical Feminism and the Nation* (cited in note 156).

¹⁶² Jay Levy, *Racism, Xenophobia and Hegemonic Masculinity: The Nordic Model of Criminalizing the Purchase of Sex*, in Sharron A. Fitzgerald and Kathryn McGarry, *Realising Justice for Sex Workers: An Agenda for Change* (Rowman & Littlefield 2018).

¹⁶³ *Ibid.*

Still, the Nordic model focuses on demand while regarding the prostitute as the victim, hence criminalizing the buyer and not the seller.

Moreover, it is intended to support the victim by acknowledging and addressing the underlying economic and social conditions through social programmes.¹⁶⁴

Considering its shortcomings, scholars highlight that far from eliminating prostitution it keeps it underground, compromising health and safety, by increasing risky practices and obstructing access to justice, and facilitating authority abuse¹⁶⁵.

Nonetheless the Nordic model is widely spread. For instance, it has been adopted in the Republic of Ireland, France, and in general it is at the basis of a neo-abolitionist shift within the European Union¹⁶⁶.

The Republic of Ireland criminalised prostitution throughout the 20th century, mainly driven by religious morality, often condemning not only prostitution but sex outside marriage in general, preferring harmful institutions such as the Magdalene laundries and the Mother and Baby Homes, over sex education, contraception and women's rights.

¹⁶⁴ Karni Kissil and Maureen Davey, *The Prostitution Debate in Feminism: Current Trends, Policy and Clinical Issues Facing an Invisible Population*, 22 *Journal of Feminist Family Therapy* 1 (2010).

¹⁶⁵ Sarah Kingston and Terry Thomas, *No Model in Practice: A 'Nordic Model' to Respond to Prostitution?*, 71 *Crime, Law and Social Change* 423 (2019).

¹⁶⁶ Carlotta Rigotti, *When the Law Meets Feminisms* (cited in note 146); Lucrecia Rubio Grundell, *The EU's Approach to Prostitution: Explaining the "Why" and "How" of the EP's Neo-Abolitionist Turn*, 28.4 *European Journal of Women's Studies* 425 (2021); Adeline Berry and Patricia Frazer, *How Sex Workers Understand Their Experiences of Working in the Republic of Ireland*, 18 *Sexuality Research and Social Policy* 869 (2021); Holly O'Callaghan, *Sex Work in Ireland* (cited in note 149); Órla Ryan, "Much-Needed" Review of Sex-Work Laws Stalled for Five Years (The Irish Times Online, March 24, 2025), available at <https://www.irishtimes.com/crime-law/2025/03/24/much-needed-review-of-sex-work-laws-stalled-for-five-years/> (last visited November 17, 2025).

In 1935, the Criminal Law Amendment Act (1885) was amended to criminalise brothels and increase sanctions for engaging in prostitution. At the end of the 20th century, the Criminal Law (Sexual Offences) Act (1993) challenged both the organization of prostitution and “loitering for the intention of supplying sexual services”¹⁶⁷. Ultimately, in 2017 together with the criminalisation of the acquisition of sexual services, sentences for brothel keeping were toughened¹⁶⁸.

Scholars recognize that many in Ireland engage in prostitution because of poverty and inequality, and the 2009 report of the Immigrant Council of Ireland considers ethnicity to be another relevant cause of discrimination¹⁶⁹. Other scholars have confirmed “how sex industries are built on racism and histories of colonialism”¹⁷⁰.

The Irish Medical Organization also stated that prostitution in Ireland is a consequence of socioeconomic inequalities¹⁷¹.

Nonetheless, scholars denounce that the current legal framework perpetuates marginalization and impedes access to support for migrants, who face eviction and deportation instead¹⁷².

Again, the Nordic model has led to difficulties in accessing healthcare, safety and justice¹⁷³. Furthermore, O’Callaghan has denounced the incompatibility of the Irish approach to prostitution with international human rights law, specifically the right to health (Art. 12 ICESCR), safety (9 ICESCR, 11(1)(e) and 11(2)(b) CEDAW),

¹⁶⁷ Adeline Berry and Patricia Frazer, *How Sex Workers Understand Their Experiences* at 870 (cited in note 163).

¹⁶⁸ *Ibid.*

¹⁶⁹ Holly O’Callaghan, *Sex Work in Ireland* (cited in note 149).

¹⁷⁰ Maddy Coy, Cherry Smiley and Meagan Tyler, *Challenging the “Prostitution Problem”: Dissenting Voices, Sex Buyers, and the Myth of Neutrality in Prostitution Research*, 48 *Archives of Sexual Behavior* 1931 (2019).

¹⁷¹ Adeline Berry and Patricia Frazer, *How Sex Workers Understand Their Experiences* (cited in note 163).

¹⁷² *Id.*; Holly O’Callaghan, *Sex Work in Ireland* (cited in note 149).

¹⁷³ O’Callaghan, *id.*

and adequate working conditions (Art. 6(1) ICESCR; 7 ICESCR, 11(1)(a) and (f) CEDAW)¹⁷⁴.

Turning now to the French legal system, it criminalised the purchase of sex with Loi no. 2016-444, which is based on two pillars. The first enhances forms of support to exit prostitution, and the second tackles exploitation by criminalizing the buyer and not the seller. It provides individuals who commit to leaving prostitution with welfare benefits, accommodations, etc., and also aims to re-educate perpetrators through mandatory re-education sessions¹⁷⁵.

Nonetheless, scholars have criticized this legal system by highlighting that it exacerbates stigmatization and precariousness. In addition, the aforementioned programmes are not as inclusive and beneficial as they seem: to access, prostitutes need particular language levels, their birth certificate and no deportation order. Furthermore, as in other systems that adopt the Nordic model, criminalizing the buyer means increased competition among prostitutes and the pressure to accept riskier practices¹⁷⁶.

Also, criminalizing “aiding or abetting prostitution” means isolating the victims, preventing them from prostituting in brothels which, as questionable as they are, are safer than street prostitution¹⁷⁷.

5.3. *Beyond Sex Wars: Frequent Flawed Arguments and Concepts in Literature*

When depicting the two sides of the coin in the prostitution debate some flawed arguments recur.

¹⁷⁴ *Ibid.*

¹⁷⁵ Rigotti, *When the law meets feminisms* (cited in note 146).

¹⁷⁶ *Id*; Niklas Jakobsson, Andreas Kotsadam, *The law and economics of international sex slavery: prostitution laws and trafficking for sexual exploitation*, 35 *European journal of law and economics* 87 (2013).

¹⁷⁷ Rigotti, *When the law meets feminisms*: (cited in note 146).

First, the focus on dignity and morality. Prostitution is not about morality nor dignity, which are abstract and arbitrary concepts. Women's health and discrimination are very much real problems instead. Hence, prostitution is a political issue and should be regarded and addressed as such¹⁷⁸.

Second, it is an issue, not a right, and it is gendered among other things.

Certainly, gender, ethnicity, together with the social and economic conditions, play a fundamental role which cannot be minimized¹⁷⁹. Most prostitutes have one or more characteristics which, in today's patriarchal society, cause vulnerability. As the lecturer Meagan Tyler confirms: "the vast majority of people in prostitution are women and girls, with an over-representation of marginalized groups within this, including Indigenous women, migrant women, women from ethnic minorities, women in poverty, women experiencing domestic abuse, homeless women and drug-addicted women"¹⁸⁰.

Consequently, "sex positivity" should be set aside, and so should the concept of "empowerment", given that those who hold power and control, and the only ones who consent and truly choose it are clients, mostly men¹⁸¹. They hold their centrality, satisfying their pleasure and are even more empowered, while taking advantage of economic hardship and power asymmetries¹⁸².

Indeed, the intersection of prostitutes' gender and social position, their need to earn money to provide for themselves and their

¹⁷⁸ Bonache, et al., *Prostitution policies* (cited in note 143).

¹⁷⁹ Meredith Brooke Beloso, *Sex, work, and the feminist erasure of class*, 38.1 Signs: Journal of Women in Culture and Society 47 (2012).

¹⁸⁰ Coy, Smiley and Tyler, *Challenging the "prostitution problem"* (cited in note 170).

¹⁸¹ *Id.*

¹⁸² MacKinnon, *Trafficking, prostitution, and inequality* at 293 (cited in note 139) ("So far as is known, their johns remain almost exclusively men. (...) Their free choice to buy women to use sexually produces immense profit for the traffickers and pimps who provide the supply").

children, and the capitalist drive for higher earnings, can significantly weaken consent. As a result, economic pressure often makes true consent effectively impossible. Thus, sex without consent is not to be “regulated”; it is to be tackled¹⁸³.

Third, to call it work is to forget about and minimize the pain – mental, emotional, physical – suffered by prostitutes regardless of the legal system they live in¹⁸⁴.

Some systems make it less risky for them, but prostitutes are still exposed to high rates of sexual violence, STIs, mental health issues (e.g., PTSD, suicidality, personality and mood disorders, anxiety)¹⁸⁵.

The point is not the “commodification of the body”, but rather a much more concrete one.

The aforementioned negative consequences derive from having sexual intercourse under pressure due to economic needs, with strangers, multiple times a day: their body cannot take it, and neither can their mind. It is not work; it is sex, and it is not consensual. Repeated exposure to such conditions causes severe physical strain and psychological trauma, highlighting how economic coercion

¹⁸³ Dworkin, *Why Women Must Get Out of Men's Laps* (cited in note 158).

¹⁸⁴ Meagan Tyler, *All roads lead to abolition? Debates about prostitution and sex work through the lens of unacceptable work*, 31 *Labor & Industry: a journal of the social and economic relations of work* 66, 75 (2021) (“There is substantial evidence of the high levels of psychological and physical harms that women and girls experience in systems of prostitution [which] are high enough for some to question whether or not it is possible to regulate out this abuse, or if there is something more fundamental about the inequalities of imperialist white-supremacist capitalist patriarchy that demands the inequalities and abuses of prostitution”).

¹⁸⁵ Kissil and Davey, *The prostitution debate in feminism* at 164 (cited in note 164). See also Andrea Dworkin, *Prostitution and male supremacy*, 1 *Michigan Journal of Gender & Law* 1 (1993); Catharine A. MacKinnon, *Prostitution and civil rights*, 1 *Michigan Journal of Gender & Law* 13 (1993); Tyler, *All roads lead to abolition?*, *id*; Georgia Zara, Delphine Theobald, Sara Veggi, Franco Freilone, Eleonora Biondi, Grazia Mattutino, Sarah Gino, *Violence against prostitutes and non-prostitutes: an analysis of frequency, variety and severity*, 37 *Journal of interpersonal violence* 15 (2022).

undermines bodily autonomy. Moreover, this situation is embedded in broader patriarchal and capitalist structures, which normalize the exploitation of bodies for profit. By framing these encounters as “work,” society ignores the absence of consent and the profound harm inflicted on these individuals¹⁸⁶.

Fourth, the stigmatization of prostitution undoubtedly exacerbates victims’ suffering, but the preferable path is not to normalize non-consensual paid sex, rather to elaborate ways to tackle it. Harm minimization is often referred to as realistic, but before women’s rights violations what is “realistic” is only a short-term “solution” which still damages women; what counts is combating and ultimately dismantling gender violence¹⁸⁷.

5.4. *Beyond Sex Wars: Women and Men in the Patriarchal Structure; Who Offers Prostitution and Who Demands It*

In order to move toward an argument which builds on the existing literature outlined in the previous sections, it is necessary to recall a relevant concept.

Prostitution does not exist in a vacuum. It is the umpteenth consequence of the patriarchal structure, and more specifically of the status and power men hold within it and the disadvantages women endure¹⁸⁸.

As previously noted, man is the standard; society itself is shaped around his needs, while women have to adjust to a system that is not tailored to them, remaining “the other” – inferior, not just different¹⁸⁹. Patriarchy is at the basis of capitalism, colonialism,

¹⁸⁶ MacKinnon, *Trafficking, prostitution, and inequality* at 281 (cited in note 139) (“Sex is supposed to be chosen and wanted; presumably this is the reason prostitution’s supporters defend it in these terms. When you are having sex with someone you want to be having sex with, you aren’t generally paying each other”). See also Dworkin, *Why Women Must Get Out of Men’s Laps* (cited in note 158).

¹⁸⁷ MacKinnon, *ibid*.

¹⁸⁸ *Ibid*; MacKinnon, *Prostitution and civil rights* (cited in note 185).

¹⁸⁹ MacKinnon, *Feminism Unmodified* (cited in note 38).

imperialism and it conceives women as different from men, hence inferior, ultimately oppressed¹⁹⁰.

One of the many dimensions in which women suffer the consequences of this imbalance is their body and sexuality. Many are the examples that demonstrate their oppression, their role as virgins and mothers, aimed at generating men's offspring, looking after them in the private sphere, cherishing a warm, subservient and subjugated position¹⁹¹.

They are the private, the moral. Men are the public, the political¹⁹².

In this picture, to control their sexuality is fundamental but not on their terms, rather on men's.

Indeed, contraception has been mostly a female burden, and obstructed while chaining them to their husbands, giving up their surname, economic independence and career prospects¹⁹³. Not only marriage and maternity have restrained women, but other elements have also contributed to it.

For example, the already examined anatomical myth of virginity has determined women's value, forgetting what science

¹⁹⁰ *Id.* at 36 ("Men's physiology defines most sports, their health needs define insurance coverage, their socially designed biographies define workplace expectations and successful career patterns, their perspectives and concerns define quality in scholarship, their experiences and obsessions define merit, their military service defines citizenship, their presence defines family, their inability to get along with each other their wars and rulership defines history, their image defines god, and their genitals define sex").

¹⁹¹ Rich, *Of Woman Born* (cited in note 44); Caroline Pateman, *The Sexual Contract* (Stanford University Press 1988); Shulamith Firestone, *The Dialectic of Sex: the Case for Feminist Revolution* (William Morrow and Company 1970); Francis and Smith, *Feminist Philosophy of Law* (cited in note 97).

¹⁹² MacKinnon, *Feminism Unmodified* at 36 (cited in note 38).

¹⁹³ Kelsey Davies, "The Female Condition":(Re) thinking Marriage, Prostitution, and Feminist Theories of Abolition, 50 *Signs: Journal of Women in Culture and Society* 71 (2024).

clearly states, namely that the hymen comes in many forms and is an elastic membrane. Instead, it has been deceitfully considered a seal which contributes to the depiction of women as objects that have to arrive intact to their future husband's hands¹⁹⁴.

Women's pleasure is not in the picture. This is clearly demonstrated by horrific practices such as female genital mutilation¹⁹⁵. Their body has to look a certain way to honor the male gaze and an image of perverse fragility. Consequently, those many Western countries which condemn female genital mutilation still permit genital surgery (e.g., labiaplasty, hymenoplasty, etc.)¹⁹⁶.

Moreover, when neither "virgin" nor mothers, they are still useful to men in other ways, such as by satisfying their pleasure.

Hence, when patriarchy meets capitalism, sex is being paid for and men's sacred and indispensable desires are fulfilled¹⁹⁷.

Furthermore, the misconception of sex as an impulse surely contributes to the consideration of sexual pleasure as untouchable. However, this further myth should be dispelled, given that impulses exist to fulfil primary necessities such as hunger or thirst, needed to make the individual survive¹⁹⁸. Sex instead does not make the

¹⁹⁴ W.H.O., *Eliminating Virginity Testing* (cited in note 67); Brochmann and Støkken Dahl, *The Wonder Down Under* (cited in note 64); Ranit Mishori, et al., *The little tissue that couldn't—dispelling myths about the Hymen's role in determining sexual history and assault*, 16 *Reproductive health* 74, 3 (2019); Rose McKeon Olson and Claudia García-Moreno, *Virginity testing: a systematic review*, 14 *Reproductive health* 61 (2017).

¹⁹⁵ W.H.O., *Female Genital Mutilation* (2025), available at <https://www.who.int/health-topics/female-genital-mutilation> (last visited November 11, 2025).

¹⁹⁶ Dina Bader, et al., *Rethinking the anti-FGM zero-tolerance policy: from intellectual concerns to empirical challenges*, 12 *Current Sexual Health Reports* 266 (2020).

¹⁹⁷ Kendra Ballard, *On the Morality of Prostitution Under Hierarchical Social Structures: A Radical Feminist Analysis*, 8.1 *Quest* 1 (2024); Amia Srinivasan, *The Right to Sex* (Bloomsbury Publishing 2021).

¹⁹⁸ Emily Nagoski, *Come As You Are: Revised and Updated: The Surprising New Science That Will Transform Your Sex Life* (Simon & Schuster 2015).

individual survive; thus, it is not an impulse but a response and should be regarded as such¹⁹⁹.

Every one of these many roles played by women in the patriarchal structure – the mother, the virgin, the prostitute – does not empower them, does not exist in a vacuum, rather, it exists in favor of men, strengthening their privilege while damaging women.

5.5. *Beyond Sex Wars: How to Face Prostitution Bearing in Mind Women's Rights. A Proposal De Iure Condendo*

After considering the characteristics and shortcomings of the existing legal approaches to prostitution, and explaining the context in which it exists, a final perspective should be outlined.

It is true that both decriminalization and abolitionism are flawed; however, there is common ground that should be considered. Indeed, prostitutes face a wide range of risks and harms, making regulation not an option²⁰⁰.

Consequently, the Nordic model *per se* should not be abandoned in the short term; evidently, the possibility to ban what is a source of exploitation, violence and damage while not punishing the victim is a significant starting point.²⁰¹ However, in order to combat it, it is relevant to work on demand and to do so means deconstructing men's power and women's role within the patriarchal and capitalist society, highlighting its negative outcomes²⁰².

¹⁹⁹ *Ibid.*

²⁰⁰ Andrea Dworkin, *Prostitution and male supremacy* (cited in note 185); MacKinnon, *Prostitution and civil rights* (cited in note 185); Tyler, *All roads lead to abolition?* (cited in note 184).

²⁰¹ Beran, *Revisiting the Prostitution Debate* (cited in note 159); Jody Freeman, *The Feminist Debate over Prostitution Reform: Prostitutes' Rights Groups, Radical Feminists, and the (Im)possibility of Consent*, 5 Berkeley Women's LJ 75 (1989); Davies, *The Female Condition* (cited in note 193)

²⁰² Beran, *Revisiting the Prostitution Debate* (cited in note 159); Freeman, *The Feminist*, *id.*

Raising awareness of prostitution, understanding the gendered consequences of patriarchy and deconstructing it, should be pursued in as many institutions and occasions as possible: from school and universities to workplaces, public conferences, and other social institutions. Men's demand for paid sexual access to women is socially constructed. The evidence base reveals that motivations for buying sex rely on notions of masculinity and sexual behavior"²⁰³.

Secondly, politics is pivotal in tackling economic and social disadvantage, for instance by enforcing equal pay legislation, working on current work structures and institutional childcare²⁰⁴. So, when demand is addressed, former prostitutes and future generations do not have to resort to traumatizing and damaging activities to sustain themselves and their children; ultimately and equally designing their preferred path toward self-fulfillment, taking care of their physical and mental health along the way²⁰⁵.

6. Where the Struggles Intensify. Prison as the Quintessential Patriarchal Oppression and Its Gendered Nature

Nowadays the capitalistic and patriarchal system blindly clings to the disputable practice of locking those who breached the social contract away from society, hiding its weaknesses behind humanitarian and criminal law principles²⁰⁶.

Built by men for men, prison is then the umpteenth patriarchal institution, which still preserves a crumb of male privilege, while discriminating against not just women but many others (e.g., LGBTQIA+ community, older people ...). Being the system tailored

²⁰³ Coy, Smiley and Tyler, *Challenging the "Prostitution Problem"* at 1933 (cited in note 170).

²⁰⁴ Ballard, *On the Morality of Prostitution* (cited in note 197).

²⁰⁵ Beran, *Revisiting the Prostitution Debate* (cited in note 159); Freeman, *The Feminist Debate* (cited in note 201).

²⁰⁶ Ulya Said and Elizabeth Kristi Poerwandani, *The Narrative of Women in Prison: The Parenting Practices and the Concepts of Mother in Incarcerated Women*, 15 Sawwa: Jurnal Studi Gender 75 (2020).

on the sane, Caucasian, straight man, what differs from the standard is less, becomes oppressed and succumbs within this violent and hierarchical structure²⁰⁷.

First of all, it is pivotal to recognize how Sykes' focus on the pains of imprisonment in *The Society of Captives*, holds some truth in it; yet, for the above-mentioned types of prisoners, reality is far more complicated and might even contradict his wisdom.

Certainly, there is more than physical pain and surely inmates endure the deprivations pointed out in his work: from liberty to goods and services, together with heterosexual relations, autonomy and personal security²⁰⁸.

Nevertheless, other scholars pay more attention to the gendered pain of imprisonment considering the grief over the lack of power, autonomy and control; as well of trust, privacy and intimacy; together with exacerbated physical and mental suffering, as it will be further clarified²⁰⁹.

Still, what should be further highlighted, after Sykes shifted the spotlight from the corporeal to other kinds of torture, is how for women prisons still hold a strong physical dimension. This argument will be clarified from a gendered perspective, specifically by considering how menstruation, pregnancy, and menopause influence women's woe in prison.

One of the under-researched gendered pains of imprisonment is the menstrual phase²¹⁰. Myths, shame and ignorance about

²⁰⁷ MacKinnon, *Feminism Unmodified* (cited in note 38).

²⁰⁸ Gresham Sykes, *The Society of Captives* (Princeton University Press 1958).

²⁰⁹ Ben Crewe, Susie Hulley and Serena Wright, *The Gendered Pains of Life Imprisonment*, 57 *British Journal of Criminology* 1359 (2017); Jennifer Ferguson and Maggie Leese, *Women, the Pains of Imprisonment and Public Health Interventions*, in *The Routledge Handbook of Women's Experiences of Criminal Justice* (Routledge 2022).

²¹⁰ Colin A. Finn, *Menstruation: A Nonadaptive Consequence of Uterine Evolution*, 73 *The Quarterly Review of Biology* 163 (1998).

women's bodies are widespread outside prisons²¹¹. Yet, within them, physical and sociological pains intensify²¹².

As well explained by some scholars: lack of resources and minimization of conditions such as premenstrual syndrome make it harder for women to recover²¹³. Thus, improvements start with education of both women and officers, the providence of medication and care.

Furthermore, another common source of discrimination and agony for women, which in prison intensifies, comes into question: pregnancy.

Between 5 and 10 % of female inmates are in fact pregnant and 90% of them give birth while still being incarcerated²¹⁴.

Concerningly, nourishment, rest, medication, and safety are far from being accomplished.

Moreover, after a certain time span allowed for breastfeeding, child custody comes into question, as do the economic and personal resources available to the mother²¹⁵.

Other gendered pains which afflict mothers have to be considered: the loss of control over their bodies due to the current dependency upon the prison staff and the forced decisions they consequently make (e.g., asking for a C-section to be sure to give birth within hospital's safe walls)²¹⁶.

²¹¹ Brochmann and Støkken Dahl, *The Wonder Down Under* (cited in note 64).

²¹² Kate Smith, *A Period in Custody: Menstruation and the Imprisoned Body*, Internet Journal of Criminology 1 (2009).

²¹³ Malaka M. Shwaikh, *Prison Periods: Bodily Resistance to Gendered Control*, 20 Journal of Feminist Scholarship 33 (2022).

²¹⁴ Adele Baldwin, Agnieszka Sobolewska and Tanya Capper, *Pregnant in Prison: An Integrative Literature Review*, 33 Women and Birth 41 (2020).

²¹⁵ Somayeh Alirezaei and Robab Latifnejad Roudsari, *Promoting Health Care for Pregnant Women in Prison: A Review of International Guidelines*, 25 Iranian Journal of Nursing and Midwifery Research 91 (2020).

²¹⁶ Laura Abbott, et al., *Pregnancy and Childbirth in English Prisons: Institutional Ignominy and the Pains of Imprisonment*, 42 Sociology of Health & Illness 660 (2020).

In addition to that, the fear of being hurt is more vivid and leads to a deep sense of fear, which, together with pressuring ideals of motherhood, proves deleterious for women's mental health²¹⁷.

On the path to women-centered care within penal institutions, basic needs are advocated: from healthy and sufficient nourishment to the right to access sanitary products, and also consistent visits, fresh air, therapy, family and midwifery support; and eventually the opportunity to detoxify and acquire parenting skills²¹⁸.

With the increase of the average age of female prison inmates, which is now over thirty years of age, menopause became a further source of gendered concern²¹⁹.

Under-researched and minimized, its symptoms (e.g., recurrent migraine, insomnia, fatigue, etc.) cause much discomfort for women, possibly requiring hormone replacement therapy, psychological support and further medication²²⁰. Once again, it is hard outside the prison system and much tougher inside. Therefore, scholars encourage providing, through the appropriate guidelines, both human and material resources. More specifically, they shed light on the need for initial assessment, educating women and officials, and hiring specialists (e.g., gynaecologists)²²¹.

A final distinction, which must be taken into account, sheds light on the substantial trauma rates.

Indeed, approximately 90% of women are pestered by past traumas before ending up in prison²²². Hence, when tracing the

²¹⁷ Saida and Poerwandani, *The Narrative of Women in Prison* (cited in note 206).

²¹⁸ Laura Abbott et al., *Pregnancy and Childbirth in English Prisons* (cited in note 216).

²¹⁹ Rifat Latif and Asifa Shahzadi, *Knowledge, Attitude, and Experience of Menopause of Female Prisoners*, 13 Journal of University Medical & Dental College 412 (2022).

²²⁰ *Ibid.*

²²¹ *Ibid.*

²²² Holly M. Harner and Suzanne Riley, *The Impact of Incarceration on Women's Mental Health: Responses from Women in a Maximum-Security Prison*, 23 Qualitative Health Research 26 (2013).

distinction between male and female prisoners a tragic factor surfaces: most female prisoners are actually victims mainly of physical, sexual and/or domestic violence²²³. Some of them come from the streets, usually use substances to remain vigilant and have met poverty, abuse and violence from a young age²²⁴.

Consequently, prisons do not seem the appropriate place for them to be, given that they lack a chance to thrive and so to heal from past trauma. Prisons are ill-suited to support rehabilitation or recovery from past trauma, as they offer limited opportunities for personal growth or healing. This does not question the necessity of serving a sentence but highlights how current prison conditions often fail to address the specific needs of women.

Still, research which considered closed Canadian penal institutions left room for hope. The women interviewed qualified prisons as shelters, underlining security, nourishment, rest, health care and the time to plan their future, get an education and remain protected from external risks²²⁵. The cutting-edge Limerick female prison offers a similar instance; yet, should be regarded as a brilliant, but not relatable, exception²²⁶.

Female inmates have to be considered moving beyond “male as the standard”. In a patriarchal system, as highlighted in the introduction, difference is dominance²²⁷, hence the key to understand

²²³ Tony Harcup and Deirdre O'Neill, *What Is News? News Values Revisited (Again)*, 18 *Journalism Studies* 1470 (2016); Baldwin, Sobolewska and Capper, *Pregnant in Prison* (cited in note 214).

²²⁴ Sandra Bucerius, Kevin D. Haggerty and David T. Dunford, *Prison as Temporary Refuge: Amplifying the Voices of Women Detained in Prison*, 61 *British Journal of Criminology* 519 (2021).

²²⁵ *Ibid.*

²²⁶ Yvonne Jewkes, *Limerick Women's Prison: An Architecture of Hope* (The Architects' Journal Online, July 14, 2022), available at <https://www.architectsjournal.co.uk/news/limerick-womens-prison-an-architecture-of-hope> (last visited November 17, 2025).

²²⁷ MacKinnon, *Feminism Unmodified* (cited in note 38).

and improve female inmates' condition is to move beyond standards tailored on men.

Menstruation, pregnancy and menopause are three practical examples of the peculiarity of their suffering and add concreteness to Crewe's work. Still, it must not be forgotten how, as clarified by the statistics above, before being inmates, most women are victims and so should be treated.

Finally, an intertwined and multidisciplinary approach involving prison, court and health services is worth implementing²²⁸. However, this approach is still not enough if considered as a final accomplishment²²⁹; rather, it should be regarded as a temporary way out of prison's bloodshed, on the path to abolition.

To ponder over prevention rather than *ex post* strategies, and so implementing existing institutions (e.g., education, health services), is a much wiser approach. Ultimately still, the above-analyzed short-term strategies should not be underestimated given that it is clear how the long-term hope of this paper is far from being considered and even more so reached.

7. Conclusion

The main point of this paper, namely women's victimization within the patriarchal structure, has been proven not only through feminist legal theory and victimology as disciplines that go hand in hand with positive law.

Various examples have been provided. Although apparently far from each other, these many ways through which women are victimized intertwine.

²²⁸ World Health Organization, *Prison and Health* (2014), available at <https://iris.who.int/handle/10665/128603> (last visited November 17, 2025).

²²⁹ David Scott, *Sympathy for the Devil: Human Rights and Empathetic Construction of Suffering*, 88 *Criminal Justice Matters* 8 (2012).

Women have to be either virgins, mothers, or whores in order to fit patriarchal stereotypes.

To be a virgin means to have one's sexuality inspected and credibility evaluated by believing in an anatomical myth. Thankfully, some jurisdictions – as shown by India and the U.K. – have made some steps forward.

To be a mother means to have one's body potentially exploited against one's will (as explained with the case of coerced treatment during pregnancy and abortion bans).

It also means having "home duties", as shown by Article 41 of the Irish Constitution. This necessarily occurs within a heterosexual marriage, which renders the home a cage.

To be forced into prostitution means to be used for acts that should be wilful and not done in order to survive and therefore paid for.

Evidently, prostitution ultimately harms women's mental, sexual, and physical health; thus, it should be tackled by moving beyond the shortcomings of the Nordic model and working at the roots by dismantling the pillars that sustain the patriarchal structure.

The first step to proceed in this direction is to question its foundations and institutions, outlining women's condition within it.

The second is to advocate for structural change, ultimately to address socio-economic disadvantages.

Finally, as considered above, women's victimization within prisons reaches its peak, given that they struggle more because of women's specific needs: pregnancy, menstruation, and menopausal care.

In conclusion, it can be stated that the high victimization rate of female prisoners sheds light on their condition outside prison, proving that the above-mentioned examples are valid.

Di violenza di genere e di giustizia riparativa

Per l'avvio di una riflessione che guardi *oltre* l'esistente

EMMA TRAINA*

* Dopo aver concluso gli studi liceali classici, si è iscritta alla Facoltà di Giurisprudenza dell'Università di Trento, dove ha conseguito la laurea nel giugno 2025. Il suo percorso universitario si è caratterizzato per un'impostazione ampia e interdisciplinare, con un particolare interesse per le tematiche di genere e per il diritto penale. Ha redatto la tesi di laurea sotto la supervisione della Prof.ssa Elena Mattevi, dal titolo *Violenza contro le donne e giustizia riparativa: un approccio femminista per guardare oltre l'esistente*.

Abstract: Through the adoption of a critical perspective on the contemporary use of criminal law for educational purposes and on the legislature's choice to provide a predominantly punitive response to the commission of an offense, the paper examines the phenomenon of gender-based violence and the newly introduced restorative justice. In the first paragraph, the issue of gender-based violence is explored through an analysis that begins with the first wave of the feminist movement and extends to the present day; in the second paragraph, the focus shifts to restorative justice, highlighting the forces that have favored its emergence and the main legislative choices made within Legislative Decree no. 150/2022, which established it in Italy. Only in the final pages of the paper are the two topics brought together, and an attempt is made to investigate the following question: is it desirable, as well as appropriate, that in Italy victims and persons identified as perpetrators of crimes that are expressions of gender-based violence be granted access to restorative justice programs as well? What are the implications?

Editor's note: The text was written prior to the promulgation of Law no. 181 of 2 December 2025, "Introduction of the crime of femicide and other legislative measures to combat violence against women and to protect victims".

Keywords: Gender Violence; Gender and Law; Restorative Justice; Penal Mediation; Legal Feminism.

Abstract: Attraverso l'adozione di una prospettiva critica nei confronti dell'odierno utilizzo del diritto penale in funzione educativa e della scelta, da parte del legislatore, di offrire una risposta prevalentemente punitiva alla commissione di un reato si guarda al fenomeno della violenza di genere e alla neo-introdotta giustizia riparativa. Nel primo paragrafo si sviscera sia il tema della violenza di genere attraverso una lettura che parte dalla prima ondata del movimento femminista e arriva fino all'attualità, nel secondo paragrafo ci si concentra sulla giustizia riparativa, mettendo in luce le spinte che ne hanno favorito l'emersione e le principali scelte legislative compiute all'interno del d.lgs. n. 150/2022 che l'ha istituita in Italia. Solo nelle ultime pagine dell'elaborato si uniscono i due argomenti e si cerca di indagare la domanda: è desiderabile, oltre che opportuno, che in Italia anche alle vittime e alle persone indicate quali autori di reati che sono espressione di violenza di genere venga consentito l'accesso ai programmi di giustizia riparativa? Quali sono le implicazioni?

N.d.R. Il testo è stato scritto prima della promulgazione della Legge 2 dicembre 2025, n. 181 "Introduzione del delitto di femminicidio e altri interventi normativi per il contrasto alla violenza nei confronti delle donne e per la tutela delle vittime".

Parole chiave: Violenza di genere; Diritto e genere; Giustizia riparativa; Mediazione penale; Femminismo giuridico.

Sommario: 1. Introduzione. – 2. Di violenza di genere. – 2.1. Termini. – 2.2. L'ingresso delle istanze femministe nel diritto. – 2.3. L'evoluzione normativa. – 2.4. L'attualità. – 3. Di giustizia riparativa. – 3.1. Definizione. – 3.2. Normativa italiana. – 3.3. Uno sguardo internazionale: pro e contro della giustizia riparativa per reati espressione di violenza di genere. – 3.4. Cosa desiderare in Italia? – 4. Conclusione.

1. Introduzione

Il tema o, meglio, i temi di cui si intende discutere nell'articolo che seguirà, sono molto ampi. Proprio per questo, non saranno sviscerati nella loro interezza. Si cercherà però di approfondire il fenomeno della violenza di genere e la neo-introdotta giustizia riparativa all'interno dell'ordinamento italiano, adottando una chiave di lettura attraverso cui valorizzarli: la critica all'utilizzo del diritto penale come strumento educativo e alla (prevalente) risposta punitivo-carceraria al reato adottata dal legislatore nei tempi recenti. Questa è una presa di posizione interpretativa che esplicitamente rompe la neutralità di chi scrive – ammesso che esista un pensiero formalmente e sostanzialmente neutro¹.

Dichiarare di aderire ad un determinato posizionamento di indagine non comporta rinunciare alle complessità che sorgeranno di conseguenza. Al contrario – proprio per l'importanza e la serietà che si crede abbiano i due temi – nel corso dell'articolo si proporrà un discorso graduale e argomentato. Dapprima si affronteranno i due

¹ In senso contrario, vedi Francesca. Sabatini, Gabriella Palermo, *Posizionamenti transfemministi, Saperi situati e pratiche spaziali nel movimento 'Non una di meno'*, in Isabelle Dumont, Giuseppe Gambazza, Emanuela Gamberoni, *Interstizi e novità: oltre il Mainstream, Esplorazioni di geografia sociale*, Geography Notebooks, 4, 2, 82 (2021). Accogliendo le suggestioni provenienti dalla teoria dei saperi situati, si crede il contrario, poiché "il processo di ricerca implic[a] sempre di per sé un posizionamento: ne consegue che la produzione di saperi è parziale e mai neutra, poiché frutto dell'esperienza soggettiva, delle oppressioni e dei privilegi che la ricercatrice/il ricercatore vive nella società.

argomenti singolarmente – mettendone in luce le principali specificità; solo successivamente si fonderanno attraverso l'interrogativo: è desiderabile, oltrech  opportuno, che la giustizia riparativa venga utilizzata in Italia anche in caso di reati che sono espressione di violenza di genere?

Si indagher  tale domanda da un lato allineandosi alle idee di molte docenti, ricercatrici femministe italiane e internazionali che da diversi anni avanzano dei dubbi e criticano il sistema penale e la sua capacit  di rispondere alle esigenze delle persone vittime di violenza di genere; dall'altro, valorizzando le posizioni di operatrici (italiane e non solo) che lavorano a stretto contatto con tali persone offese e che denunciano dei rischi intrinseci alla giustizia riparativa per queste ultime.

2. Di violenza di genere

2.1. Termini

Il termine 'violenza di genere' si pu  dire sia di recente introduzione all'interno del linguaggio giuridico. In realt , non   l'unico utilizzato per indicare il tipo di violenza esercitata nei confronti di una persona per il fatto di appartenere ad un determinato genere².

² Vedi Francesca Poggi, *Violenza di genere e Convenzione di Istanbul: un'analisi concettuale*, Diritti umani e diritto internazionale, n.1, 66-67 (2017). L'espressione 'violenza di genere' ha assunto nel tempo plurimi significati: pu  indicare la violenza che lo stesso genere rappresenta (violenza del genere); pu  indicare la violenza per imporre il rispetto delle caratteristiche, dei ruoli che sono attribuiti ad un sesso e che viene esercitata contro chi non vi si conforma (violenza per il genere); pu  indicare la violenza che   diretta contro una persona in base alla appartenenza a un determinato genere (violenza basata sul genere).

*Discriminazione contro le donne, violenza nei confronti delle donne, violenza di genere, violenza di genere contro le donne, violenza domestica, violenza nelle relazioni affettive, femminicidio o femmicidio*³,...

La stesura di questo elenco è a prova della sua abbondanza. L'esito di quella che si potrebbe definire una "confusione terminologica" in materia, sorta forse dall'urgenza di "etichettare" i diversi fenomeni, è che talune formule vengono (tutt'oggi) usate indistintamente, come se si equivalessero⁴.

Ciò emerge anche all'interno delle fonti giuridiche internazionali: se da un lato il primo testo adottato dalla Assemblea Generale delle Nazioni Unite il 18 dicembre 1979, conosciuto come CEDAW (Convenzione sull'eliminazione di ogni forma di discriminazione contro le donne) parla genericamente di 'discriminazione contro le donne'⁵, dall'altro lato la Convenzione di Istanbul – adottata l'11 maggio 2011 dal Consiglio d'Europa – parla

³ Vedi Emanuele Corn, *Il reato di "femminicidio", Note da un'analisi comparata con paesi Latino-Americani*, in Stefania Scarponi (a cura di) *Diritto e genere. Analisi interdisciplinare e comparata*, 295 ss., Wolters Kluwer, Milano, 2016. Partendo dalla considerazione che il neologismo "femminicidio" è entrata nel linguaggio corrente principalmente attraverso i *mass media*, l'Autore ne ripercorre la storia etimologica, facendo riferimento sia al termine coniato e diffuso dalla antropologa messicana Marcela Lagarde (*femminicidio*) sia a quello della sociologa statunitense di origine sudafricana Diana E.H. Russel (*femicidio*).

⁴ Vedi Maria (Milli) Virgilio, *Le violenze maschili contro le donne. Tra impunità e populismo penale punitivo*, in Stefania Scarponi (a cura di), *Diritto e genere. Temi e questioni*, 124, (Trento: Quaderni della Facoltà di Giurisprudenza, n. 45 2020).

⁵ Integrazioni terminologiche sono intervenute negli anni successivi. Da menzionarsi ci sono la Raccomandazione Generale n. 19 (1992) e quella successiva n. 35 (2017). Nella prima si ricomprende fra le forme di discriminazione contro le donne, la 'violenza di genere'; nella seconda invece, al paragrafo 9, si indica, quale termine più appropriato per nominare il fenomeno, "*gender-based violence against women*" in quanto rende più esplicite le "*gendered causes and impacts of violence*" e "*strengthens the understanding of this violence as social*" (Cfr. CEDAW Committee, *General Recommendation No. 35*, 2017, par. 9).

di 'violenza contro le donne'⁶. È invece la Direttiva dell'Unione Europea 2012/29/UE che all'interno del considerando No. 17 definisce la 'violenza di genere' quale "violenza diretta contro una persona a causa del suo genere, della sua identità di genere o della sua espressione di genere o che colpisce in modo sproporzionato le persone di un particolare genere. [...]. È considerata una forma di discriminazione e una violazione delle libertà fondamentali della vittima e comprende la violenza nelle relazioni strette, la violenza sessuale (compresi lo stupro, l'aggressione sessuale e le molestie sessuali), la tratta di esseri umani, la schiavitù e varie forme di pratiche dannose, quali i matrimoni forzati, la mutilazione genitale femminile e i cosiddetti reati d'onore."⁷

La questione terminologica è ampia e aprirebbe molti spunti di riflessione che però esulano dal cuore dell'articolo. È sufficiente ora dire che nell'articolo si utilizzerà il termine 'violenza di genere' e questo principalmente per una ragione: si ritiene che possa includere tutte le molteplici forme che questo tipo di violenza può assumere. Come viene detto in letteratura, infatti, i termini 'violenza contro le donne' e 'violenza di genere' non sono sinonimi e perciò non andrebbero confusi ma posti in una relazione di specialità⁸. In altre

⁶ Rispetto a questo testo bisogna dire che, oltre a definire la violenza nei confronti delle donne all'art. 3 lett. a) come una "una violazione dei diritti umani e una forma di discriminazione contro le donne, comprendente tutti gli atti di violenza fondati sul genere che provocano o sono suscettibili di provocare danni o sofferenze di natura fisica, sessuale, psicologica o economica [...]", introduce normativamente il concetto di genere. All'art. 3 lett. c) con questo termine si indicano "ruoli, comportamenti, attività e attributi socialmente costruiti che una determinata società considera appropriati per donne e uomini".

(Vedi Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*, CETS No. 210, Istanbul, 11 May 2011).

⁷ Vedi DIRETTIVA 2012/29/UE DEL PARLAMENTO EUROPEO E DEL CONSIGLIO, che istituisce norme minime in materia di diritti, assistenza e protezione delle vittime di reato e che sostituisce la decisione quadro 2001/220/GAI.

⁸ In tal senso, vedi Sara De Vido, *The Prohibition of Violence Against Women as Customary International Law? Remarks on the CEDAW General Recommendation No. 35*,

parole, le donne⁹ sono una delle categorie delle possibili soggettività (fra cui le persone trans, non binarie e appartenenti alla comunità *queer*) che possono essere vittime di violenza di genere.

Nell'articolo si preferisce focalizzarsi non sulle differenze che tale violenza può assumere in ragione dell'identità di genere e/o sesso di appartenenza e/o orientamento sessuale di chi la subisce ma sul filo conduttore che le attraversa tutte: la sua matrice storico-culturale. Come anche indicato anche nella Convenzione di Istanbul, tale violenza "ha una natura strutturale [...] ed è uno dei meccanismi sociali cruciali per mezzo dei quali le donne sono costrette in una posizione subordinata rispetto agli uomini"¹⁰.

La violenza di genere è un prodotto derivante dalla secolare diffusione di un modello culturale e relazionale sessista, fondato su dinamiche di potere diseguali e discriminatorie all'interno di ogni contesto sociale rilevante (relazioni sesso-affettive, famiglia, lavoro, internet, strade, strutture ospedaliere, scenari di guerra, tratta migratoria); proprio per il fatto di avere dal lato dominante il genere maschile, questo modello culturale e sociale ha preso il nome di patriarcato¹¹. Affermarne tutt'oggi l'esistenza non è una forma di

Diritti umani e diritto internazionale, n. 2, 381, (2018). L'Autrice scrive: "*The equation women-gender is also worrying because it can be exploited to minimize and limit international legal obligations with regard to violence perpetrated against LGBTQIA.*"

⁹ Rispetto a delle critiche sul concetto unitario di "donne", si approfondisce la corrente del femminismo intersezionale. Con questa si intende evidenziare che a definire le molteplici condizioni (e discriminazioni) delle donne vi sono altri elementi (oltre al genere), quali lo status sociale e/o il gruppo etnico di appartenenza. Cfr. Anna Loretoni, *Un femminismo intersezionale e multidisciplinare*, in Iride, (2), 307 ss, (2018); Angela Davis, *Donne, classe, razza*, Edizioni Alegre, (Roma: 2018).

¹⁰ Vedi Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*, CETS No. 210, Istanbul, 11 May 2011), Preamble.

¹¹ Vedi TRECCANI, *Enciclopedia online*, disponibile a <https://www.treccani.it/enciclopedia/patriarcato/> (visitato il 16 novembre 2025) e TRECCANI, *Enciclopedia online*, disponibile a <https://www.treccani.it/vocabolario/patriarcato/> (visitato il 16 novembre 2025). Definiscono come patriarcato un "sistema in cui vige il 'diritto paterno', ossia il

mistificazione ideologica e non è neppure un “errore giuridico”: le importanti riforme legislative avvenute nel secolo scorso hanno eliminato una serie di terminologie ormai percepite come intollerabilmente desuete (ad esempio, “patria potestà”), affermato il principio di parità tra coniugi, eliminato alcune tipologie di reato obsolete (ad esempio, il cd. matrimonio riparatore o il delitto d’onore), ed hanno progressivamente eroso le discriminazioni in ambito lavorativo. Eppure, ritenere che abbiano portato ad un parallelo cambiamento culturale e sociale appare forse ingenuo, oltretutto sbagliato. E infatti, sono gli stessi studi sociologici, antropologici e *gender studies* che parlano ancora oggi di esistenza del patriarcato. Quest’ultimo potrebbe essere definito come un insieme di pratiche e di strutture che, sia all’interno della famiglia sia all’interno di ogni dimensione sociale, istituiscono, in qualche modo riproducono e legittimano il dominio del genere “più forte” sulla restante parte della società, ad esso subordinata per ragioni riguardanti, ad esempio, il genere, la classe e la “razza”¹².

2.2. L’ingresso delle istanze femministe nel diritto

Gli atti internazionali sopra citati, che hanno avuto e tutt’oggi hanno ricadute sugli ordinamenti interni dei paesi ratificanti in senso di rispetto e di adozione di obblighi positivi e negativi da essi derivanti, non sarebbero venuti alla luce se, prima, le istanze femministe non fossero progressivamente entrate all’interno degli

controllo esclusivo dell’autorità domestica, pubblica e politica da parte dei maschi più anziani del gruppo”; ciò comporta che i figli (maschi) entrino a far parte del gruppo di appartenenza del padre, prendendone il nome, i diritti, la potestà, che a loro volta trasmetteranno ai discendenti nella linea maschile.

¹² Vedi Angela Davis, *Donne, classe, razza*, Edizioni Alegre, Roma, 2018. Il termine “razza” viene usato quale “costrutto sociale”, creato per giustificare forme di discriminazioni e disuguaglianze sociali. Non esiste nessuna “razza” biologicamente parlando e si prendono fermamente le distanze da ogni pensiero in tal senso.

organi di produzione legislativa e nelle aule giudiziarie¹³. Rispetto a ciò è interessante fare una digressione che, necessariamente, tocca la genesi e l'evoluzione del movimento e del pensiero femminista.

Sebbene scritti e saggi di donne definibili femministe *ante-litteram* siano rinvenibili anche nel corso dei secoli precedenti, accademicamente si riconduce la prima "ondata"¹⁴ del femminismo intorno agli anni 60/70 del Novecento. Partita con l'urgenza di far saltare il contratto sociale vigente, che vedeva l'uguaglianza dei soli uomini all'interno della sfera pubblica e il loro dominio nella sfera privata, è stato attraverso la chiave de "il personale è politico"¹⁵ che le donne si sono rese conto della natura socio-culturale della loro subordinazione a livello privato e hanno fatto collettivamente irruzione nella dimensione pubblica, destabilizzando la costruzione socio-politica patriarcale fino a quel momento esistita¹⁶. Si apriva così una crisi che non poteva chiudersi con l'inclusione delle donne

¹³ In tal senso, vedi Ilaria Boiano, *Femminismo e processo penale*, 112, Ediesse, Roma, 2015.

¹⁴ Sulla criticità di utilizzare l'etichetta di "ondata" per definire le evoluzioni del movimento femminista negli anni, vedi Bianca Carmelli, *Ondate del femminismo: analisi di un'etichetta*, *Filosofemme* (11 aprile 2022), disponibile a <https://www.filosofemme.it/2022/04/11/ondate-del-femminismo/> (visitato il 16 novembre 2025).

¹⁵ Vedi Rossella Ciciarelli, *"Il personale è politico": storia e significato dello slogan femminista*, *Beyond Stereotypes* (30 agosto 2019), disponibile a <https://www.bossy.it/il-personale-e-politico-storia-e-significato-dello-slogan-femminista.html> (visitato il 16 novembre 2025). L'Autrice ripercorre la genesi e la storia del famoso slogan femminista, usato per dare forma all'idea che il privato fosse collegato a fenomeni più ampi, quali la dimensione politica, sociale ed economica. La sofferenza personale delle donne, soprattutto grazie all'emersione dei gruppi di autocoscienza, si rileva come una condizione politica che può essere quindi risolta solo collettivamente.

¹⁶ Vedi Ida Dominijanni, *Patriarcato: il passato che non può tornare*, D – La Repubblica delle donne (14 marzo 2022), disponibile a <https://www.libreriadelledonne.it/puntodivista/dallastampa/patriarcato-il-passato-che-non-puo-tornare/> (visitato il 16 novembre 2025).

nell'ordine precedente, ma con la ricerca – in chiave trasformativa – di un nuovo patto sociale.

Il pensiero femminista, quale prospettiva in grado di gettare uno sguardo originale sul pensiero occidentale nel suo complesso, ha criticato dall'interno e ha rovesciato non solo le categorie del pensiero politico ma anche della filosofia, sociologia, economia e, non da ultimo, del diritto¹⁷. Rispetto a quest'ultimo, infatti, non si può dire che fosse un luogo di produzione del sapere lontano ed intoccato dalle dinamiche discriminatorie e sessiste vigenti all'interno della società. Anzi, in quanto uno dei suoi stessi riflessi, ne era intriso. Per fare un esempio, al pari della lingua italiana, anche quella giuridica è ispirata ad un principio androcentrico: infatti, sia i termini giuridici concreti che astratti sono declinati al maschile¹⁸. Ritenere Che questa fosse una neutra scelta linguistica è del tutto errato. Ad averlo già capito, e pure a fatale prezzo, era stata la scrittrice e attivista francese Olympe de Gouges, che nel 1791 aveva provveduto a stilare la analoga versione “al femminile”, della *Dichiarazione dei diritti della donna e della cittadina*.

La voluta dimenticanza delle donne nella sfera del diritto pubblico e del diritto civile “ha precluso alle donne, nella costruzione della moderna democrazia rappresentativa, la titolarità dei poteri nella sfera della politica¹⁹”. Attraverso istituti quali, per esempio, la civilistica *infirmitas sexus*²⁰, esse sono state sottoposte a forme di tutela

¹⁷ Vedi Eleonora Cappuccilli, Roberta Ferrari, *Il discorso femminista, Storia e critica del canone politico moderno*, Scienza e Politica, 28 n. 54, 6 e 9, (2016).

¹⁸ Vedi Elena Ioriatti Ferrari, *Linguaggio giuridico e genere*, in Stefania Scarponi (a cura di) *Diritto e genere. Analisi interdisciplinare e comparata*, 55, Wolters Kluwer, Milano, 2016.

¹⁹ Vedi Marina Graziosi, *Dispartà e diritto. Alla origine della disuguaglianza delle donne*, in Stefania Scarponi (a cura di), *Diritto e genere. Analisi interdisciplinare e comparata*, 7, Wolters Kluwer, Milano, 2016.

²⁰ *Id*, 12. Letteralmente “debolezza/infermità dovuta al sesso”; L'Autrice ricorda la prima comparsa di tale espressione nell'opera di diritto criminale di Prospero Farinaccio (1544-1618), *Praxis*. Coniandola dai giuristi romani (che la utilizzavano sporadicamente e probabilmente con diversa accezione) la eleva a categoria

sulla base di una vera e propria inesistenza o minorazione della capacità d'agire, per cui venivano loro negati il diritto di voto, il diritto ad amministrare autonomamente il patrimonio, nonché la possibilità di accedere in modo pieno allo studio e a determinate professioni o carriere. Tuttavia, questa dimenticanza non deve far giungere alla facile conclusione che le donne, e tutto ciò che era stereotipicamente considerato "femminile", fossero indifferenti ad ogni branca del diritto. Al contrario, per i giuristi ed i legislatori del campo penale le donne sono state molto presenti: come "presenza da governare saldamente per regolare, senza problemi, un assetto che si voleva di impronta patriarcale"²¹. La regolazione si è manifestata da un lato nella rigida limitazione della sfera delle loro libertà, dall'altro nell'imposizione di una fitta rete di specifici doveri²², anche per il tramite di talune fattispecie di reato. Basti accennare al fatto che la piena imputabilità era loro riconosciuta per tutti (e solamente) quei reati che erano in grado di alterare – se commessi – l'ordine (di impronta patriarcale-religiosa) costituito e/o mettere in discussione l'onorabilità di padri e mariti. Fra questi, l'adulterio (abolito nel Codice penale italiano solo nel 1981 con la legge n. 442 del 5 agosto, *ex art.* 587, cd. delitto d'onore), il parricidio, lo stupro, la seduzione, l'aborto, i reati particolarmente gravi da mettere in pericolo la sicurezza dello Stato, l'eresia, la stregoneria, l'esercizio di pratiche magiche ed ogni altro tipo di reato che desse prova di un utilizzo di particolare abilità od astuzia vedevano la piena punibilità delle donne.²³

giuridica sui cui confini è stato possibile avallare ogni tacito pregiudizio nei confronti delle donne. Tramite questa è stata giuridicamente possibile impedire alle donne un pieno godimento dei diritti civili e, sul piano penale, riconoscere una loro piena imputabilità in forza della loro minorata razionalità dovuta al sesso.

²¹ *Id.*, 7.

²² *Id.*, 8.

²³ *Id.*, 17.

In aggiunta, vi era una generale sfiducia nella razionalità delle donne. Le posizioni di alcuni pensatori²⁴ hanno infatti gettato le loro ombre a lungo all'interno delle riflessioni giuridiche penali, alimentando uno stereotipo di donna minorata, infima, menzognera, con pratiche ricadute in tema di testimonianza. Ciò si può vedere chiaramente nel più importante testo di procedura penale del secolo: Vincenzo Manzini nell'edizione del 1932 scriveva: "Le donne, in genere, rendono deposizioni più estese, ma meno fedeli che gli uomini"²⁵.

Per quanto le voci del dibattito non fossero completamente unanimi²⁶, le posizioni culturalmente misogine dei pensatori moderni hanno avuto, nella realtà delle norme giuridiche, un'ampia eco che ha consentito di mantenere per molto tempo fattispecie di reato e forme di punizione intimamente contrastanti con i principi penalistici razionali e illuministici. Si pensi alle ipotesi di punizione "privata" a seguito di un pubblico processo, storicamente demandata alla famiglia²⁷ (le cd. pene corporali domestiche); oppure all'applicazione del delitto di maltrattamenti in famiglia e di abuso dei mezzi di correzione solo nei casi in cui gli atti violenti compiuti andavano oltre

²⁴ *Id.*, 21-22. Come portavoce di questa corrente l'Autrice richiama il giurista francese André Tiraqueau (1488-1558), la cui opera influenzò lo stesso Farinaccio. Scrive che sulla base della debolezza d'animo e minore razionalità egli sostiene la minore punibilità delle donne e "sulla base della loro nota propensione alla menzogna ritiene opportuno che non compaiano in giudizio come testimoni, anche perché ovviamente si crede loro meno che ai maschi."

²⁵ Vedi Marina Graziosi, *Disparità e diritto. Alla origine della disuguaglianza delle donne* 47. Autore della citazione riportata: Vincenzo Manzini, *Trattato di diritto processuale penale italiano*, vol. III, p. 283, (Utet ed) (Torino, 1932)

²⁶ Vedi Ilaria Boiano, *Femminismo e processo penale*, cit., 66. L'Autrice fa riferimento al teorico penalista della Scuola classica Francesco Carrara che non individuava nel sesso una causa di esclusione dell'imputabilità e la cui influenza di pensiero fu così ampia da far escludere nel primo Codice penale italiano, il Codice Zanardelli del 1889, questo come fattore capace di incidere sull'imputazione.

²⁷ *Id.*, 67.

il “legittimo” *ius corrigendi* riconosciuto in capo al padre di famiglia²⁸. Nei fatti l'*habeas corpus*, ossia l'immunità del cittadino e della cittadina da restrizioni arbitrarie della libertà e da punizioni autoritative lesive dei diritti, ha subito una forma di attenuazione per le donne fino alla sopracitata legge del 1981 abrogativa del delitto d'onore.

In aggiunta, alcuni plurisecolari pregiudizi di matrice culturale (prima che giuridica) nei confronti delle donne – pur se formalmente eliminati dal Codice penale e dal Codice di procedura penale – si denuncia che continuino ad aleggiare tanto nella società quanto nelle aule giudiziarie, condizionando l'efficacia del procedimento, nonché la risposta degli operatori, l'accertamento dei fatti e delle responsabilità²⁹.

Lo spazio che si è dedicato alla digressione storica sul tema non è fine a sé stesso ma consente di capire come mai una parte del movimento femminista (in Italia ma non solo) degli anni '70, nel momento in cui si è presentata la possibilità di un dialogo con le istituzioni, ha mostrato una scarsa fiducia nei suoi esiti o addirittura un disinteresse a volerlo aprire³⁰. Secondo la corrente più radicale del movimento il ricorso al diritto non era praticabile, perché esso rappresentava un “dispositivo che storicamente ha concorso a

²⁸ *Id.*, 70. L'Autrice riprende l'analisi svolta da Vescovi in *Enciclopedia giuridica italiana*, (edizione 1904), nella parte dedicata a *Maltrattamenti in famiglia e abuso dei mezzi di coercizione*. Egli scrive, in riferimento a tali reati, che intervenivano “a colpire di pena i trasmodamenti della potestà familiare”, dal momento che la legge consentiva di ricorrere a mezzi coercitivi “per correggere le scorrettezze” del soggetto sottoposto ad autorità.

²⁹ In questo senso, si richiama l'importante lavoro dell'Avvocata Ilaria Boiano, *Femminismo e processo penale*, cit., 255 ss. (Futura editrice, settembre 2015) e della Professoressa Elena Larrauri, *Cinque stereotipi sulle donne vittime di violenza... e alcune risposte del femminismo ufficiale*, in *Studi sulla questione criminale*, III, n.2, 65 ss., (Carocci editore, 2008).

³⁰ Vedi generalmente Donatella Di Cesare, Franco Vaccari, *Prospettive femministe di Caterina Botti, Iride*, n.1, 181 ss., (Mimesis Edizioni 2014).

determinare e rafforzare il potere degli uomini”³¹ e che era intrinsecamente complice delle disparità e disuguaglianze. In sostanza, non si poteva affidare il compito di tutelare le donne allo strumento che era stato complice di secoli di oppressione e subordinazione. Il mutamento della società poteva avvenire, secondo questa corrente, solo da un cambiamento che passasse attraverso la cultura e l’educazione: erano questi gli ambiti che potevano andare a incidere, sostanzialmente, sulle storture sessiste e discriminatorie insite nella società. Si desiderava agire sul piano simbolico, ossia sui pensieri che giustificavano l’oppressione esistente, nella convinzione che l’uguaglianza formale di opportunità socio-economiche non fosse sufficiente a garantire piena libertà e dignità alle donne. In questo senso, si reclamava la differenza sessuale, affinché la libertà femminile potesse essere rivendicata senza generare ulteriori discriminazioni.³² Bisognava modificare prima la presunta neutralità e universalità del maschile plurale per poi incidere sul piano simbolico il rapporto uomo-donna: solo da questo cambiamento sarebbe potuto nascere un nuovo modo di stare al mondo, sulle ceneri del dominio maschile, riscontrabile prima nel diritto e poi nel processo³³. Al contrario, assumere le vesti di legislative all’interno di una società, di istituzioni che erano state concepite da uomini e per uomini, si riteneva portasse a nient’altro che risultati compromissori e al ribasso³⁴. Non potevano esistere leggi che dessero voce e valore

³¹ Vedi generalmente Ilaria Boiano, *Femminismo e processo penale*, cit., 221 (Futura editrice, settembre 2015).

³² Vedi, Donatella Di Cesare, Franco Vaccari, *Prospettive femministe di Caterina Botti*, cit., 187 (Mimesis Edizioni 2014).

³³ Vedi, Ilaria Boiano, *Femminismo e processo penale*, cit., 55 (Futura editrice, settembre 2015).

³⁴ Vedi generalmente Libreria delle Donne di Milano, *Non credere di avere dei diritti: la generazione della libertà femminile nell’idea e nelle vicende di un gruppo di donne* 84 (Torino: Rosenberg & Sellier, 1987). Come accaduto a cinque anni di distanza dalla presentazione del progetto di legge sulla violenza sessuale, “passato il vaglio della Commissione Giustizia, il testo arriva in aula per la discussione alla Camera dei deputati così rimaneggiato da risultare irriconoscibile alle sue stesse presentatrici.

alla molteplice e differente esperienza femminile, se questa non era nemmeno riconosciuta socialmente³⁵.

A contrapporsi, vi era la corrente emancipazionista. Le femministe che vi hanno aderito rivendicano una serie di mutamenti di ordine sociale ed economico, volti a restituire effettiva pari dignità alle donne. Il fine era quello della loro omologazione all'ordine costituito: perseguendo l'ideale illuministico di uguaglianza universale, si astraevano le differenze e ci si batteva "per il paritario accesso all'educazione, alla proprietà, alle professioni, e ai diritti sociali e politici"³⁶. In questo senso, l'accesso alla produzione legislativa era visto non solo come desiderabile ma chiave del cambiamento.

2.3. *L'evoluzione normativa*

Guardando al contesto italiano, si può dire che per molti anni il femminismo egemonico abbia manifestato uno scarso interesse per il diritto³⁷. Ciò ha forse fatto sentire abbandonate in *primis* le operatrici

Come esempio si può ricordare che la richiesta di modifica del Codice penale per considerare la violenza contro le donne un reato contro la persona e non più contro la morale, già contenuta nella proposta di legge del '77, verrà accolta solo nel 1996.

³⁵ Vedi Donatella Di Cesare, Franco Vaccari, *Prospettive femministe di Caterina Botti*, cit., 183 (Mimesis Edizioni 2014). Va infatti specificato che la corrente radicale si intreccia con la seconda ondata del femminismo, quella detta della differenza, che ha il merito di aver dischiuso una riflessione profonda e radicale sui sessi e sul concetto di genere. Per evitare di cedere in una logica essenzialistica (deterministica) propria del realismo di genere, è stato necessario compiere l'ulteriore passo di radicalizzazione, al fine di riconoscere la differenza nella differenza (cfr. Judith Butler, *Questione di genere. Il femminismo e la sovversione dell'identità*, 1990) ed evitare di adottare una visione di "donna" connessa al sesso biologico.

³⁶ *Id.*, 181.

³⁷ Vedi Anna Cavaliere, *Tra uguaglianza e differenze. Letture femministe del diritto in un'opera recente*, in *Ragion pratica*, (1), 286 (2017). L'Autrice fa riferimento alle esperienze estere in cui il pensiero e la militanza femminista si avvicinano alle teorie giuridiche e si articolano in riflessioni legate agli studi di genere (menziona i corsi di

del diritto che, con l'apertura dell'accesso alle professioni forensi, avevano fatto ingresso nei tribunali e che nel tentativo di introdurre l'esperienza delle donne nei discorsi giuridici venivano tacciate di "parzialità" e "non obiettività" (etichette di cui la prospettiva maschile non ha mai sofferto, perché è strutturalmente assunta come neutra)³⁸. In *secundis*, ha colpito anche quelle donne che, non avendo mezzi diversi per fuoriuscire dalla violenza, si sono viste costrette a chiedere supporto a quelle stesse istituzioni permeate di sessismo, maschilismo e pregiudizi – al pari della stessa società³⁹.

Il cambio di passo è poi avvenuto: come primo e celebre caso si può citare la discussione e seguente produzione legislativa su temi legati alla salute riproduttiva (e annessi diritti) delle donne⁴⁰. Un altro

Feminist Jurisprudence e Feminist Legal Theory, Women's Law, attivi fra America, Australia, Paesi scandinavi), inesistenti in Italia.

³⁸ Vedi Susanna Pozzolo, *Teoria femminista del diritto. Genere e discorso giuridico*, in Thomas Casadei (a cura di), *Donne, diritto, diritti. Prospettive di giusfemminismo*, 33, (Torino: Giappichelli, 2015).

³⁹ Per fini esplicativi vedi il primo caso giudiziario in cui una donna (Franca Viola), si oppose, sostenuta dalla sua famiglia, nel 1966 al cd. 'matrimonio riparatore' e portò in giudizio l'uomo che dopo averla sequestrata e stuprata la chiese in sposa poiché, ex art. 544 Codice penale (abrogato dalla l. 15 febbraio 1996 n. 66) "Per i delitti preveduti dal capo primo e dall'articolo 530 [N.d.R. i delitti contro la libertà sessuale e la corruzione di minorenni- contenuti nel Titolo IX *Dei delitti contro la moralità pubblica e il buon costume*], il matrimonio, che l'autore del reato contragga con la persona offesa, estingue il reato, anche riguardo a coloro che sono concorsi nel reato medesimo; e, se vi è stata condanna, ne cessano l'esecuzione e gli effetti penali." La sua storia personale e giuridica è narrata nel toccante romanzo di Viola Ardore "Oliva Denaro".

⁴⁰ In tal senso, Donatella Di Cesare, Franco Vaccari, *Prospettive femministe di Caterina Botti*, cit., 183 (Mimesis Edizioni 2014). L'Autrice Di Cesare prende ad esempio una delle questioni etiche e bioetiche maggiormente discusse: l'aborto. Ripercorrendo il pensiero della filosofa Botti, si rinviene un grave limite del dibattito pubblico italiano, il pensiero radicale è assente e si dà per scontata la strategia emancipazionista. Ciò porta a rilanciare vecchi luoghi comuni e ottenere una soluzione pratica insoddisfacente e compromissoria, non accompagnata da una riflessione etica e dalla rivendicazione della libertà delle donne. Anche dalla parte

caso importante è la legge n. 66 del 1996⁴¹ in tema di violenza sessuale che, si può dire, abbia ufficialmente aperto una stagione connotata da un elevato ricorso alla legge per la tutela dei diritti fondamentali e la protezione delle donne nei casi di lesioni e violenza⁴².

In tutti gli anni che seguirono il '96 sono stati emanati molti atti legislativi sul tema (principalmente attraverso la fonte del decreto-legge) che hanno nei più dei casi introdotto e/o modificato articoli del Codice penale e del Codice di procedura penale.

Andando a guardare alle principali scelte evolutive di fondo, si può dire che il legislatore, prediligendo la risposta penale, abbia ricercato un generale inasprimento sanzionatorio e un'accelerazione processuale per quei reati che, all'interno della legge n.69/2019 (conosciuto con il nome Codice Rosso) sono iscrivibili alla violenza di genere⁴³.

Se rispetto all'"inasprimento sanzionatorio c'è da dire che la scelta tradisce, probabilmente, la credenza della reale efficacia deterrente (in ottica general-preventiva) di una pena molto elevata,

progressista si sostiene che "la pratica abortiva è sì un male morale o un dramma umano", ma legalizzarla è "un male minore rispetto al vietarla".

⁴¹ Vedi Legge 15 febbraio 1996, n. 66, "Norme contro la violenza sessuale".

⁴² Vedi LIBRERIA DELLE DONNE DI MILANO, *Non credere di avere dei diritti*, cit., 78 (Rosenberg & Sellier 1987). È importante sottolineare che, nonostante la iniziativa di legge fosse popolare, il dibattito interno al movimento femminista non mancò. Rispetto al contenuto, particolarmente controversa fu la scelta sulla procedibilità d'ufficio: le promotrici, forse perché "mosse da una naturale indignazione per la tracotanza del sesso maschile ma, più profondamente, mosse dall'orrore per quelle donne che la sopportano", hanno visto nell'obbligatorietà dell'esercizio dell'azione penale una forma di tutela da parte dello Stato.

⁴³ Vedi generalmente: Maltrattamenti contro familiari e conviventi (art. 572 c.p.); Violenza sessuale, aggravata e di gruppo (artt. 609-bis, 609-ter, 609-octies c.p.); Atti sessuali con minorenne (art. 609-quater c.p.); Corruzione di minorenne (art. 609-quinquies c.p.); Atti persecutori (art. 612-bis c.p.); Diffusione illecita di immagini o video sessualmente espliciti (art. 612-ter); Lesioni aggravate e deformazione dell'aspetto della persona mediante lesioni personali permanenti al viso (artt. 582, 583-quinquies).

rispetto all'accelerazione processuale è doveroso fare qualche ulteriore osservazione.

Delineando un generale impianto che richiama un'idea di "corsa contro il tempo", si cerca di prevenire e reprimere episodi di violenza attraverso un ampio uso della forza pubblica. Gli istituti che possono essere richiamati a dimostrazione sono: le misure precautelari, l'ammonimento questorile e la querela.

Lo strumento processuale delle misure precautelari è stato ulteriormente rafforzato soprattutto attraverso due leggi molto recenti, la l. n. 122 e la l. n. 168 del 2023. Infatti, si sono introdotte (andando addirittura a modificare l'originale impianto del Codice antimafia⁴⁴) misure sempre più limitative della libertà personale e di movimento della persona indagata o imputata, le cui basi fondative non sempre risiedono su un provvedimento dell'autorità giudiziaria, con tutte le garanzie annesse, ma su un'operazione eseguita dagli ufficiali o agenti di polizia giudiziaria, su autorizzazione del pubblico ministero (per esempio: nell'allontanamento urgente dalla casa familiare o nell'arresto in flagranza differita). Ulteriori modifiche nel generale ambito delle misure custodiali e cautelari, non approfondibili, sono state introdotte con legge 2 dicembre 2025, n. 181, "Introduzione del delitto di femminicidio e altri interventi normativi per il contrasto alla violenza nei confronti delle donne e per la tutela delle vittime."⁴⁵

L'ammonimento questorile (che può essere emesso già in caso di cd. reati-spia di violenza di genere, anche senza che sia intervenuta

⁴⁴ La sorveglianza speciale di pubblica sicurezza, misura di prevenzione disciplinata agli artt. 4, 6 e 14 del Codice antimafia viene estesa anche per l'art. 572 e 612-bis c.p. e per i "delitti, consumati o tentati, di cui agli articoli 575, 583, nelle ipotesi aggravate ai sensi dell'articolo 577, primo comma, numero 1, e secondo comma, 583-*quinqies* e 609-*bis* del medesimo codice".

⁴⁵ Si rimanda all'articolo di Francesco Lazzeri, *In G.U. la l. 2 dicembre 2025, n. 181 (c.d. legge sul femminicidio): una panoramica dei profili penalistici sostanziali e processuali*, in *Sistema penale*, (3 dicembre 2025), disponibile in <https://www.sistemapenale.it/it/scheda/legge-femminicidio-gazzetta-ufficiale-novita-diritto-penale-sostanziale-processuale>.

la querela) ha natura amministrativa ma, per come è disciplinato nell'ordinamento, finisce per avere degli effetti penali: questo, infatti, assume un'accezione repressiva quasi automatica⁴⁶ e anche stigmatizzante nei confronti del destinatario. Le azioni di quest'ultimo, infatti, *in malam partem* e *pro-futuro*, rimangono connotate da un maggior grado di disvalore giuridico sia sul versante della colpevolezza che della gravità (anche nel caso di vittima diversa rispetto a quella per cui è intervenuto l'ammonimento)⁴⁷.

Rispetto alla querela, bisogna dire che questo è un istituto interessante poiché si pone sul crinale sostanziale-processuale. Quando il legislatore prevede la procedibilità di un reato a querela di parte, questa è necessaria per poter legittimamente avviare il processo; la sua remissione può invece incidere sull'esito del procedimento: se revocabile, e correttamente ritirata, può portare all'estinzione del reato. In particolare, per i reati espressivi di violenza di genere, le discussioni rispetto alla scelta 'procedibilità d'ufficio/procedibilità a querela di parte' aprono delle riflessioni circa la libera autodeterminazione delle persone vittime di tale violenza. Da un lato, la necessità dell'ordinamento di dare una risposta a quella che, in modo non velato, viene trattata come una emergenza; dall'altro lato, la possibilità che una persona dentro il circolo della violenza, decida di non querelare o, dopo averlo fatto, si ponga dei dubbi circa la sua reale volontà di proseguire il conflitto giudiziario. Ovviamente questa possibilità si inserisce all'interno di un contesto, il sistema e il processo penale, che può non essere in grado di accogliere i tempi e le complesse situazioni delle persone che subiscono violenza. Ciò che si è cercato di fare, forse per evitare delle "perdite di tempo", è stato fugare ogni perplessità con una forma di decisionismo istituzionale che nelle riforme recenti è stato sempre più

⁴⁶ Nel caso di nuova segnalazione di soggetto già ammonito non risulta necessaria la querela di parte al fine di aprire un procedimento penale, ma sarà sufficiente agire d'ufficio.

⁴⁷Vedi, Valeria Cannas, *Violenza di genere e misure di prevenzione*, in *Diritto penale e processo*, n.2, 161, (2024).

marcato⁴⁸. Il codice penale non tipizza solamente ipotesi di procedibilità d'ufficio come il caso di maltrattamenti contro familiari e conviventi *ex art.* 572 c.p.; talune ipotesi aggravanti che rientrano nell'attuale norma di violenza sessuale (tra cui, se commessa contro persona minorenni, da ascendente, genitore anche adottivo, tutore, pubblico ufficiale) *ex art.* 609-*bis*; o ancora il caso di atti persecutori *ex art.* 612-*bis* se nei confronti di un minore o di una persona con disabilità. Al contrario, quasi rimarcando il carattere di "eccezionalità" dei reati in materia rispetto alle categorie penalistiche generali, sono state anche introdotte negli anni delle forme "ibride" di querela: quella irrevocabile e quella rimettibile solo processualmente. Nel primo gruppo, si può citare la violenza sessuale "semplice" e gli atti persecutori aggravati, se commessi mediante minacce reiterate; nel secondo, invece, rientra il reato di atti persecutori "semplice" e, a seguito della legge 2 dicembre 2025 n. 181, anche per il reato di diffusione illecita di immagini o video sessualmente espliciti, *ex art.* 612-*ter*.

2.4. L'attualità

Guardando all'attualità, il dibattito rispetto all'utilizzo del diritto per dare corpo e voce alle istanze femministe pare essersi riaperto a seguito della legge del 2019 "Codice Rosso". Forse recuperando quanto già paventavano le femministe radicali rispetto all'utilizzo del diritto, ci si è rese conto che il progetto emancipazionista, ormai inglobato nelle istituzioni, è stato riproposto sotto forma di norme pressoché esclusivamente penali, spesso insoddisfacenti, che offrono una lettura emergenziale del fenomeno.

⁴⁸ Vedi generalmente per le riflessioni in tema di querela, Maria (Milli) Virgilio, *Legislazioni a contrasto della violenza maschile contro le donne e autodeterminazione femminile*, in Stefania Scarponi *Diritto e genere. Analisi interdisciplinare e comparata*, 328, (Milano: Wolters Kluwer, 2016).

La lettura che si può evincere è quella di una risposta populista⁴⁹ ad un problema ben più complesso. Le ricadute di questo approccio sono molto pratiche e riguardano il lato vittima e il lato autore oltre che l'intera collettività.

Come già argomentato, i reati di violenza di genere – rappresentando qualcosa in più della fattispecie che li inquadrano⁵⁰ – hanno sia una dimensione individuale (che ruota attorno alla responsabilità penale dell'autore) sia una collettiva (sensibilità sociale condivisa). Riprendendo il famoso slogan del movimento femminista “Non Una di Meno”, la persona violenta non sarebbe altro che la figlia (troppo sana) delle dinamiche patriarcali e discriminatorie presenti nella nostra società delle quali, proprio in ragione del loro carattere educativo e culturale, dobbiamo considerarci corresponsabili. In aggiunta, rispetto alla teoria general-preventiva della pena, bisogna dire che nessuno studio ne abbia mai dimostrato empiricamente l'efficacia: è pacifico metterne oggi in dubbio la sua

⁴⁹Vedi generalmente il disegno di legge (n.1433) per l'introduzione del delitto di “Femminicidio” nel Codice penale. Vedi anche

Francesco Menditto, *Riflessioni sul delitto di femminicidio*, in *Sistema penale*, (2 aprile 2025), disponibile a <https://www.sistemapenale.it/it/scheda/menditto-riflessioni-sul-delitto-di-femminicidio> (visitato il 16 novembre 2025);

Maria (Milli) Virgilio, *Nominare il femminicidio. Non in nostro nome*, in *Studi sulla questione criminale* (Nuova serie dei delitti e delle pene), (10 marzo 2025), disponibile <https://studiquestionecriminale.wordpress.com/2025/03/10/nominare-il-femminicidio-non-in-nostro-nome/> (visitato il 16 novembre 2025);

REDAZIONE, *Contro l'introduzione del delitto di femminicidio: documento sottoscritto da oltre settanta professoress, ricercatrici e studiose penaliste*, in *Sistema penale*, (28 maggio 2025), disponibile a <https://www.sistemapenale.it/it/documenti/femminicidio-documento-penaliste#:~:text=Contro%20l'introduzione%20del%20delitto,professoress%2C%20ricercatrici%20e%20studiose%20penaliste&text=Pubblichiamo%20in%20allegato%2C%20per%20,svolgendo%20un%20ciclo%20di%20audizioni> (visitato il 16 novembre 2025).

⁵⁰ Vedi Barbara Pezzini, *Una Direttiva in materia di lotta alla violenza contro le donne e alla violenza domestica*, in *Quaderni costituzionali*, (3), 734 (2024).

capacità educativa e dissuasiva nella società⁵¹. Ci si chiede dunque: nel cercare una risposta alla violenza di genere, non sarebbe desiderabile recuperare la dimensione del tessuto sociale, la quale è pressoché assente nell'attuale quadro legislativo?

Dal lato vittima, ritenere appropriata la scelta di creare un percorso di fuoriuscita dalla violenza inasprendo le pene dei reati commessi in loro danno e irrigidendo le diverse fasi procedurali (tra cui, l'impossibilità di rimettere la querela nei più dei casi) è un'opinione che, forse, non ha molta aderenza con quanto accade nella realtà. Guardando al contesto italiano, si può citare il rapporto realizzato dal GREVIO (l'organo che monitora l'applicazione della Convenzione di Istanbul nei paesi aderenti) nel 2019. Il punto più interessante è contenuto al par. 221, riguardante i tassi di denuncia e di condanna. Dall'analisi emerge che "I dati ISTAT [...] mostrano che nonostante i crescenti tassi di denuncia del reato di *stalking*, il numero di condanne annuale è circa dieci volte inferiore al numero di reati denunciati [...]. I tassi di denuncia e condanna per violenza sessuale sono entrambi relativamente bassi e in diminuzione: mentre il numero di reati di violenza sessuale denunciati è da 4.617 episodi del 2011 a 4.046 nel 2016 (con un tasso di incidenza delle donne vittime e degli uomini autori di violenza in più del 90% dei casi), il numero di autori di violenza condannati è sceso da 1.703 a 1.419 nello stesso periodo. Per quanto riguarda il reato di maltrattamento [...]: i casi denunciati sono passati da 9.294 a 14.000, mentre le condanne, che si riferiscono per lo più a uomini di origine italiana, sono aumentate da 1.320 nel 2000 a 2.923 nel 2016". Sebbene si possa individuare un aumento delle denunce per i reati di maltrattamento e delle condanne, è anche vero che il rapporto rimane stabile a "una condanna ogni cinque denunce". Si scrive che per individuare le ragioni dietro questo basso tasso di condanna, bisognerebbe "indagare su quanto affermato dalle organizzazioni di donne, secondo cui i rapporti delle forze dell'ordine a volte sono vaghi e

⁵¹ Vedi Giovanni Fiandaca, *Prima lezione di diritto penale*, (Bari: Editori Laterza, 2017).

insufficienti a supportare un'azione legale, mentre i tribunali penali spesso operano discriminazioni nei confronti delle donne, sottovalutano le conseguenze ed i rischi della violenza basata sul genere, fomentano pregiudizi e stereotipi sessisti ed espongono le donne ad una vittimizzazione secondaria".⁵² Guardando soprattutto al reato di violenza sessuale, le difficoltà che si riscontrano in ambito giudiziario sono legate alla cd. "cultura dello stupro". Questa si compone di una serie di "miti" che sono parte della (misogina) "memoria collettiva" secolarmente stratificatesi in gran parte della popolazione. Fra questi, si annovera la credenza che "non si può essere stuprate da una persona che conosci", "molte donne, segretamente, *"desire to be raped"*, "se una donna dice 'no', in realtà intende 'sì'"⁵³; a queste si aggiunge il "se l'è cercata", nel caso in cui indossi un abbigliamento socialmente definito come "provocante", abbia fatto uso di alcool o altre sostanze, faccia un utilizzo libero, volontario, consensuale del suo corpo. L'esistenza, anche all'interno delle aule giudiziarie di questi miti – unita anche all'immaginario della "vittima ideale"⁵⁴ – contribuisce a generare in loro una difficoltà di denunciare la violenza sessuale subita, poiché si inserisce la paura o di non essere credute o di essere ritenute responsabili di quanto vissuto. Sicuramente questo incide sulla fiducia che le vittime

⁵² Vedi generalmente GREVIO, *Rapporto di Valutazione di Base Italia*, Strasburgo, novembre 2019, paras. 221–22, pp. 69–70, <https://www.pariopportunita.gov.it/media/2191/primo-rapporto-grevio-sullitalia-2020.pdf> (visitato il 16 novembre 2025).

⁵³ Vedi Marie Keenan, Estelle Zinsstag, *Sexual Violence and Restorative Justice*, 31, (Oxford: University Press, 2022).

⁵⁴ Vedi generalmente Elisabetta Piras, *Se l'è cercata! Violenza di genere, colpevolizzazione della vittima e ingiustizia epistemica*, in *Ragion pratica*, (1), 251 ss., (2021). Partendo da una definizione di vittimizzazione (ossia il processo di "costruzione sociale" delle vittime, che crea aspettative e comportamenti ritenuti opportuni), l'Autrice riprende il pensiero di Trudy Govier. Lei delinea un legame tra vittimizzazione e stereotipo della vittima ideale, che è tale solo in quanto inerme, passiva, impotente, rispettabile; totalmente opposto rispetto al colpevole che è invece rappresentato come un mostro.

possono avere nei confronti del sistema giudiziario e sul loro percorso di superamento del trauma.

Anche dal lato autore, l'esistente modello punitivo pare non essere, in linea con quanto dice la stessa Costituzione all'art. 27 comma 2, adeguato alla sua rieducazione. Come viene detto in dottrina, la condizione dell'autore di reati sessuali, all'interno degli istituti penitenziari, è quella di "ibernazione". "Gli autori di reati sessuali sono collocati [...] all'interno di sezioni carcerarie particolari, separate. [...] Questi detenuti espiano la pena isolati, in sostanza in regime di doppia privazione di libertà, al fine di tutelare la loro incolumità dagli altri detenuti, che per cultura e prassi consolidata non accettano, anzi disprezzano, la commistione con protagonisti di determinate tipologie di crimini, soprattutto quelli contro donne e bambini considerati vittime deboli, fragili. Di fatto i detenuti *sex offender* sono limitati nello svolgimento di ogni attività ricreativa, lavorativa, sportiva o culturale non potendo partecipare o condividere con i detenuti interni in altre sezioni del circuito carcerario tali attività"⁵⁵. A queste riflessioni "particolari" date dallo

⁵⁵ Francesco Caraballese, et al., *Il trattamento giudiziario del sex offender: vecchi limiti, nuove opportunità*, 3 *Rassegna italiana di criminologia*, 229, 234 (2020) ("La mancanza di articolati interventi trattamentali determina una condizione di "ibernazione penitenziaria" degli autori di violenza sessuale, soggetti che proprio in relazione alle loro caratteristiche richiederebbero interventi specifici e l'offerta di risorse terapeutiche [...] allo scopo di ridurre i rischi di recidivare quei comportamenti [...]"). Vedi anche Paolo Giulini, Alessandro Vassalli e Silvana Di Mauro, *Un detenuto ibernato: l'autore di reato sessuale tra tutela dei diritti e prospettive di difesa sociale*, in *Carcere e Territorio* 429 e ss (Giuffrè 2003);

Roberta Palmisano, *Minorità sociale, vita detentiva, tema per gli Stati Generali dell'esecuzione penale*, tavoli 4 e 2, (Dipartimento Amministrazione Penitenziaria-Ufficio studi, ricerche, legislazione e rapporti internazionali, luglio 2015), disponibile a https://www.giustizia.it/giustizia/page/it/pubblicazioni_studi_ricerche_testo_selezionato?contentId=SPS1181689, (visitato il 23 novembre 2025) (I *sex offenders* "vivono in regime quasi di isolamento "perché non è consentito loro di svolgere alcuna attività trattamentale se non nel contesto della sezione e quindi senza scambi con altri soggetti. Questi condannati finiscono per essere gli esclusi dagli esclusi, di fatto come 'ibernati', con istinti e pulsioni pronti a sciogliersi al ritorno in libertà, forse

status di autore di reati sessuali vanno aggiunte le informazioni, generali, sulle carceri nel nostro paese, sulle cui condizioni tragiche e spesso lesive della dignità delle persone detenute l'Associazione Antigone annualmente realizza dei report preziosi e fondamentali⁵⁶. Un sempre più grande divario pare essersi aperto fra l'ideale rieducativo e la realtà: il sistema punitivo pare quasi diseducare, producendo diversi effetti desocializzanti e incidendo negativamente sulla personalità della stragrande maggioranza dei detenuti⁵⁷.

Ricapitolando, all'interno del paragrafo sono stati valorizzati gli aspetti dell'ampio argomento 'violenza di genere' che si ritengono rilevanti rispetto – come detto in apertura – ad una parallela critica dell'odierno utilizzo del diritto penale in funzione educativa e della prevalente risposta punitiva. Si è mostrato anche come le insoddisfazioni derivanti dal ricorso al penale nel rispondere al fenomeno abbiano un'origine risalente nel tempo e siano, ad oggi, condivise e diffuse in buona parte dell'accademia giuridica.

3. *Di giustizia riparativa*

Giunge il momento di parlare di giustizia riparativa. Nell'articolo viene messa in luce – visto quanto detto in apertura – come un tipo di giustizia capace di far vedere oltre il modello di risposta al reato classico fino ad oggi esistente, che fa del diritto penale uno strumento in chiave populista⁵⁸ e della pena una forma di sanzione para retributiva.

ancora più esasperati. Quindi spesso nulla o quasi il carcere riesce ad incidere sul pericolo di futura recidiva").

⁵⁶ Antigone, *Nodo alla gola*, XX *Rapporto sulle condizioni di detenzione* (2024), disponibile a www.rapportoantigone.it/ventesimo-rapporto-sulle-condizioni-di-detenzione/ (visitato il 23 novembre 2025).

⁵⁷ Giovanni Fiandaca, *Prima lezione di diritto penale*, 28-29 (Editori Laterza 2017).

⁵⁸ Vedi Roberto Cornelli, *È populismo penale? Il contrasto alla violenza di genere nelle società punitive*, 4 *Giurisprudenza Italiana* 980, 982 (2024) (L'espressione "populista" fa più riferimento all'utilizzo di sentimenti sociali di paura, rabbia, risentimento, indignazione (della cui creazione/ri-costruzione gli stessi mass media o esponenti di

Oltre a fornire una definizione del modello riparativo/dialogico di risoluzione del conflitto derivante dal reato, si cercherà di capire se e come potrebbe essere utilizzato per i reati espressione di violenza di genere.

3.1. Definizione

Sebbene non esista una definizione univoca di giustizia riparativa, quella maggiormente accolta la individua come un “un nuovo paradigma di giustizia alternativo a quello tradizionale e rivolto alla riparazione delle conseguenze della condotta criminosa, strumento che mira a “superare” il reato, attraverso l’incontro e il dialogo fra vittima e reo, cercando di sollecitare in quest’ultimo un’auto-responsabilizzazione circa l’accaduto e giungere a “riannodare” i fili interrotti della relazione, riparando l’offesa e il dolore arrecato alla vittima”⁵⁹.

Sarebbe però corretto ricordare che le radici della giustizia riparativa sono molto antiche e giungono fino al terreno della “premodernità”⁶⁰. Non volendosi approfondire eccessivamente il

partiti politici potrebbero essere definiti responsabili) come leva per poter offrire (e giustificare) un intervento di risposta esemplare, definitivo e urgente che rassicuri (ma solo superficialmente) la società del fatto che le istituzioni si stanno occupando del problema. Tutto ciò finisce però per portare a un progressivo incremento di durezza della risposta penale, forzandone i suoi stessi limiti: “uso ipertrofico della legislazione penale, aumento della severità delle pene, compressione dei diritti delle persone e delle garanzie processuali”); Vedi anche Stefano Anastasia, *L’uso populista del diritto e della giustizia penale*, 1 Ragion pratica 191 ss. (2019).

⁵⁹ Anna Lorenzetti, *Giustizia riparativa e dinamiche costituzionali*, *Alla ricerca di una soluzione costituzionalmente preferibile*, in *Dal Codice Rocco al Codice Rosso, Un itinerario attraverso la complessità del fenomeno*, 20 (Giappichelli Editore - Torino 2020).

⁶⁰ Confronta Elena Mattevi, *Una giustizia più riparativa*, *Mediazione e riparazione in materia penale*, Università degli studi di Trento: Collana della facoltà di giurisprudenza, 3 (2017) L’Autrice afferma come il modello della giustizia riparativa sia affine a quelli di penalità premoderni, pur essendo mutato il contesto in cui si diffonde. Richiama l’Autore Giovanni Così, che nel testo “Invece di giudicare, Scritti sulla mediazione” scrive: “Quasi seguendo le oscillazioni di un pendolo,

tema, è sufficiente dire che il progressivo abbandono nei paesi centro-europei, a partire dal '200/'300, di una risposta "privata" al reato – la quale si presentava come una forma di diritto alla "vendetta" (riconosciuta alla persona offesa ma anche a tutto il suo *entourage*) – è stato parallelo all'emersione di un'impronta sempre più pubblicistica al reato⁶¹. Venendo progressivamente meno l'idea che il reato rappresenti un'offesa privata, per cui sia più importante "ripararlo che punirlo"⁶², emerge un nuovo modo di fare giustizia che, velocemente, assume i toni della giustizia egemonica. Questa si caratterizza – nei suoi tratti essenziali – con l'officiosità dell'azione pubblica (salve alcune fattispecie ancora ritenute una "questione privata"), il ruolo di coordinamento e direzione conferito al giudice, più che alla mediazione sociale, e la punizione, ad ogni costo, del colpevole.⁶³ Finisce così per mutare il senso e il significato di giustizia che da un connotato distributivo/risarcitorio passa ad uno di repressione e vera e propria "lotta contro il crimine" di stampo politico: la fonte costitutiva della stessa giustizia egemonica è la legge.⁶⁴ Ai due attori tradizionali, vi si affianca un terzo, che si potrebbe in questa fase nominare genericamente "soggetto pubblico". Questo prenderà sempre più spazio, tanto da estromettere, nella sua evoluzione finale, le stesse persone offese dal

l'informalismo cerca infatti spesso di formalizzarsi, mentre i sistemi di giustizia ufficiali tendono a produrre periodicamente pratiche informali".

⁶¹ Maurizio Fioravanti, *Lo Stato moderno in Europa* 165 (Editori Laterza 2002).

⁶² *Id.* 166.

⁶³ *Id.* 171. Questa forma di giustizia egemonica si salda sia sul conferimento di poteri molto intrusivi e penetranti ai giudici (mezzi di indagini senza scrupoli, si ricorda anche la tortura; arbitrio nell'accusa da muovere, procedura da svolgere, raccolta delle prove), sia sulla centralità della pena: questa inizia a diventare dispositivo di giustizia retributiva, mezzo di esempio e dissuasione (ma anche di arbitrio del giudice, che la commisurerà anche sulla base di alcuni criteri di valutazione penale: la colpevolezza, la responsabilità, l'elemento psicologico, le circostanze).

⁶⁴ Confronta Mario Sbriccoli, *Giustizia negoziata, giustizia egemonica. Riflessioni su una nuova fase degli studi di storia della giustizia criminale*, in *Storia del diritto penale e della giustizia* 143 (Giuffrè Editore 2009).

processo. Quello che si afferma oggi è che queste siano diventate le “grandi dimenticate” all’interno del sistema penale: sia in una prospettiva di prevenzione/deterrenza al crimine che di rieducazione/risocializzazione dell’autore⁶⁵. Come ogni evento storico importante, l’instaurazione della giustizia egemonica seguirà un percorso lungo e non lineare e diverrà definitiva solo durante il diciottesimo secolo⁶⁶, a seguito della stagione inquisitoria che condurrà ad un punto evolutivo di non ritorno. Le derive repressive alla libertà, alle idee, alle intelligenze di quel periodo assumeranno un peso tale che l’unica soluzione possibile sarà quella di coniugare il modello egemonico alla ragione⁶⁷. Ci si avvia verso la secolarizzazione del diritto penale, sia sostanziale che processuale: l’affermazione del principio di legalità è la base fondante del nuovo apparato della giustizia, a cui si affiancano i corollari della irretroattività della legge penale e del divieto della sua estensione analogica; le norme devono essere astratte e generali, conformi ai principi del vivere civile; la responsabilità penale è personale, come personale è la pena la quale – pur essendo pubblica, sicura, certa – deve anche essere proporzionata al delitto, afflittiva e dissuasiva⁶⁸ per le altre persone consociate ma senza perdere il connotato di utilità e umanità (sono proprio di questo periodo le teorie abolizioniste della pena di morte).

È importante tenere presente che forme di giustizia negoziata, basate su prassi riparative e/o conciliative, hanno caratterizzato per lungo tempo il modo di intendere la risoluzione di controversie di diverse comunità indigene precoloniali (si pensi, per esempio al Canada, al Centro America, alla Nuova Zelanda ma anche

⁶⁵ Vedi Grazia Mannozi, *La giustizia senza spada* 54 (Giuffré 2003).

⁶⁶ In generale Maurizio Fioravanti, *Giustizia criminale*

⁶⁷ *Id.* 182-192.

⁶⁸ Vedi Mario Sbriccoli, *La piccola criminalità e la criminalità dei doveri nelle riforme settecentesche del diritto e della legislazione penale*, in *Storia del diritto penale e della giustizia* 417 (Giuffré Editore 2009) (Scrivo: “La convinzione che manovrando sulle pene si diminuiscono i reati si diffonde in tutta Europa”).

all’Australia). Tra le violenze commesse dai futuri colonizzatori di tali paesi rientra anche l’imposizione/trasposizione di modelli di cultura giuridici occidentali: tra queste, una forma di giustizia che aveva (già) assunto il volto della giustizia egemonica.⁶⁹

Ritornando alla diffusione della ‘giustizia riparativa’ ai giorni nostri, in Occidente, interessante delineare alcune delle spinte che possono aver inciso sul crescente interesse verso questa.

Come prima si può menzionare la scienza vittimologica, accompagnata da studi di antropologia giuridica e dalla corrente abolizionista⁷⁰. L’attenzione verso la persona offesa (che viene usata nell’articolo come sinonimo di ‘vittima’) è recente all’interno della dottrina penalistica e processualistica. La sua estromissione “giustificata entro certi limiti per ragioni garantistiche, e comunque per garantire il monopolio dello Stato nell’amministrazione della giustizia, si era spinta troppo oltre”⁷¹. Il reato era diventato un’entità oggettiva e lo Stato, sostituitosi alla persona offesa (nei fatti, estromettendola) aveva assunto le vesti di “vittima simbolica”.

A seguire le riflessioni accademiche interverranno testi legislativi internazionali. Tra questi, la Risoluzione 40/34 del 29 novembre 1985 adottata dall’Assemblea Generale delle Nazioni Unite e contenente la Dichiarazione dei “Principi Fondamentali di Giustizia per le Vittime di Reato e di Abuso di Potere”; la Raccomandazione

⁶⁹ Vedi Grazia Mannozi, *Le sfide poste dall’istituzionalizzazione della giustizia riparativa: importazione di modelli e nuovi colonialismi* in *La giustizia riparativa* (d.lgs. n. 150/2022 – d.lgs. n. 31/2024) 5 ss., (Giappichelli 2025). Per approfondimenti e spunti per avviare una lettura decoloniale sulla giustizia riparativa,

⁷⁰ Vedi in generale Francesco Parisi, *Giustizia riparativa e sistema penale* 6 ss. (Giappichelli 2025); ma vedi Mattevi, *Una giustizia più riparativa, Mediazione e riparazione in materia penale* 10-17 (citato alla nota 58). Rispetto all’antropologia giuridica l’Autrice richiama primi studi incentrati su “microcosmi delle comunità africane o centroamericane”. La corrente abolizionista parte dall’assunto che la pena sia inefficace ed ingiusta e per questo, vista la natura privatistica del conflitto, è la sola de-istituzionalizzazione della giustizia il mezzo attraverso cui poter comporre la lite in un modo realmente soddisfattivo e utile per vittima e autore.

⁷¹ Confronta *Id.* 31.

concernente l'assistenza alle vittime e la prevenzione della vittimizzazione, adottata nel 1987 dal Comitato dei Ministri del Consiglio d'Europa (Racc. No. R (87)21 del 17 settembre 1987), ed infine l'importante Direttiva del 25 ottobre 2012 (2012/29/UE del 25 ottobre 2012).⁷²

La Direttiva europea del 2012 è particolarmente importante poiché contiene una prima definizione giuridica di vittima – la quale verrà ripresa anche all'interno della successiva legislazione interna – ne indica i diritti e ne definisce gli obblighi che gli Stati membri hanno nei loro confronti⁷³. Interessante dire che il riconoscimento dello *status* di vittima, in particolare il diritto all'accesso ai servizi di assistenza si ha a prescindere dall'esistenza di un procedimento penale; in altri termini, la vittima esiste perché è stato commesso un fatto, anche se la sua qualificazione giuridica quale reato non è stata formalizzata attraverso una denuncia⁷⁴.

⁷² Elena Mattevi, *La giustizia riparativa nelle fonti sovranazionali: uno sguardo d'insieme* 4 (Sistema penale, 23 novembre 2023), disponibile a https://www.sistemapenale.it/pdf_contenuti/1700667330_003-mattevi.pdf (visitato il 23 novembre 2025). Vedi anche Marco Bouchard & Fabio Fiorentin, *La giustizia riparativa* 37 ss (Lefebvre Giuffré 2025).

⁷³ Dir. del Parlamento Europeo e del Consiglio, 25 ottobre 2012, no. 29. La direttiva procede per CAPI: il primo è dedicato alle "Disposizioni generali" (tra cui le "Definizioni"); il secondo a "Informazioni e sostegno" (tra cui, diritto di comprendere e essere compresi, all'informazione nei vari momenti di contatto con le autorità pubbliche, alla interpretazione e traduzione, all'accesso ai servizi e all'assistenza alle vittime); il terzo alla "Partecipazione al procedimento penale (fra cui, il diritto di essere sentiti, di non esercitare l'azione penale, del patrocinio gratuito); il quarto alla "Protezione delle vittime e riconoscimento delle vittime con specifiche esigenze di protezione (in cui si sancisce, in primo luogo, il "Diritto alla protezione" da una forma di vittimizzazione secondaria e ripetuta, il diritto all'assenza di contatti fra vittima e autore, alla protezione durante le indagini, alla protezione della vita privata,...); il quinto alle "Altre disposizioni" (riguardanti la formazione degli operatori, la cooperazione fra Stati); il sesto alle "Disposizioni finali".

⁷⁴ Marco Bouchard & Fabio Fiorentin, *Sulla giustizia riparativa* 3 (Questione giustizia, 23 novembre 2021), disponibile a <https://www.questionegiustizia.it/data/doc/3060/buochard-fiorentin-la-giustizia->

Per completezza espositiva si aggiunge che gli studi cd. vittimologici e le loro ricadute all'interno delle riflessioni penali e procedurali non sono (stati) accolti pacificamente e all'unanimità⁷⁵: molte autrici e autori hanno espresso le loro perplessità. In particolare, per il possibile aggancio di una deriva "vittimistica" con lo stesso populismo penale di cui si è scritto sopra, nonché con la connessa diminuzione di una serie di garanzie fondamentali in capo alla persona imputata in un procedimento penale. Chiaramente le preoccupazioni in tal senso sono serie e necessitano di essere approfondite. Ciò a cui, forse, sarebbe desiderabile tendere è la ricerca di un equilibrio fra la completa estromissione della persona offesa e la sua assoluta prevalenza.

La seconda spinta potrebbe essere rubricata con "la crisi del modello di giustizia penale occidentale". Questo è un tema molto ampio, che coinvolge una pluralità di livelli: il momento legislativo, la parte più strettamente processuale e, per finire, quella legata al momento esecutivo. Sebbene in relazione a ciascuno di questi il discorso assume delle specificità, l'*humus* comune su cui si innestano è la corrente politica populista che le moderne e globalizzate democrazie liberali stanno attraversando, con inevitabili conseguenze sul profilo penale⁷⁶. Si insegue il fine di apportare un

riparativa.pdf (visitato il 23 novembre 2025). Si specifica però che in assenza di un procedimento penale, lo statuto di 'vittima' non dovrebbe incidere sulle garanzie del potenziale indagato/imputato.

⁷⁵ Vedi in generale Marta Bertolino, *La violenza di genere e su minori tra vittimologia e vittimismo: notazioni brevi: notazioni brevi*, 1 Rivista Italiana di Diritto e Procedura Penale 65 (2021); Anastasia, *L'uso populista del diritto penale*, (citato alla nota 56); Tamar Pitch, *Il manifesto della vittima* (Edizioni Gruppo Abele 2022).

⁷⁶ Confronta Anastasia, *L'uso populista del diritto e della giustizia penale* 192 (citato alla nota 56). L'Autore si richiama a studiosi di fenomeni politici che cercano di individuare, negli anni a cavallo fra i due secoli (XX e XXI), "la manifestazione di una terza ondata populista [...] in stretta correlazione con la globalizzazione neoliberale"; cerca poi nell'articolo di delineare una definizione di "populismo" e di individuarne le caratteristiche proprie "che consentono la verifica empirica della consistenza della categoria e quindi della sua rilevanza nella interpretazione delle

(apparente) senso di sicurezza all'interno di contesti sociali in cui – per mancanza di uno stato sociale adeguatamente finanziato e attento ai bisogni educativi, abitativi, di salute, di lavoro di coloro che vivono in determinati territori e quartieri – viene usata la criminalizzazione come antidoto alle conseguenze di un progressivo abbandono economico e sociale, disoccupazione, precarizzazione e crescita delle disuguaglianze⁷⁷.

Guardando alla parte legislativa – di cui si è accennato nel paragrafo precedente solo in riferimento al fenomeno della violenza di genere – sotto un profilo generale si può notare che le recenti legislature hanno sistematicamente introdotto una serie di nuovi titoli di reato, perché “l'uso simbolico del diritto penale è diventato un capitale essenziale nella ricerca e nel consolidamento del consenso politico”⁷⁸. Se da un lato, sulla spinta di un'emotività contingente per placare l'opinione pubblica⁷⁹, c'è la tendenza normativa a introdurre nuovi reati o a inasprire le pene di quelli già esistenti⁸⁰, dall'altro lato

trasformazioni del diritto penale e dei sistemi di controllo sociale istituzionale coattivo che gli sono correlati”.

⁷⁷ Vedi Tamar Pitch, Andrea Pugiotto, *L'odierno protagonismo della vittima. Un dialogo tra Tamar Pitch e Andrea Pugiotto*, 3 Studi sulla questione criminale 111, 113 (2019). Nella parte dell'articolo scritta da Tamar Pitch, scrive: “e tuttavia il populismo penale va di pari passo allo smantellamento delle protezioni del welfare”.

⁷⁸ Anastasia, *L'uso populista del diritto e della giustizia penale* 194 (citato alla nota 56).

⁷⁹ Vedi Giovanni Fiandaca, *La punizione* 13 (Il Mulino 2024). L'Autore scrive: “Con l'aggravante che gli orientamenti favorevoli [N.d.R. alla punizione], lungi dal basarsi su considerazioni razionali, traggono prevalentemente impulso da spinte emotive e da sentimenti individuali e collettivi di frustrazione, rabbia, risentimento che si diffondono specie nei momenti di crisi socioeconomica [...]”.

⁸⁰ Vedi ad esempio Antigone, *Nodo alla gola: XX Rapporto sulle condizioni di detenzione* (2024), 23, <https://www.rapportoantigone.it/ventesimo-rapporto-sulle-condizioni-di-detenzione> (visitato il 23 novembre 2025). “Nonostante la crescita degli ingressi di fatto le persone in carcere con un lungo residuo di pena da scontare stanno aumentando, tanto nei numeri assoluti quanto in percentuale sul totale. Le persone con un residuo pena superiore ai tre anni, ergastolani inclusi, sono passati dal 36,2% dei presenti del 2010 al 43,8% del 2015 al 48,7% del 2023. La causa di tutto questo non è certo un aumento della criminalità per i fatti più gravi, che, come abbiamo visto altrove, è anzi in calo. Il fenomeno dipende invece dall'innalzamento delle pene, una

le ricadute di queste scelte politiche si manifestano nella parte processuale e nella parte esecutiva.

Rispetto alla parte processuale, la crisi si manifesta nel pacifico dato della (eccessiva) durata dei procedimenti penali, sia a livello del singolo grado che negli eventuali tre. Come controprova si può citare la Relazione illustrativa al decreto legislativo 10 ottobre 2022, n. 150, la quale nei primi novantanove articoli introduce disposizioni o interventi sul Codice penale e sul Codice di procedura penale il cui filo conduttore è l'efficienza del processo e della giustizia penale (per la piena attuazione dei principi sia costituzionali, che convenzionali, che dell'UE) ma soprattutto per la riduzione, entro il 2026, del 25% della durata media del processo penale nei tre gradi di giudizio⁸¹.

Con riferimento alla parte esecutiva, di cui si è già fatta parziale menzione, si precisa ora che il discorso convoglia su due differenti binari: il primo legato alla dimensione strettamente pratico-espiativa; il secondo legato ad aspetti gius-filosofici della pena. Da entrambi emerge una generale crisi dell'attuale assetto penale punitivo, che nasce, a monte, dalla scelta di utilizzare la sanzione detentiva quale principale forma di risposta al reato. Riguardo il primo aspetto, si riprendono le riflessioni rispetto alle generali misere condizioni di vita all'interno degli istituti penitenziari. Riguarda al secondo tema, senza aprire una digressione rispetto agli scopi e alle teorie della pena, basta ribadire che nessuna prova è emersa riguardante il fatto che la pena detentiva possa effettivamente svolgere una funzione di

tendenza che si registra da anni, e che comporta, oltre all'invecchiamento della popolazione detenuta, anche una crescita delle presenze in carcere che prescinde dall'aumento degli ingressi. Se non fosse che gli ingressi sono invece anche loro in aumento. Ed è la combinazione di questi due fenomeni che sta facendo salire così rapidamente i numeri della detenzione nel nostro paese".

⁸¹ Vedi relazione illustrativa al d.lgs. 10 ottobre 2022, n. 150, "Attuazione della legge 27 settembre 2021, n. 134, recante delega al Governo per l'efficienza del processo penale, nonché in materia di giustizia riparativa e disposizioni per la celere definizione dei procedimenti giudiziari", in *Gazzetta Ufficiale della Repubblica Italiana*, Serie generale, (2022), n. 245, suppl. straord. n. 5, p. 182.

orientamento socioculturale; nessuna dimostrazione scientifica che abbia una effettiva efficacia dissuasiva-deterrente sui consociati. È dunque doveroso chiedersi se la scelta di ricorrere a questo tipo di risposta sia più una presa di posizione “di comodo”, piuttosto che una decisione che mette in primo piano “acquisizioni scientifiche dotate di fondamento empirico relative a come il sistema punitivo funziona nella realtà effettuale.”⁸²

3.2. *Normativa italiana*

L’interesse verso la giustizia riparativa ha investito vari paesi in Europa, tra cui anche l’Italia. A seguito di un lungo dibattito dottrinale riguardante la sua opportunità, il significato, le potenzialità⁸³, è intervenuto anche il legislatore che, nel 2022, all’interno della cd. Riforma Cartabia in campo penale l’ha introdotta e disciplinata. Non si farà una disamina articolo per articolo del d.lgs. n. 150/2022 ma se ne metteranno in luce gli aspetti salienti.

In primo luogo, bisogna dire che la giustizia riparativa è stata disciplinata organicamente, andando così ad operare una mutazione nella geometria del sistema penale: come in un’ellissi, i due fuochi sono diventati la giustizia penale classica e quella riparativa⁸⁴. Con la specificazione che tra sistema penale tradizionale e riparativo vige un rapporto di complementarità: ciò significa che è possibile ricorrere a programmi di giustizia riparativa in qualsiasi stato e grado del procedimento penale – in parallelo, nella fase esecutiva della pena o della misura di sicurezza e anche una volta terminata la loro esecuzione. In un senso più deflattivo, si può procedere anche prima

⁸² Per le riflessioni sulle acquisizioni scientifiche di efficacia delle pene, Giovanni Fiandaca, *Prima lezione di diritto penale*, cit., 9.

⁸³ Vedi per esempio. Elena Mattevi, *Una giustizia più riparativa, Mediazione e riparazione in materia penale*, cit.; Grazia Mannozi, *La giustizia senza spada*, (Torino: Giuffrè, 2003).

⁸⁴ Vedi Grazia Mannozi, *Le sfide poste dall’istituzionalizzazione della giustizia riparativa: importazione di modelli e nuovi colonialismi*, in Valentina Bonini (a cura di), *La giustizia riparativa* (d.lgs. n. 150/2022 – d.lgs. n. 31/2024), 3, (Torino: Giappichelli, 2024).

della presentazione della querela – se il reato è procedibile a querela rimettibile.

Guardando alle scelte di fondo operate dal legislatore bisogna dire che è stata scelta l'opzione generalista. Questo significa che è possibile accedere a programmi di giustizia riparativa per qualsiasi reato, a prescindere dalla gravità oggettiva/soggettiva di questo e dalle caratteristiche dell'autore. Questo approccio, come si evince dalla Relazione finale al disegno di legge poi successivamente confermato nel relativo d.lgs. n.150/2022, è stato preferito per due ordini di ragioni: da un lato per la vittima e la sua possibilità di “*empowerment*”, dall'altro lato per l'autore e l'ampliamento della possibilità di bilanciare i suoi interessi con quelli della vittima.

Rispetto alla prima, l'approccio generalista consente di offrirle una voce più forte, rimuovendo degli ostacoli all'accesso che possano basarsi su idee astratte di quali sono i reati mediabili o su stereotipate concezioni di ‘vittima’ che possano poi nei fatti tradursi in immotivate preclusioni di *storytelling*, ascolto, riparazione. Rispetto al secondo, permette a qualsiasi autore di reato (senza compiere delle discriminazioni in base al fatto tipico realizzato) di incontrare la persona offesa – qualora anche quest'ultima ne abbia interesse – o una vittima altra o diversa (per esempio una vittima surrogata). A ciò si aggiunge la possibilità, di partecipare a programmi di giustizia riparativa che gli consentano di assumersi le responsabilità del reato commesso e di realizzare, in modo simbolico o materiale, la riparazione⁸⁵.

La normativa offre poi una serie di definizioni molto importanti che, come già detto, riprendono i principali testi internazionali in materia.

All'art. 42 comma 1 lett. a) del d.lgs. 150/202 si definisce come giustizia riparativa “Ogni programma che consente alla vittima del reato, alla persona indicata come autore dell'offesa e ad altri soggetti

⁸⁵ Vedi Grazia Mannozi, *Le sfide poste dall'istituzionalizzazione della giustizia riparativa: importazione di modelli e nuovi colonialismi.*, cit., 14.

appartenenti alla comunità di partecipare liberamente, in modo consensuale, attivo e volontario, alla risoluzione delle questioni derivanti dal reato, con l'aiuto di un terzo imparziale, adeguatamente formato, denominato mediatore”.

La definizione parte da quella di “programma” – il quale può prendere la forma della mediazione penale (anche con una vittima di reato diverso da quello per cui si procede), del dialogo riparativo e di ogni altro programma dialogico guidato. Per il suo svolgimento si richiama anche la “comunità” attraverso cui, auspicabilmente, si potrebbe far uscire dall’isolamento la vittima e il presunto *offender*⁸⁶. Questa può essere composta dai familiari della vittima e della persona indicata quale autore, oppure da enti ed associazioni rappresentativi di interessi lesi dal reato, rappresentanti o delegati di vari enti locali, servizi sociali, autorità di pubblica sicurezza e, genericamente, da “chiunque altro vi abbia interesse”.

Altro aspetto da sottolineare è l'utilizzo del termine “mediatore” per indicare il soggetto a cui è affidato il compito di comporre la lite⁸⁷. Una parte della dottrina lamenta la scelta di tale

⁸⁶ Vedi Elena Mattevi, *Definizioni e principi generali della giustizia riparativa tra indicazioni sovranazionali e previsioni nazionali*, in Valentina Bonini (a cura di), *La giustizia riparativa* (d.lgs. n. 150/2022 – d.lgs. n. 31/2024), 81-82, (Torino: Giappichelli, 2024). Cfr. inoltre Francesco Parisi, *Giustizia riparativa e sistema penale*, 20, (Torino: Giappichelli, 2025). Rispetto al ruolo della comunità l'Autore scrive: “La giustizia riparativa enfatizza l'interdipendenza funzionale tra reato, giustizia e comunità. [...] Si ritiene che la comunità, da una parte, giochi un ruolo non indifferente nella stessa produzione delle cause sociali dei reati, giacché in essa maturano le condizioni che, almeno in parte, contribuiscono a generare le cause del crimine dall'altra ne subisce le conseguenze: [...] non soltanto qualora il reato offenda beni superindividuali o collettivi [...] ma anche nell'ipotesi in cui l'offesa riguardi una vittima individuale [...]. L'approccio comunitario alla giustizia riparativa richiede, dunque, che il reato torni alla comunità”.

⁸⁷ Sulla scelta del termine “mediatore” cfr. Relazione illustrativa al decreto legislativo 10 ottobre 2022, n. 150, cit., p. 369; viene data una motivazione etimologica: “il mediatore è terzo in quanto sta “nel mezzo”, “né più in alto né più in basso”, bensì accanto a ogni partecipante”

termine, anziché del più neutro “facilitatore”. Come scritto sopra, la mediazione penale – la quale si realizza attraverso un dialogo che coinvolge esclusivamente l’autore e la vittima, sotto la guida di una figura terza e imparziale – è una specie dei diversi programmi riparativi realizzabili.

La figura del mediatore, bisogna aggiungere, è stata disciplinata in un separato decreto (del 9 giugno 2023). Mucha attenzione è stata posta sulla sua formazione, la quale ha una componente teorica e pratica, poiché sono tante le responsabilità che ricadono su di essa; tra queste: l’acquisizione di tecniche meditative, di dialogo riparativo e di ogni altro programma dialogico; la capacità di raccogliere consenso; di discernere quale sia il programma riparativo più idoneo al caso concreto; di vagliare la fattibilità del programma riparativo scelto; di relazionarsi con i partecipanti e le loro fragilità, con altri mediatori e con le diverse figure della giustizia.

Vittima, invece, sempre ex art. 42, è “la persona fisica che ha subito direttamente dal reato qualunque danno patrimoniale o non patrimoniale, nonché il familiare della persona fisica la cui morte è stata causata dal reato e che ha subito un danno in conseguenza della morte di tale persona”. A questa si aggiunge, non senza dibattito⁸⁸, all’art. 53 comma 1 lett. a) del d. lgs. 150 anche la “vittima di un reato diverso da quello per cui si procede” (cd. vittima surrogata).

Cfr. inoltre Elena Mattevi, *Definizioni e principi generali della giustizia riparativa tra indicazioni sovranazionali e previsioni nazionali*, cit., 83. L’Autrice richiama le “Linee di indirizzo del Dipartimento per la Giustizia minorile e di comunità in materia di Giustizia riparativa e tutela delle vittime di reato”, elaborate nel 2019, in cui si distingue il mediatore dal mero facilitatore: i primi sono soggetti “competenti in materie socio umanistiche, pedagogiche, psicologiche con conoscenze in area giuridica [...], nella risoluzione di conflitti in area penale”; i secondi sono dei professionisti che hanno fatto esperienza nel contesto dei servizi minorili e/o dell’esecuzione penale adulti.

⁸⁸ Vedi, Marco Bouchard, *Giustizia riparativa e vittima di reato*, in Valentina Bonini (a cura di), *La giustizia riparativa (d.lgs. n. 150/2022 – d.lgs. n. 31/2024)*, 242, (Torino: Giappichelli, 2024); Marco Bouchard & Francesco Fiorentin, *La giustizia riparativa*, (Milano: Giuffré, 2024).

La figura invece della “persona indicata come autore” pone dei quesiti che toccano direttamente principi centrali del processo penale, soprattutto le garanzie a questa riconosciute. Da come si evince nella Relazione illustrativa al disegno di legge sopra citata⁸⁹, la scelta di tale perifrasi mira: da un lato, a rispettare l’art. 27 comma 2 (principio di non colpevolezza/presunzione di innocenza) e dall’altro a non subordinare la persona definitivamente condannata allo stigma perenna della colpa. Le persone indicate quali autori dell’offesa possono dunque essere: quella indicata dalla vittima prima della querela, la persona indagata, imputata, sottoposta a misura di sicurezza, la persona condannata con pronuncia irrevocabile, o nei cui confronti è stata emessa sentenza di non luogo a procedere ovvero di non doversi procedere (per mancanza di una condizione di procedibilità o per intervenuta causa estintiva).

Merita dire che, nonostante la precisione a livello terminologico, una parte della dottrina non è completamente rassicurata e teme che la giustizia riparativa possa aprire la strada ad un indebolimento del diritto di difesa e della presunzione di innocenza. Le preoccupazioni sono molto serie e meritano attenta valutazione. D’altro canto, però, bisogna sottolineare che i principi della giustizia riparativa differiscono da quelli del procedimento giurisdizionale: la composizione della lite avviene in una formazione a quattro e non più a due, e l’obiettivo centrale è la realizzazione di un programma e di attività che siano espressione “di un servizio pubblico di cura della relazione fra persone⁹⁰”; vige la volontarietà, la consensualità, l’equa considerazione, la riservatezza, il coinvolgimento della comunità. A queste regole si contrappongono l’obbligatorietà, la pubblicità, la formazione della prova in dibattimento della giustizia classica⁹¹.

⁸⁹ Vedi Relazione illustrativa al decreto legislativo 10 ottobre 2022, n. 150, cit., 532.

⁹⁰ Vedi Marco Bouchard, *Giustizia riparativa e vittima di reato*, cit., 106.

⁹¹ *Id.*

Proprio per le diversità esistenti, occorre garantire che il riconoscimento da parte del presunto autore all'interno di un programma riparativo del fatto lamentato dalla persona offesa (riconoscimento che dovrebbe valere solo in termini di fattibilità dello stesso⁹²) non si traduca, all'interno del parallelo contenitore processuale, in un'assunzione di responsabilità in senso penalistico o in una confessione.

Distinto dal programma è l'esito riparativo ossia, *ex lett. e*) del medesimo articolo, "qualunque accordo, risultante dal programma di giustizia riparativa, volto alla riparazione dell'offesa e idoneo a rappresentare l'avvenuto riconoscimento reciproco e la possibilità di ricostruire la relazione tra i partecipanti". L'accento posto sulla "reciprocità" richiama gli elementi essenziali della giustizia riparativa: l'essere orientata a risolvere il pregiudizio con modalità dialogica e il riconoscimento dei bisogni dell'altra parte, ricostruendo la relazione fra i/le partecipanti⁹³. Quando raggiunto, può essere di tipo simbolico o materiale. Con il primo si fa riferimento a gesti (quali scuse o dichiarazioni formali, impegni comportamentali anche pubblici) che siano volti a ricostruire positivamente la relazione fra i partecipanti e che testimoniano uno sviluppo positivo nel clima della loro relazione. Con il secondo invece la nozione resta "vaga" e

⁹² Sul punto "riconoscimento del fatto", sebbene il d.lgs. n. 150/2022 sia rimasto silente, una parte della dottrina ritiene che si dovrebbe considerarsi come norma *self executing* quella contenuta nella Direttiva 29/2012/UE, che ritiene sia indispensabile il riconoscimento dei fatti principali da parte del presunto autore nel caso di svolgimento di programma riparativo al fine di evitare forme di vittimizzazione secondaria. Su tale accertamento dovrebbe intervenire il/la mediatore/trice, non l'autorità giudiziaria. Questo rappresenterebbe un indispensabile "punto di partenza" per la realizzazione di un programma veramente espressione di un dialogo empatico fra le parti e teso alla (auto)responsabilizzazione della persona indicata come autore.

⁹³ Vedi Art. 43 comma 1 lett. b), che riporta quale principio a cui la giustizia riparativa in materia penale deve conformarsi: "l'equa considerazione dell'interesse della vittima del reato e della persona indicata come autore dell'offesa".

probabilmente molto legata alla natura degli interessi coinvolti⁹⁴. Importante dire che, al momento della conclusione del programma, il mediatore è tenuto a redigere una relazione da inviare all'autorità giudiziaria.

Rispetto ai principi che informano la giustizia riparativa, questi sono contenuti all'art. 43 d.lgs. 150/2022. Al comma 3 si afferma che "L'accesso ai programmi di giustizia riparativa è assicurato ai soggetti che vi hanno interesse con le garanzie previste dal presente decreto ed è gratuito".

L'unico motivo per il quale si può limitare l'accesso è, come viene scritto al comma 4, «il pericolo concreto per i partecipanti, derivante dallo svolgimento del programma»⁹⁵, sulla cui esistenza si pronuncia non solo il mediatore ma anche, *ex art. 129-bis c.p.p.* comma 1, l'autorità giudiziaria giudicante e requirente (nel corso delle indagini preliminari), quando reputa che lo svolgimento di un programma riparativo possa essere «utile» alla risoluzione del conflitto. Il significato di "pericolo" si dovrebbe intendere sia come i rischi di violenza fisica e psicologica derivanti dall'incontro delle parti (i quali, come si dirà, possono essere particolarmente presenti in reati espressivi di violenza di genere) e anche i possibili condizionamenti della funzione cognitiva del processo penale (es. esigenze cautelari, probatorie)⁹⁶.

⁹⁴ Vedi Federica Brunelli, *I programmi di giustizia riparativa, Il mediatore: ruolo, doveri, formazione*, in Valentina Bonini (a cura di), *La giustizia riparativa* (d.lgs. n. 150/2022 – d.lgs. n. 31/2024), 162, (Torino: Giappichelli, 2024).

⁹⁵ Per un commento al comma 4, cfr. Elena Mattevi, *Definizioni e principi generali della giustizia riparativa tra indicazioni sovranazionali e previsioni nazionali*, cit., 90. L'Autrice scrive: "Contrariamente a quanto contenuto nella Relazione illustrativa al decreto, il giudizio sul pericolo concreto per gli interessati non dovrebbe spettare solo all'autorità giudiziaria, ma anche ai mediatori esperti che prendono in carico il caso e che potrebbero acquisire informazioni decisive sul punto [...]".

⁹⁶ Vedi Marco Bouchard & Fabio Fiorentin, *La giustizia riparativa*, 192-200, (Torino: Lefebvre Giuffré, 2025).

Altri aspetti assolutamente non secondari sono: la partecipazione attiva e volontaria delle parti suggellata dal loro consenso (che deve sussistere in ogni fase dell'*iter*).

Nel corso del programma gli interessati sono invitati a esprimere i loro vissuti, punti di vista e a dialogare; sulle dichiarazioni fatte vige la massima riservatezza. Volendosi infatti mantenere su due binari separati, il canale della giustizia riparativa e quello del sistema penale classico, non si forniscono degli strumenti (né al pubblico ministero né al giudice) per venire a conoscenza di quanto accaduto nel programma, se non la relazione del mediatore, la quale contiene "la descrizione delle attività svolte e dell'esito riparativo raggiunto" (art. 57 comma 1). L'aspetto della riservatezza non è secondario ma, anzi, concorre a creare il clima/presupposto necessario a far sì che le parti si aprano al dialogo in modo sincero, sentendosi al sicuro e potendo toccare anche degli aspetti emotivi – se lo desiderassero.

Gli esiti riparativi, invece, devono conformarsi alla "ragionevolezza" e alla "proporzionalità"; questi due parametri non tendono alla realizzazione di un esito che si presenti come "aritmeticamente" equilibrato ma che possa definirsi in qualche modo proporzionato rispetto alla dimensione offensiva del reato per come emersa dall'incontro fra le parti⁹⁷. Dell'esito riparativo farà una valutazione l'autorità giudiziaria, ai fini dell'art. 133 c.p. "Gravità del reato: valutazione agli effetti della pena"; della sospensione condizionale della pena *ex* art. 163 c.p. o dell'attenuante *ex* art. 62 n.6 c.p., della remissione tacita della querela oppure, in fase di esecuzione, ai fini dell'assegnazione al lavoro esterno, permessi premio, misure alternative alla detenzione o liberazione condizionale.

⁹⁷ *Id.*, 92. Per approfondimenti sui requisiti di "ragionevolezza" e proporzionalità" (in chiave critica). Cfr. Francesco Parisi, *Giustizia riparativa e sistema penale*, cit., 208. L'Autore auspica l'eliminazione di tali due parametri al fine di poter rendere la definizione di "esito riparativo" la più inclusiva possibile, vista l'ampiezza che il significato di riparazione a un'offesa può assumere.

Da come emerge, la nuova pena cd. “riparativa” diventa un’integrazione delle ‘teorie sugli scopi della pena’ già esistenti; non apporta delle modifiche qualitative, ma quantitative: la pena, per come già definita, resta; ciò che può mutare è la sua durata⁹⁸. Il rischio di una strumentalizzazione della giustizia riparativa in chiave deflattiva forse non è così alto, dato che solo nel caso di reati perseguibili a querela remissibile si può avere l’estinzione della vicenda criminale al di fuori del contenitore procedimentale⁹⁹.

La panoramica sull’istituto sopra offerta è minima e non approfondisce i diversi dubbi, questioni e riflessioni a cui esso apre. Certamente, oggi, delle scelte “a monte”, dei bilanciamenti sono stati compiuti dal legislatore; ciò però non cancella il fatto che la giustizia riparativa non è una scelta costituzionalmente “neutra” ma, al contrario, pone dei ripensamenti sul modo di interpretare i principi propri della giustizia penale classica (che fanno da “eco” al testo fondamentale): il principio di legalità, della certezza della pena, (*Nullum crimen, nulla poena sine lege*), dell’obbligatorietà dell’azione penale, della presunzione d’innocenza, del “giusto processo” condotto da un giudice terzo e imparziale, la ragionevole durata dei processi... per citarne alcuni. Ognuno di loro, seppur contenuto nella cornice riparativa, ne esce modificato nelle sue sfumature e contorni.

I dubbi costituzionali che emergono sono importanti e per fare in modo che diventino motore di cambiamento e non un freno serve accompagnarli da, forse, nuovi paradigmi, i quali non possono nascere senza un cambiamento culturale: per abbracciare una nuova concezione della giustizia, per accogliere delle risposte che vadano oltre quella retributiva-carceraria (data la tensione con il principio rieducativo della pena), per evitare la strumentalizzazione “populista” della vittima che potrebbe portare a un rafforzamento

⁹⁸ Cfr. Francesco Cingari, *Giustizia riparativa e commisurazione della pena criminale*, in Valentina Bonini (a cura di), *La giustizia riparativa (d.lgs. n. 150/2022 – d.lgs. n. 31/2024)*, 248, (Torino: Giappichelli, 2024).

⁹⁹ *Id.*, 243.

della linea securitaria, per non creare errate sovrapposizioni fra il concetto di “assunzione di responsabilità” e di “colpevolezza” in capo al presunto autore del fatto, per ripensare radicalmente la pena,..., per tutto ciò serve l’educazione. O, per meglio dire, diseducarsi/decostruirsi e poi imparare di nuovo. Per esempio, ritenere che la sete di vendetta e di punizione *post delictum* sia una caratteristica intrinseca e insuperabile della psiche umana e che, al contrario, non sia una tendenza sulla quale è possibile lavorare e che è possibile affrontare attraverso modalità e linguaggi diversi, chiude già in partenza qualsiasi porta ad un diritto penale alternativo.

Chiaramente non si devono sminuire i cambiamenti, la fatica, i fallimenti che la giustizia riparativa porterà con sé: come ogni cosa, richiederà tempo, sensibilizzazione, finanziamenti, supporto sociale e politico al fine di poter iniziare a dare i suoi frutti. Quello che però, forse, è necessario, è evitare di applicare ingiusti “*doppi standard*”¹⁰⁰ di valutazione nei suoi confronti, a maggior ragione per il fatto che i modelli fino ad ora *in auge* non sono stati in grado di dimostrare (quantitativamente e qualitativamente) la loro efficacia. Giustizia riparativa (a maggior ragione nella prospettiva “complementare” che il legislatore italiano le ha conferito) non è sinonimo di “giustizia privata”, “vendetta”, “giustizia arbitraria” ma mira al recupero di un altro principio rilevante: il diritto di autodeterminarsi, di prendere parola (sia come vittime sia come persone indicate quali autori) nella ricerca di una risposta effettivamente *giusta* al reato.

3.3. *Uno sguardo internazionale: pro e contro della giustizia riparativa per reati espressione di violenza di genere*

Avendo tratteggiato singolarmente il fenomeno della violenza di genere e l’istituto della giustizia riparativa, giunge ora il momento di unificarli attraverso la domanda contenuta in apertura: è

¹⁰⁰ Con questa espressione si intende una forma di *bias* cognitivo in forza del quale si applicano dei principi di giudizio diversi (prescindendo dalle ragioni per cui lo si fa, che possono essere culturali, di genere, sociali) per situazioni simili.

desiderabile (oltre che opportuno) che in Italia la giustizia riparativa venga utilizzata anche per quei reati che sono espressione di violenza di genere?

L'utilizzo di questi due aggettivi non è casuale: come scritto sopra, il dato normativo non introduce nessuna preclusione all'accesso al programma riparativo sulla base del titolo di reato o sulla sua gravità; dunque, per i reati quali – ad esempio – la violenza sessuale, maltrattamenti contro familiari e conviventi, atti persecutori (che sono, secondo dati ISTAT¹⁰¹, i maggiormente denunciati), legalmente e astrattamente si potrebbe, lato autore e/o lato vittima, farne richiesta.

L'approccio scelto al tema cita le esperienze e le decisioni legislative compiute in altri stati sia dell'Unione europea che extra e i testi internazionali. Grande punto di riferimento sono le voci di operatori/operatorici che lavorano nel settore della violenza di genere o in centri di giustizia riparativa.

Punto di partenza è che i reati di violenza di genere possono essere commessi all'interno di un contesto di familiarità e di legame intimo/amicale/di fiducia fra *abuser* e *victim* o, al contrario, le parti coinvolte possono essere estranee o appena conoscenti. La violenza, inoltre, può essere perpetrata all'interno di contesti in cui è più facilmente individuabile una dinamica di squilibrio di potere (si fa riferimento, per esempio, alla famiglia ma anche al luogo di lavoro) o anche in luoghi apparentemente neutri ma che, nella sostanza, si rivelano molto spesso densi di discriminazioni (si fa riferimento, per esempio, alla "strada" ma anche alla dimensione eterea dell'*internet*). Queste diversità certamente ricadono su aspetti legati sia al profilo

¹⁰¹ ISTAT, *Denunce Forze di Polizia. Il percorso giudiziario* (Statistiche Ministero dell'Interno, 2014–2022), available at <https://www.istat.it/statistiche-per-temi/focus/violenza-sulle-donne/il-percorso-giudiziario/denunce-forze-di-polizia/>, (last visited on 18.11.2025), (come risulta dai dati, le fattispecie annualmente più denunciate, sia a livello regionale sia nazionale, sono maltrattamenti in famiglia, atti persecutori e violenza sessuale; le recenti introduzioni di reato — come l'art. 612-ter c.p. — possono spiegare numeri ancora limitati).

criminologico dell'autore sia a quello 'vittimologico' della persona offesa, ma anche: sulla loro dinamica relazionale; sull'esistenza di altre vittime che, indirettamente, sono state lese dal crimine (si pensi, ad esempio, alla cd. 'violenza indiretta' agita verso le figlie e ai figli, nel caso di violenza in famiglia); sulla composizione della "comunità" che può essere stata lacerata dal fatto criminoso e chiede di prendere parola. Inoltre, la tipologia delle violenze può variare nella sua durata: in particolare, la violenza interna ad una relazione affettiva può essere situazionale (ossia, accadere una sola volta); situazionale ma in qualche modo ricorrente/strutturale (soprattutto si verifica al manifestarsi di determinate situazioni quali, per esempio, (ab)uso di alcool o sostanze stupefacenti); vero e proprio cd. "*intimate terrorism*", ossia il caso in cui la violenza assume la forma di controllo totale, *escalations* ricorrenti di atti violenti unita all'esercizio di potere sulla persona che ne è destinataria¹⁰².

Data questa premessa non si può nascondere il fatto che le specificità della singola fattispecie criminosa suscitano delle riflessioni, dei dubbi, delle possibilità propri rispetto alla sua trattazione all'interno di un percorso riparativo; a renderla ancora più specifica sono poi le stesse persone coinvolte, i loro caratteri, le loro prospettive, i loro desideri. E ognuna di queste reazioni/versioni è legittima e merita di essere validata poiché non esiste né il manuale della vittima perfetta, né quello dell'autore mostruoso. Va detto però che ciò che si cela dietro l'eccessivo particolarismo è il rischio di mettere sullo sfondo gli (esistenti) punti di contatto che uniscono tutte le fattispecie che danno origine alla violenza di genere: primo fra tutti, lo squilibrio di potere – che affonda le sue radici nella cultura, nella storia, nel modo di concepire i rapporti tra vittima e autore – e poi gli

¹⁰² K. Lünemann and A. Wolhuis, *Victim Offender Mediation: Needs of Victims and Offenders of Intimate Partner Violence. 2nd Comparative Report – Interviews & Focus Groups* at 5 and 10 (Criminal Justice Programme, European Commission 2015), available at http://www.antoniocasella.eu/restorative/Lunneman_2015.pdf (last visited on 18.11.2025) (con dati raccolti nel 2013 nell'ambito di un progetto finanziato dalla Commissione Europea).

stereotipi che, per l'appartenenza ad un determinato genere, vengono ricondotti e, in modo più o meno violento, fatti rispettare. Dato questo indimenticabile e importante nucleo comune, nascono delle riflessioni che possono essere trasversali ad ogni dinamica di 'violenza di genere'.

Entrando nel vivo del dibattito, sotto il profilo internazionale tre sono i testi di cui occorre fare menzione. In primo luogo, *l'Handbook on Restorative Justice Programmes*, *l'Handbook for Legislation on Violence against women* e la Convenzione di Istanbul.

Rispetto al primo testo, come si ricorda al capitolo 2 (*Overview of standards and norms*), punto 4 (*Other relevant international standards and norms*), il Comitato della CEDAW raccomanda che l'utilizzo di forme alternative di risoluzione delle controversie, inclusa la mediazione e la conciliazione “*should be strictly regulated and allowed only when a previous evaluation by a specialized team ensures the free and informed consent of victims/survivors and that there are no indicators of further risks to the victims/survivors or their family members*”; aggiunge che queste procedure “*should empower the victims/survivors [...] ensuring adequate protection of the rights of women and children*”¹⁰³.

Nel secondo testo, le previsioni sono molto forti e, come indicato al capitolo 3.9.1, si parla di una generale “*Prohibition of mediation*”, a cui si accompagna la raccomandazione, rivolta ad ogni legislatore aderente, per cui la relativa disciplina dovrebbe “*Explicitly prohibit mediation in all cases of violence against women, both before and during legal proceedings*.” Il divieto trova la sua radice nel presupposto che, sottraendosi il caso al controllo giudiziario, “[it] presumes that both parties have equal bargaining power, reflects an assumption that both parties are equally at fault for violence, and reduces offender accountability”

¹⁰³ United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, 2nd ed., at 20 (Vienna, Criminal Justice Handbook Series 2020) (indicando, tra gli esempi virtuosi, la legislazione spagnola che dal 2004 vieta la mediazione nei casi di violenza contro le donne).

¹⁰⁴. Il rischio (che giustifica il divieto) che si paleserebbe sarebbe dunque quello della re-vittimizzazione della vittima durante il programma riparativo (causata dalla disparità di “potere di contrattazione” con l’autore) e la non adeguata condanna di quest’ultimo.

All’interno della Convenzione di Istanbul, fondamentale è l’art. 48, che non prevede una preclusione in generale ma, come si evince dalla rubrica dello stesso, *the “Prohibition of mandatory alternative dispute resolution processes or sentencing”*. Come recita tale articolo infatti, “Le parti devono adottare le necessarie misure legislative o di altro tipo per vietare il ricorso obbligatorio a procedimenti di soluzione alternativa delle controversie, incluse la mediazione e la conciliazione, in relazione a tutte le forme di violenza che rientrano nel campo di applicazione della presente Convenzione”¹⁰⁵. È il carattere di obbligatorio dei percorsi di giustizia riparativa per i reati di violenza di genere ad essere vietato dal Consiglio d’Europa, non l’utilizzo in sé; superato il precedente errore di traduzione commesso dal legislatore italiano nel momento di ratifica della Convenzione di Istanbul¹⁰⁶, si può affermare che non esista nessuna preclusione, ad oggi, sul punto.

¹⁰⁴United Nations, Department of Economic and Social Affairs, Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* at 38, para. 3.9.1 (New York, United Nations 2010), available at <https://www.un.org/womenwatch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (last visited on 18.11.2025)), quoted and translated in Anna Lorenzetti and Roberta Ribon, *Giustizia riparativa e violenza di genere: alla ricerca di un possibile dialogo*, *Giudicedonna.it*, no. 4 (2017), at 7–8.

¹⁰⁵Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence* (Istanbul Convention), CETS No. 210, May 11, 2011, art. 48.

¹⁰⁶Elena Mattevi, *Giustizia riparativa e violenza di genere: brevi considerazioni su una relazione possibile, a certe condizioni*, *Sistema Penale*, no. 11 (9 dic. 2024), at [pagina se disponibile], available at <https://www.sistemapenale.it/it/documenti/giustizia-riparativa-e-violenza-di-genere-una-relazione-pericolosa> (last visited on 18.11.2025) (come evidenzia l’autrice, con la ratifica della Convenzione di Istanbul, avvenuta con legge n. 77/2013,

Guardando agli Stati stranieri invece, quelli che hanno compiuto delle scelte legislative contrarie all'utilizzo della giustizia riparativa per reati di violenza di genere, sono la Spagna e la Francia¹⁰⁷. Posizioni opposte sono state adottate in Austria, Finlandia, Grecia, Olanda, Danimarca e, oltre i confini europei, Nuova Zelanda, Canada, America.

Interessante citare, fra tutti, il caso austriaco; l'associazione *Neustart* che è incaricata di gestire le misure di *probation* tra cui anche la mediazione, la quale viene ampiamente utilizzata (si stima, in generale, per circa l'85% dei casi entrati nel circuito penale¹⁰⁸) anche per i casi di *intimate partner violence* (conosciuta con l'acronimo IPV). Questa opera su tutto il territorio nazionale e analizza, come si evince dal Report di Valutazione dell'Austria del 2017 redatto dal GREVIO¹⁰⁹ circa 1500 casi all'anno. Bisogna specificare che nei dati raccolti non si opera una distinzione fra i casi in cui la mediazione rappresenta una forma di vera e propria *diversion* processuale (assegnati al "*pre-trial-stage*" dal pubblico ministero a *Neustart*) e quelli in cui si utilizza *post* condanna¹¹⁰.

il legislatore italiano aveva introdotto un testo tradotto non ufficialmente che, all'art. 48, conteneva un divieto assoluto di mediazione in casi di violenza contro le donne. Tale traduzione è stata rettificata con comunicato pubblicato in Gazzetta Ufficiale, Serie Generale n. 278 del 28/11/2017).

¹⁰⁷ Cfr. Gabriella Di Paolo, *La giustizia riparativa: esperienze oltre confine*, Processo penale e giustizia, Fasc. straord. (2023), at 34–35 (per approfondimenti sulle scelte legislative comparate: in Spagna, *Ley Orgánica* 1/2004, de 28 de diciembre, de Medidas de Protección Integral contra la Violencia de Género — confermata da *Ley Orgánica* 10/2022, de 6 de septiembre — che vieta l'utilizzo della giustizia riparativa e della mediazione nei reati di violenza fisica, psicologica, sessuale e molestie; in Francia, dal 2020 è esclusa la possibilità di ricorrere a percorsi riparativi nei casi di violenza nella coppia o commessa da un partner).

¹⁰⁸ K. Lünemann & A. Wolhuis, *Victim Offender Mediation*, cit., 5.

¹⁰⁹ GREVIO, *Baseline Evaluation Report – Austria* (Council of Europe, 2017), pp. 43 e ss., <https://rm.coe.int/grevio-report-austria-1st-evaluation/1680759619>.

¹¹⁰ Più informazioni sono ricavabili dall'*addendum* al secondo report redatto all'interno dell'UE nel novembre 2015, specifico dell'Austria che, oltre a descrivere una serie di casi realmente realizzati di mediazione, ha riportato quanto emerso da

Non potendosi approfondire, si dice che in ognuno degli stati sopra menzionati la giustizia riparativa si può instaurare in diverse fasi del procedimento. In Danimarca, in Olanda e in Grecia, per esempio, questa è complementare al sistema penale; nei primi due paesi si può attivare sia *pre* che *post* al processo; nel terzo solo *pre*. Ma anche con diverse modalità: in Austria si privilegia la *victim-offender mediation* (VOM); in Nuova Zelanda si ricorre alla modalità delle “*Conferences*”, ossia i gruppi di discussione che si svolgono fra la vittima, l'autore, assistenti sociali, altre figure di supporto e familiari; in Canada, invece, è stata “recuperata” la modalità dei “*Circles*”, ossia un *community-based approach* di risoluzione delle controversie.

Da come emerge c'è una forte dicotomia nelle scelte compiute dagli ordinamenti e per questo è interessante approfondire i motivi di chiusura e di apertura alla giustizia riparativa per i casi di violenza di genere.

Rispetto alle criticità, molte voci provenienti dalla dottrina, soprattutto femminista, dai Centri a tutela delle vittime di violenza e da organismi internazionali hanno fatto sentire il loro dissenso e preoccupazione. Una delle critiche più forti al suo utilizzo rivendica il recente superamento dell'idea per la quale le forme di violenza contro le donne (in particolare legate alla dimensione domestica e sessuale) siano un affare privato, destinato a essere trattato con riservatezza. Il rischio che si vede sotteso alla giustizia riparativa è quello di ripristinare una gestione delle problematiche o delle dinamiche legate al nucleo familiare all'interno della famiglia stessa;

una discussione intervenuta fra esperti di giustizia riparativa nei casi di violenza fra partner. In questa hanno preso parte due membri dello staff di *Neustart*, un pubblico ministero, un/a giudice, la direttrice di un “*Violence Protection Centre*”. Cfr. B. Haller & V. Hofinger, Austria, in *Victim Offender Mediation: Needs of Victims and Offenders of Intimate Partner Violence. Addendum to the 2nd Comparative Report: The Country Reports, Criminal Justice 2013, with the financial support of the European Commission*, November 2015, https://www.ikf.ac.at/wp-content/uploads/2021/04/RJ_Country_Report.pdf.

modalità che ricorda molto il famoso detto popolare de “i panni sporchi si lavano in casa”.

Un altro punto di critica mette al centro la persona offesa; in generale, delineando un’immagine di vittima “fragile”, la cui impotenza e vulnerabilità è la diretta conseguenza della posizione di dominio in cui si trova la persona che ha agito violenza, si porta come argomentazione lo squilibrio di potere fra le due parti. Si noti anche il dato secondo cui i reati espressivi di violenza di genere seguono una dinamica “ciclica”, che passa sotto il termine tecnico di “*stop and go*”¹¹¹: questo andamento renderebbe la giustizia riparativa un’opzione pericolosa.

Altre critiche riguardano l’autore. Il loro filo conduttore, contenuto sia nell’*Handbook for Legislation on Violence against women* e nei rapporti GREVIO, è l’intollerabilità della sua impunità e il bisogno di una sua responsabilizzazione – che può avvenire solo all’interno del contenitore processuale. La minaccia che viene rinvenuta nella giustizia riparativa, soprattutto negli ordinamenti in cui è realizzabile in ogni stato e grado del procedimento, addirittura prima della proposizione di un’eventuale querela, è il possibile meccanismo deflattivo che potrebbe scatenare. Le operatrici ritengono ingiustificabile che un modo per “sgravare il carico di lavoro di Procure e Tribunali”¹¹² ricada sulle donne che subiscono o hanno subito violenza, invitandole a ricorrere a meccanismi di risoluzione del reato esterni alle aule giudiziarie. Letto sotto questa

¹¹¹ Richiamandosi agli studi di Leonor E. Walker, si dipingono le dinamiche che accadono “nei più” dei casi di violenza maschile ed in particolare di violenza domestica. Questa è un’alternanza di cicli di aggressioni/scuse/perdono che si continua a ripetere nel tempo, ma le fasi di riappacificamento diventano sempre più brevi e le violenze sempre più gravi. L’andamento ciclico si riflette poi nel comportamento delle vittime che si rivolgono ai Centri antiviolenza, che chiedono aiuto quando ricorre l’aggressione e lo interrompono nel momento della riappacificazione.

¹¹² Elena Biaggioni, *Giustizia riparativa e violenza di genere. Una relazione tossica e pericolosa*, in *Giustizia riparativa e violenza di genere: una relazione pericolosa? Sistema penale*, cit., 25 (9 dicembre 2024).

lente, le voci critiche intravedono la diffusione del messaggio per cui i reati che integrano la violenza di genere non siano particolarmente importanti e non meritino le garanzie, le tutele, la pubblicità che sono tipiche del procedimento penale.

In aggiunta, basandosi sui risultati ottenuti all'interno dei percorsi di 12 mesi obbligatori nei CUAV (Centri per uomini autori di violenza) – si riporta la difficoltà sia di lavorare con gli uomini che hanno agito violenza sia di far riconoscere loro la responsabilità di quanto compiuto. Dunque, si domandano: è possibile ottenere tale responsabilizzazione/riconoscimento del fatto all'interno di un percorso di riparazione, condotto da una sola persona, che ha sicuramente una durata minore?¹¹³ Come ostacolo ulteriore viene richiamata l'eventualità in cui la persona indicata come *offender* decida di ricorrere alla giustizia riparativa solo per ottenere dei vantaggi processuali quali, per esempio, evitare un processo oppure ottenere uno sconto di pena. Se questa è l'unica motivazione sottesa alla scelta di cominciare un percorso riparativo, è possibile che possa riconoscere il male arrecato e responsabilizzarsi?

Ultimo punto della critica riguarda le abilità della persona a cui è affidata la gestione del percorso riparativo. Si esprimono diverse preoccupazioni circa la possibilità che il lavoro del mediatore/della mediatrice possa arrivare, per esempio, ad acuire la dinamica violenta tra le parti, anziché eliminarla, nell'eventualità in cui intervenga in un momento in cui le parti non sono "pronte", ma sono state erroneamente considerate tali. Oppure, potrebbero presentarsi dei casi di "apparente esito positivo" che potrebbero sfociare nel prosieguo della dinamica violenta o, peggio ancora, del suo aggravamento.

Esauriti i punti contrari, si approfondisce la prospettiva opposta, che viene offerta da coloro che si adoperano per realizzare la giustizia riparativa nei casi di violenza contro le donne (e la sostengono) nelle diverse parti del mondo di cui sopra si è parlato,

¹¹³ *Id.*, 30.

Per cominciare, sul rischio della re-privatizzazione della giustizia penale e la connessa diminuzione del disvalore del fatto violento commesso bisogna fare una puntualizzazione. Ciò che caratterizza la giustizia riparativa non è la fuoriuscita dal circuito della “rilevanza penale” di un fatto ma la sua eventuale trattazione al di fuori delle dinamiche classiche che si sviluppano nelle aule giudiziarie – spesso luogo di vittimizzazione¹¹⁴. Adottarla non dovrebbe portare a diminuire il carattere riprovevole (in termini penali, l’offensività e il disvalore) delle singole fattispecie né il carattere di pubblicità che il fenomeno della violenza di genere, anche per via del diritto penale, ha acquisito negli anni recenti.

Venendo agli altri punti, il primo riguarda la persona offesa. Tra coloro che sostengono la giustizia riparativa in questo settore si riscontra positivamente che le vittime, all’interno del percorso, vivono una sorta di *empowerment*.¹¹⁵ Ciò accade proprio per il fatto che a queste è data la possibilità di portare la loro esperienza in maniera diretta, usando le loro parole e voce. Quello che si dovrebbe creare grazie all’aiuto del mediatore è uno spazio di ascolto: le persone offese, forse proprio per la prima volta, hanno la possibilità di farsi sentire. L’acquisizione di fiducia, sicurezza, autostima che il confronto diretto con l’autore, in uno spazio non giudicante, potrebbe provocare, può a tutti gli effetti essere il mezzo attraverso cui

¹¹⁴ Per alcuni casi concreti: Corte di Appello di Torino, Sez. IV penale, sent. 31 marzo 2022 (dep. 20 aprile 2022), n. 2277, nel commento del 22 luglio 2022 di Elena Biaggioni, *La difficile posizione delle vittime di violenza sessuale: l’insostenibile confronto con il pregiudizio sulla scarsa attendibilità della persona offesa e lo stereotipo dello stupratore modello*, in *Sistema penale*, <https://www.sistemapenale.it/it/scheda/vittima-violenza-sessuale-pregiudizio-scarso-attendibilita-persona-offesa>; Cass., Sez. III, sent. 16 ottobre 2019 (dep. 12 febbraio 2020), n. 5512.

¹¹⁵ Cfr. L. Drost, B. Haller, V. Hofinger, et al., *Restorative Justice in Cases of Domestic Violence: Best Practice Examples Between Increasing Mutual Understanding and Awareness of Specific Protection Needs*, Comparative Report, Criminal Justice 2013, with the financial support of the European Commission, January 2015, p. 13, https://www.euforumrj.org/sites/default/files/2019-12/7388_restorative_justice_in_cases_of_domestic_violence.pdf.

compensare l'effettivo squilibrio di potere da cui il reato è caratterizzato e "nutrito". Inoltre, avere il supporto di una parte terza, neutrale (e anche della comunità partecipante) che in nessun modo "scarica" la colpa sulla vittima o sul suo comportamento può essere un elemento non solo di crescita personale ma anche di validazione esterna/pubblica del proprio vissuto di abuso¹¹⁶.

Il secondo punto riguarda la persona indicata come autore. Forse dovendosi compiere un "atto di fiducia" bisogna chiedersi: un percorso riparativo, caratterizzato dalla ricerca di un dialogo (e di una preparazione in questo senso) in cui non c'è spazio per vittimizzare la vittima o "scaricare" le proprie responsabilità all'esterno, può effettivamente spingere una persona ad assumersi il peso del proprio agito? A farsene carico? Anche per gli *offenders* il percorso riparativo potrebbe essere d'aiuto per sviluppare empatia, soprattutto grazie all'ascolto delle parole della persona su cui hanno agito violenza. Un dialogo in cui l'autore non è un imputato, ma parte, potrebbe porre delle condizioni per l'avvio di un percorso di cambiamento, più di quanto non possa fare un processo – nel quale la vittima non ha pressoché ruolo e la persona imputata (fermo restando il principio del *nemo tenetur se detegere*) raramente riconosce il fatto di reato. Potrebbe anche dissuadere lo stesso (e il suo avvocato) dall'usare delle linee difensive cd. strumentali¹¹⁷. Che delle

¹¹⁶ *Id.*

¹¹⁷ Cfr. E. Beringheli, *Il profilo dell'autore dei reati di violenza domestica. Il trattamento criminologico*, Corso di formazione contro la violenza sulle donne – Edizione 2024, Università degli Studi di Milano, Dipartimento di Scienze Biomediche per la Salute, https://www.ordineavvocatomilano.it/media/allegati/SERVIZI%20PER%20IL%20CITTADINO/VIOLENZA%20SULLE%20DONNE/CORSO%20PROFESSIONALIZZANTE%202024/Corso17_9_24%20Enrica%20Beringheli.pdf. Alla *slide* n. 5 fa riferimento all'utilizzo della linea difensiva della "Incapacità di intendere e di volere" (che si desume, a contrario, dall'art. 85 c.p.), quale mezzo per dichiarare la non imputabilità della persona imputata: "Nel 37% dei casi il giudice dispone la perizia psichiatrica ma alla fine si è registrata solo nel 21,4% dei casi una sentenza di assoluzione per una totale incapacità di intendere e di volere". Precisa che questa strategia difensiva è stata praticata anche in assenza di precedenti psichiatrici

scuse non siano sufficienti per dimostrare il cambiamento di una persona è fuori di dubbio, ma che possano esserne la premessa è un elemento da valorizzare¹¹⁸. In aggiunta, il carattere volontario dell'accesso al percorso potrebbe portare a degli esiti più fruttuosi rispetto alla partecipazione obbligatoria a percorsi di recupero.¹¹⁹

3.4. Cosa desiderare in Italia?

Tirare le fila del discorso, vista la delicatezza dei temi trattati, non porta a delle risposte assolute ma, forse, a nuovi punti di partenza.

Ferma la critica all'odierno utilizzo del diritto penale in chiave educativa e la modalità punitiva con la quale si risponde alla commissione di reati e fermo il d.lgs. n.150/2022, che non prevede nessuna astratta forma di preclusione all'accesso alla giustizia riparativa basata sul titolo di reato o sulla sua gravità, si indaga lo scenario in cui questa viene effettivamente utilizzata per riparare le conseguenze dannose derivanti da un reato espressione di violenza

(persone già in cura o che abbiano avuto un tso). Interessante il collegamento fra la bassa percentuale di persone indicate "incapaci" per reati di violenza domestica e la frequente narrazione mediatica che narra, in riferimento a colui che ha commesso il fatto, di "*raptus*" di gelosia, rimandando a un immaginario di alterazione mentale. Rispetto al riconoscimento del fatto, riporta che nel 91,4% l'equipe che si occupa di realizzare il trattamento criminologico riscontra una non ammissione di responsabilità del fatto prima del trattamento, che si abbassa al 19% dopo di questo.

¹¹⁸ . Haller & V. Hofinger, Austria, in *Victim Offender Mediation: Needs of Victims and Offenders of Intimate Partner Violence. Addendum to the 2nd Comparative Report: The Country Reports*, Criminal Justice 2013, with the financial support of the European Commission, November 2015, p. 9, https://www.ikf.ac.at/wp-content/uploads/2021/04/RJ_Country_Report.pdf. Per completezza espositiva va citato il fatto che in taluni dei casi analizzati due *offenders* sono stati accusati per altri due attacchi violenti alla *partner* (in un caso, il condannato è stato proscioltto, nel secondo, condannato al pagamento di una "*conditional fine*" e a seguire un *anti-violence training*.) In altri due casi la violenza, da fisica, è diventata psicologica.

¹¹⁹ Per approfondimenti: Alessandro Catania, *Rilievi sulla natura penale dei percorsi di recupero per sex offenders. Le tre interpolazioni dell'art. 15, L. n. 168/2023*, in *Diritto penale e processo*, n. 2, (2024).

di genere e per ricucire le relazioni interpersonali (individuali e collettive) che a causa di questo si sono strappate. Questa operazione “intellettuale” consente di mettere meglio in luce degli aspetti imprescindibili (e da garantire) a cui apre una risposta favorevole.

In *primis*, la realizzazione di un percorso riparativo deve partire da una corretta “valutazione dei rischi”. Affinché la persona a cui è affidata la mediazione nel caso di specie e/o i giudici e/o i pubblici ministeri (che decidessero di inviare il caso al Centro di giustizia riparativo competente) valutino correttamente l’esistenza di un pericolo concreto (*ex art. 43 del d.lgs. n. 150/2022*) derivante dallo svolgimento del programma, servono dei criteri comuni. Questi esistono già e sono ancora più preziosi e validi perché delineati anche sulla base dell’esperienza dei CAV. Su proposta dall’Associazione Differenza Donna, è stato avviato un programma europeo (FuTuRe) che si è concluso con la stesura di una serie di linee guide per la valutazione e l’autovalutazione del rischio di recidiva della violenza maschile contro le donne nelle relazioni di intimità¹²⁰. L’utilizzo di questionari di valutazione del rischio rappresenta uno strumento prezioso, soprattutto per quanto riguarda l’eventuale estensione della giustizia riparativa ai casi di *intimate partner violence*. Griglie, questionari, *risk assessment* diversi dovrebbero essere elaborati e applicati per affrontare gli altri (e numerosi) casi che compongono l’insieme delle tipologie di violenza contro le donne (che mutano per luoghi e modalità). La loro seria applicazione dovrebbe, per esempio, consentire di individuare una infattibilità del programma nei casi, per esempio, di *domestic violence*, sfociati in “*intimate terrorism*”. Ulteriori valutazioni sulla possibilità in concreto di accedere alla giustizia riparativa andrebbero parametrize caso per caso, sulla base del reato di cui si sta discutendo, della relazione fra le parti, dei loro caratteri, del tempo trascorso dalla commissione del fatto violento, del momento processuale in cui si inizierebbe il percorso. Ogni elemento

¹²⁰ Per approfondimenti, FuTuRe, *Linee guida per la valutazione e l’autovalutazione del rischio di recidiva della violenza maschile contro le donne nelle relazioni di intimità*.

è importante e sarebbe impossibile (oltre che inutile) pensare a tutte le “combinazioni fattuali” possibili: la realtà, molto spesso, riesce a superare la fantasia.

In *secundis*, dovrebbero essere adottati dei criteri comuni per la corretta raccolta del consenso. Con riferimento alla vittima, nel momento di informazione sull'esistenza della giustizia riparativa si deve evitare, in tutti i modi, di dipingerla come una (ennesima) forma di “lavoro di cura” (in questo caso educativo/rieducativo) che questa ha nei confronti del suo *abuser*. Riformulando: si deve in tutti i modi cercare di evitare la narrazione, vittimizzante/colpevolizzante/moralizzante, secondo cui è compito della persona che ha subito violenza “prendersi cura” e “sentirsi responsabile” della rieducazione della persona che con lei è stata violenta. La decisione di intraprendere tale percorso non dovrebbe mai nascere da questa sorta di “senso di colpa”, le cui origini sono sicuramente da ricondurre ad un modello culturale patriarcale. Al contrario, dovrebbe nascere dal desiderio di aver capito che è la persona violenta ad essere nel torto e che lei, in quanto vittima, non è responsabile di quanto subito. La spinta alla giustizia riparativa dovrebbe nascere, in modo quasi pressoché esclusivo, dalla convinzione che il confronto con l'autore possa metterla nella condizione di dire quello che desidera colmando così, forse, quello squilibrio di potere che ha caratterizzato il rapporto – superando lo stigma della vittima e sopravvivendo alla violenza subita.

Inoltre, dovrebbe, essere assolutamente chiarificato il modo in cui il mediatore dovrebbe comportarsi se si verificasse, ad esempio, una modifica del titolo di reato, durante lo svolgimento del programma. Soprattutto con riferimento alla “*intimate partner violence*” – che spesso in Italia si sussume sia nel reato di maltrattamenti che nei i “reati spia” di “Lesioni” o “Percosse” – potrebbe essere importante stilare un “protocollo comune” per i casi in cui, nel corso del programma riparativo, emergesse uno storico di violenza molto più ampio di quanto inizialmente dichiarato e ciò

portasse alla configurazione di nuove ipotesi di reato. Sulla base delle testimonianze delle operatrici di settore, accade molto di frequente che la vittima denunci l'ultimo episodio di violenza e tutti gli altri emergano solo successivamente. In questa eventualità, quale prassi operativa dovrebbe seguire il mediatore?

Da una parte si deve tenere fermo il dovere di riservatezza a cui, *ex art.* 50 del d.lgs. n.150/2022, è tenuto; dall'altra, si deve considerare che all'art. 52 si scrive che il mediatore non può essere obbligato alla denuncia o alla deposizione davanti all'autorità giudiziaria o ad altre autorità sugli atti compiuti, sulle dichiarazioni rese dai partecipanti e sulle informazioni apprese, salvo: il loro consenso; il pericolo di commissione di imminenti o gravi reati; quando le dichiarazioni integrino di per sé reato. Esclusi i tre casi-eccezione tipizzati, le restanti possibilità sono sprovviste di tutela: sarebbe necessario che compisse un ulteriore vaglio di fattibilità? Sarebbe sufficiente che invitasse la persona offesa a presentare querela, se reato procedibile a querela?

Questi sono dei quesiti aperti su cui sarebbe estremamente importante riflettere, per evitare pratiche scoordinate e incerte, potenzialmente pericolose e discriminatorie.

Come si evince il percorso è complesso e per una sua efficiente realizzazione serve maggiore chiarezza, specifica formazione dei futuri mediatori in materia di violenza di genere e soprattutto numerosi finanziamenti affinché i Centri di giustizia riparativa possano offrire servizi gratuiti e disponibili su tutto il territorio nazionale. Inoltre, sarebbe auspicabile l'avvio di un dialogo fra le istituzioni e i centri che da anni lavorano a contatto con tali vittime e autori.

Ma queste sono complessità che si è deciso di indagare poiché si crede importante cominciare ad immaginare qualcosa che guardi *oltre* l'esistente e le sue narrazioni, spesso polarizzanti.

Guardando, per esempio, alla vittima: dare per scontato che questa (qualsiasi sia la situazione di violenza che ha subito) non

voglia incontrare l'autore del reato, non voglia parlarci e voglia ottenere a tutti i costi una sentenza di condanna a seguito di un processo, anche se faticoso e lungo, potrebbe forse condurre a riflessioni di immobilità. Immobilità nel senso che si continua ad alimentare l'immagine di una vittima (in particolare quella di violenza di genere) debole, incapace di autodeterminarsi, di sapere cosa vuole e che fa del trauma della violenza un elemento quasi identitario. Ciò può essere vero, magari è anche vero in molti casi, ma non si deve, per questo, ritenere sempre vero. E se da un lato l'esistenza di queste situazioni deve essere contemplata e trattata di conseguenza (possibilmente con la dichiarazione di infattibilità del programma di giustizia riparativa in una fase, per lo meno, di pre-condanna), dall'altro lato non dovrebbe portare a mettere in ombra le altre possibilità. Possibilità che possono essere caratterizzate da una voglia di riscatto personale, di forza, determinazione già in una fase temporalmente vicina al fatto violento. E questo si sente di scriverlo proprio in ragione della sempre maggiore condivisione e diffusione dell'assunto che la vergogna della violenza non ricade (e non deve farlo) su chi l'ha vissuta, ma su chi l'ha commessa. Questa recente e imprescindibile consapevolezza, ci si augura, possa anche contribuire a mutare la narrazione che della persona che ha subito violenza viene fatta. Parallelamente, la giustizia riparativa è una pratica seria, legalmente disciplinata e ritenuta applicabile nel settore penale. Indagare il tema della sua applicabilità non significa "bagatellizzare" o voler (ri)privatizzare il fenomeno della violenza di genere. Anzi, proprio per la serietà che ha l'argomento, si reputa, oggi, essenziale far tendere la critica al modello penale e sanzionatorio esistente verso la ricerca di risposte che tengano conto di ogni elemento rilevante per avviare programmi di risoluzione alternativa delle controversie penali veramente consensuali, sicuri, giusti, di crescita e anche responsabilizzanti per l'autore. Chiaramente anche la giustizia riparativa – se non accompagnata (a maggior ragione nel settore della violenza di genere) da un parallelo cambio culturale – rischia di

diventare un vuoto, e magari dannoso, simulacro, attraverso il quale avallare e ricreare dinamiche e stereotipi sessisti: e tale deriva non è accettabile in alcun modo. Ma introdurre delle preclusioni formali all'accesso in risposta a tale timore, rischia di rendere inutilmente inflessibile l'andamento della già "irrigidita" vicenda processuale e di quella imprevedibilmente umana che nasce dopo la commissione di un reato – facendo così, forse, scivolare via un'occasione trasformativa.

4. Conclusione

Si conclude l'articolo, con la speranza che quanto esposto possa viaggiare e muoversi fra altre menti – e così evolversi.

Attraverso l'adozione di uno sguardo critico si è cercato di analizzare l'evoluzione normativa della violenza di genere e di guardare alla recente introduzione della giustizia riparativa in Italia.

La scelta di adottare questa lente è dovuta al fatto che una parte del pensiero di chi scrive crede e spera che un giorno il mondo sarà un luogo in cui gli attuali istituti penitenziari saranno sostituiti da un modello non punitivo di risposta al reato. Un'altra parte è consapevole che questo obiettivo è ancora lontano e che per raggiungerlo, nella realtà, è necessario procedere per gradi. In questo senso si crede che la giustizia riparativa, nel rispetto dei principi e delle garanzie che la informano, possa rappresentare un primo passo per iniziare a ripensare alla giustizia e a cosa, per noi, significhi. Può rappresentare un primo passo concreto per dare seguito alla già maturata presa di consapevolezza che la pena carceraria non ha un impatto positivo sulla recidiva (anzi, spesso ne aumenta la probabilità) e che l'istituto di pena è un luogo in cui si subisce e si attua violenza. Può rappresentare un primo passo per muoversi oltre le soluzioni offerte, le narrazioni fornite, la giustizia ottenuta.

Se l'inizio di un ripensamento del sistema penale nel suo complesso può venire (garantite tutte le attenzioni del caso) da una modalità di risposta al reato maggiormente dialogica anche nel

settore dei reati di violenza di genere, accompagnata dalla imprescindibile pratica femminista di cui i Centri nei centri antiviolenza in Italia sono custodi, si sarà ottenuto un risultato importante. Risultato che è solo un punto di partenza, per un percorso che sarà impegnativo ma, forse, desiderabile.

Per guardare davvero *oltre* l'esistente è però fondamentale ricordarsi (e nessun intervento legislativo dovrebbe prescindere da ciò) che la violenza di genere è un problema educativo, scolastico, lavorativo, familiare, relazionale, culturale: ogni aspetto della società ne è attraversato. Che tutti e tutte ne siamo responsabili: quando non facciamo notare alle persone a noi care che stanno attuando comportamenti sessisti; quando non prendiamo le distanze da un amico (o amica) che condivide immagini intime senza il consenso della persona ritratta; quando non criticiamo un commento misogino/omofobo/transfobico che una persona nel nostro giro di conoscenze fa; quando non creiamo sufficienti alleanze amicali in cui discutere e stigmatizzare comportamenti "di coppia" che, pur presentati come "normali", non lo sono affatto. E, vista la maggior parte di autori uomini, questo discorso vale soprattutto per loro. A regnare però non vi è solo l'omertà, ma anche la mancanza di parole. Spesso non si hanno le espressioni per capire o descrivere il disagio che certe situazioni ci creano e il fulcro è proprio qui: l'educazione dovrebbe essere lo strumento per poter apprendere un vocabolario con il quale nominare gli atti discriminatori, i commenti sessisti, i comportamenti controllanti, i gesti violenti, le situazioni dolorose che vediamo, subiamo, attuiamo. Nominare è il primo atto di resistenza che possiamo realizzare per incamminarci lungo un sentiero veramente trasformativo che ci conduca a un futuro in cui non dovremo piangere altre sorelle.

Scuderoni v. Italy

Domestic Violence as a Systematic Failure of Italy

MARIA BEATRICE NERI*

Abstract: This article reflects on the phenomenon of domestic violence starting from the analysis of the recent judgement of the European Court of Human Rights (ECtHR) *Scuderoni v. Italy*, where the victim experienced a violation of the prohibition of ill-treatment and the right to respect for private life and correspondence, as established in Articles 3 and 8 of the European Convention on Human Rights, due to the inactivity of the Italian court which underestimated this problem. The analysis is then followed by a focus on the principal international conventions created to tackle gender – based violence and domestic violence, the Istanbul Convention and the European Convention on Human Rights, whose Articles 3 and 8 were violated by Italy. Ultimately, the phenomenon of domestic violence is analyzed from the Italian point of view, reporting data and measures that have been adopted to stop this form of violence. This is followed by a discussion on the delay of Italian authorities in recognizing domestic violence, the inadequacy of risk assessment to adopt preventive measures and to tackle the problem, with a consideration on the effectiveness of the investigations around the phenomenon of domestic violence.

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Keywords: Domestic Violence; Human Rights; Delay of Institutions; Risk Assessment; Investigations.

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1. Introduction

Article 3 of the *Convention on Preventing and Combating Violence against Women and Domestic Violence*, the *Istanbul Convention*, reports that domestic abuse, also called “domestic violence”, can indicate all acts of physical, sexual, psychological, or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim. In contrast, the United Nations defines violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”¹. While gender-based violence can occur in both public and private spheres, domestic violence occurs within the family or between current or former spouses or partners. An analysis conducted by the WHO on behalf of the UN Interagency working group on violence against women in 2018 using data from 2000–2018 across 161 countries and areas found that worldwide nearly 30% of

¹ Declaration on the Elimination of Violence against Women, UNGA Res 48/104 (20 December 1993) UN Doc A/RES/48/104, art 1.

women (1 in 3), have been subjected to physical and/or sexual violence by an intimate partner, non-partner, or both².

Generally, both men and women can be victims or perpetrators of this form of violence; these events usually happen in a family context, but research consistently shows that women are more likely to experience domestic violence and to suffer more severe consequences compared to men³, but also that male perpetrators often use coercion, control, and domination over the female victim⁴. From a legal perspective, victims of domestic violence may seek protection in another state if this is not available in their state of origin. Customary law prohibits violence against women⁵: states must intervene with due diligence and other effective protective measures for all individuals without discrimination. The *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, also known as the *Istanbul Convention*, is the principal international instrument to prevent and fight gender based violence and domestic violence, by establishing a set of obligations⁶ and ensuring women's fundamental rights. However, these measures

² World Health Organization, 'Violence against Women Prevalence Estimates, 2018: Global, Regional and National Prevalence Estimates for Intimate Partner Violence against Women and Global and Regional Prevalence Estimates for Non-Partner Sexual Violence against Women' (2021) at 37.

³ See *id.* (Worldwide, 27% of women aged 15–49 years who have been in a relationship report that they have been subjected to some form of physical and/or sexual violence by their partner).

⁴ See Michael Paul Johnson, *Conflict and Control: Gender Symmetry and Asymmetry in Domestic Violence*, 12 *Violence against Women* 1003 (2006); Evan Stark, *Coercive Control: The Entrapment of Women in Personal Life* (Oxford University Press 2007); Marieh Tanha, et al., *Sex Differences in Intimate Partner Violence and the Use of Coercive Control as a Motivational Factor for Intimate Partner Violence*, 25 *Journal of Interpersonal Violence* 1836 (2010).

⁵ United Nations Committee on the Elimination of Discrimination against Women, 'General Recommendation No 35 on Gender-Based Violence against Women, Updating General Recommendation No 19', (26 July 2017), UN Doc CEDAW/C/GC/35, para 2.

⁶ Catherine Briddick, *Resisting Domestic Violence*, 36 *International Journal of Refugee Law* 106 (2024).

will not achieve the intended results without the effective implementation of the convention by multiple States.

The situation related to domestic violence has recently been brought to the attention of the European Court of Human Rights by an Italian woman, Valentina Scuderoni. She has been a victim of this form of violence for nine months, but the Italian institutions did not take effective measures to prevent and tackle this form of violence. In the end, her application was dismissed, since the discussed conduct were regarded as mere “nastiness” in the context of family disputes.

With this decision, Italian institutions contributed to undermining her fundamental rights and failed in their duty to protect the woman due to the delay and the superficial manner in which the matter was addressed. The decision of the Strasbourg Court has restored the woman’s dignity and has condemned Italy for not having adequately protected Mrs. Scuderoni from the physical and psychological violence perpetrated by her former partner. In particular, the importance of a timely recognition of the abuses and the imposition of an appropriate judgment on the perpetrator of the abuse has been underlined in order to protect the woman.

2. The Judgment Scuderoni v. Italy

2.1. Principal Facts

Valentina Scuderoni had been denigrated and psychologically abused for nine months by her former partner, who was living with her and their son even after their divorce. In particular, he was “forcing her to stay awake at night by shining a light on her, wrongly accusing her of imaginary behavior, denigrating and psychologically abusing her, causing her a state of acute anxiety and emotional instability”. In addition to this, he prevented her from going to certain parts of the house, constantly moved her possessions, and threatened to throw all her belongings into the street and to kidnap their son.

In February 2018, she initiated civil proceedings against the former partner, describing the abuses of which she was a victim, the threats and the controlling behavior of her ex-husband. Given that the hearing was scheduled for nine months later, she asked the court to set an earlier date. It was only in August 2018 that the Court granted her and her child the exclusive use of their family home and set her former partner's contact rights with the child. She also asked to obtain a protection order, submitting complaints, medical reports, and evidence from the criminal investigation, but the Court rejected the application for protection since they considered that the main allegations concerned certain facts – episodes of sleep deprivation, threats, verbal and physical violence, separation from her son without her consent – which had taken place only in the presence of the aggressor. The latter denied all the accusations against him, claiming that the applicant displayed irrational behavior.

From March 2018, the acts of violence became more persistent and severe, starting with the man illegally accessing Scuderoni's personal and work messaging accounts, up to sending her to the hospital with a "neck and scalp injury", after having violently grabbed her hair. Because of these facts, she lodged several criminal complaints, and, in February 2019, the prosecutor decided to commit the defendant to trial.

Even in this case, there was no justice for the woman: after four years of proceedings, the Italian court characterized the partner's act as nastiness, thinking that his behavior, although objectively aggressive, was an expression of conflict instead of ill treatment.

At this point, Valentina appealed to the European Court of Human Rights, relying on Article 3 (prohibition of ill treatment) and Article 8 (right to respect for private life and correspondence) of the European Convention on Human Rights (ECHR). In particular, she complained that the domestic court had not examined her application promptly and that the criminal investigation had been ineffective. She further complained that the Court had failed to properly assess the

risk of physical and psychological violence and her need for protection.

2.2. *Decision of the Court*

In Scuderoni's application, she complained about a "late examination of her appeal by the domestic courts, as well as the rejection by the civil court of her application for a protection order and a lack of effectiveness of the criminal investigation"⁷, invoking Articles 3⁸, 6, and 8⁹ of the Istanbul Convention. Valentina Scuderoni claims that domestic violence not only includes physical injuries but also psychological consequences, and Article 3 applies when further aggressions are to be feared. She alleged that in her proceedings gender based prejudices and stereotypes intervened. According to the applicant's position, the authorities would have considered her to be a credible victim only if she had behaved passively and was unable to seek help.

Given the fact that the applicant was a lawyer, she activated all the legal mechanisms and she underlined these prejudices. In this regard, the CEDAW Committee¹⁰ reportedly found out that such stereotypes influence court decisions in cases of gender based violence, affecting women's role, their credibility and behaviour, leading to secondary victimization, but more importantly to failure in the protection of their fundamental rights. In the end, the authorities intervened too late to adequately address the gravity of the situation, therefore preventive measures were not adopted.

The Court considered that the woman's grievances had to be examined from the perspective of Article 3 and Article 8 of the

⁷ *Scuderoni v. Italy*, ECHR 6045/24 (2025).

⁸ Art. 3, European Convention on Human Rights.

⁹ See *Id.* Art. 8.

¹⁰ United Nations Committee on the Elimination of Discrimination against Women, 'Concluding observations on the eighth periodic report of Italy' (27 February 2024) UN Doc CEDAW/C/ITA/CO/8.CEDAW/C/ITA/8 (2024).

Convention. According to the Court, the mistreatment described in Article 3 must reach a minimum of gravity, usually including bodily injuries or severe physical or mental suffering. However, the Court further explained that, in some cases, if the treatment denigrates the individual, showing a lack of respect for human dignity, or if it makes fear grow, it can be considered relevant for article 3. The Court noted that, in this case, domestic violence was not just composed of a physical dimension, but the psychological dimension was important here as well. As a matter of fact, the conduct of the former partner of the victim contributed to the creation of a growing sense of fear in the victim, to the point that he also materialized some of the threats he had made.

After that, the Strasbourg Court considered the positive obligations that Article 3 places on Italian authorities, which include the obligation to create a legislative framework and to adopt operative measures to protect the victims, as well as the obligation to conduct an effective investigation into defensible allegations of infliction of such treatment. In particular, the authorities must react to the allegations of domestic violence, evaluating the risk for the life proactively and comprehensively, and if this is present, they must take preventive operational measures, adequate and proportional to the risk, as specified in *Kurt v. Austria*¹¹.

Despite the seriousness of the allegations made by the woman, the domestic court failed to carry out a domestic violence risk assessment or take preventive measures and dealt with the matter too late.

The ECHR Court considered that the conclusions shared by the domestic courts were questionable, since the harassment, assaults, incessant calls, and the control of the applicant's telephone were considered as simple "nastiness". The conduct of the abuser was considered to be more an expression of conflict and resentment than an act of systematic abuse.

¹¹ *Kurt v. Austria*, ECHR 62903/15 (2021).

In addition to this, the Court stressed the diligence required in a domestic violence case and reported that this diligence has been obstructed by an ongoing issue in Italy. According to the GREVIO¹² report, Italian courts continue to require violence to be habitual for the offence of ill-treatment in the family to be made out, basing their stance on Article 572¹³ of the Italian Criminal Code. Therefore, courts often dismiss repetitive violence as non habitual, especially when the incidents occur in a short period of time or at the end of the relationship.

According to the Court, the authorities failed in obtaining a comprehensive view of the applicant's situation since they limited their analysis to isolated acts rather than viewing the pattern of the abuse. With the judgment of 23 September 2025, the Strasbourg Court recognized the violation of Articles 3 and 8 of the ECHR Convention, in particular the infringement of Article 3 prohibiting inhuman or degrading treatment or punishment, and Article 8 regarding the right to privacy. They argued that Italian authorities had not evaluated the risk that the former partner could persist in the abuses and did not consider the specific problem of domestic violence during their investigations, despite the evidence they had.

Therefore, this judgment has established a clear principle: States must conduct a careful analysis of situations involving victims of domestic violence and carry out assessments regarding the potential risks of future violence that victims may face. They also cannot intervene solely with the punishment after the crime has been committed, but they must adopt all the measures that are necessary to prevent the risk of further aggressions.

In particular, the Court emphasized the “special diligence required when dealing with complaints of domestic violence”. In the case under examination, Italian authorities had failed to respect, even

¹² Council of Europe, Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), *Baseline Evaluation Report on Italy* (3 January 2020).

¹³ Art. 572, r.d. 19 October 1930, no. 1398.

if they had all the information revealing a real and immediate risk of further violence.

Therefore, States must also ensure effective investigations and guarantee that criminal proceedings are conducted in a reasonable period of time. In this case, the Italian court had not intervened in a reasonable time since it examined the recourse after nine months and did not promptly conduct criminal investigations. There is no doubt that the late interventions on this matter had caused significant damage to the health of Mrs. Scuderoni as well as a breach of her human rights, granted by Articles 3 and 8 of the ECHR.

Lastly, the Court pointed out that the specific features of acts of domestic violence, as recognized in the *Istanbul Convention*, needed to be taken into account in domestic proceedings, and that the State, in its response to her complaint, had failed to adequately discharge its procedural obligation to ensure appropriate treatment of the violence suffered.

3. Legislative Framework

3.1. The Istanbul Convention

The previously mentioned *Council of Europe Convention on preventing and combating violence against women and domestic violence*, the *Istanbul Convention*, is an international treaty designed to help tackle violence against women and girls. It was adopted in 2011, and entered into force in 2014. This Convention recognizes violence against women as a human rights violation. The *Istanbul Convention* marked a significant point of change as it demanded that the ratifying governments adopt a list of concrete measures to fight all forms of violence against women and domestic violence. Following this path, the Convention has guided towards new important legislative reforms, but also to the development of new and better services for the victims, as well as the creation a positive dynamic for the

evolution of politics, services and the conception of violence against women.

It covers four areas of action, often called the four “Ps”:

1. Prevention: preventing violence against women, including awareness raising campaigns and education in non – violence and equality between women and men;
2. Protection: protecting victims, challenging gender stereotypes, promoting women’s empowerment and programs to teach perpetrators to adopt a non – violent behavior;
3. Prosecution: prosecuting perpetrators, informing victims of their rights, giving them easy access to shelter, and encouraging everyone to report violence to authorities;
4. Policies: implementing related comprehensive and coordinated policies, with dissuasive sanctions for perpetrators, effective public prosecution and introducing laws which criminalize this form of violence.

To ensure the effective implementation of the Convention, a two-pillar monitoring mechanism has been established. It consists of an independent expert body (GREVIO, Group of Experts on Action against Violence against Women and Domestic Violence), which draws up reports on the themes of the Convention, and a Committee of the Parties, that provides the political and administrative framework required for the Convention’s monitoring system to operate effectively.

In order to reach the Convention’s aim, namely to elaborate effective policies to prevent and combat violence against women, a deep understanding of gender-based violence must be obtained through data collection and research.

Following this path, Article 11 of the *Istanbul Convention* establishes that the

“Parties shall undertake to: (a) collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this

Convention; (b) support research in the field of all forms of violence covered by the scope of this Convention to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention”.

In the framework of the Convention, this norm is often underestimated, since the focus is often on the forms of prevention and repression for this violence, but data collection and the following elaboration are essential to measure the progress of the States in implementing the provisions of the Convention¹⁴.

3.2. *The European Convention on Human Rights: Articles 3 and 8*

Another relevant instrument for the judgment analyzed in this article is the *European Convention on Human Rights*, which protects the rights of more than 830 million people in Europe. Coming into force in 1953, this was the first instrument that gave binding effect to some of the rights stated in the *Universal Declaration of Human Rights*. Individuals whose rights are established in the Convention, in cases of violation, are allowed to bring human rights complaints in front of the European Court of Human Rights, in order to make sure that the rights enshrined in it are protected.

In the judgment under exam, the victim, after having unsuccessfully asked for a remedy in front of the national court, applied to the European Court of Human Rights to have the violation of her rights recognized. The Articles that have been examined and violated in this case are, first of all, article 3 of the Convention, which is an absolute right prohibiting torture, inhumane or degrading treatment or punishment. As a result, the State must not engage in torture or other inhumane treatment, as well as prevent such

¹⁴ See Biljana Brankovic, *Article 11. Data collection and research*, in Sara De Vido and Micaela Frulli (eds.), *Preventing and Combating Violence Against Women and Domestic Violence: A Commentary on the Istanbul Convention* at 196 (Edward Elgar Publishing, 2023).

treatment from happening. In the judgment under examination, it can include abuses committed by the man against the woman that were perpetrated during the couple's cohabitation and throughout the nine months of inaction by Italian authorities.

The other relevant Article for the case is Article 8, which protects the right to respect for private life, family life, the home, and correspondence. In particular, the concept of private life includes control over the body, appearance, relationships and personal choices. The government cannot interfere in the lives of people and must adopt strong measures to protect them. In *Scuderoni v. Italy*, the authorities failed in their mission to protect the woman from ongoing domestic violence and harassment by her former partner, thus violating her right to private life.

4. Domestic Violence in Italy: Data and Legislative Instruments

The first comprehensive research about this form of violence was conducted in 2014 by ISTAT, the Italian National Institute of Statistics, which interviewed more than 24,761 women¹⁵. Around 13.6% of people interviewed had suffered some form of physical or sexual violence from a current or precedent partner, with a number of victims around 2 million and 800,000¹⁶. It emerges that psychological and economic violence was reported by between 26.4% and 46.1%¹⁷ of survey respondents. After the COVID 19 pandemic, the cases of domestic violence increased: during the lockdown, calls to 1522 increased by 73% compared to the previous year but, on the

¹⁵ Istituto Nazionale di Statistica (ISTAT), *Nota metodologica sulla rilevazione della violenza contro le donne* (ISTAT, 2015), available at <https://www.istat.it/wp-content/uploads/2015/06/nota-metodologica-violenza.pdf> (last visited November 19, 2025).

¹⁶ ISTAT, *La violenza contro le donne dentro e fuori la famiglia, Anno 2014* (ISTAT, June 5, 2015), available at https://www.istat.it/it/files/2015/06/Violenze_contro_le_donne.pdf (last visited November 19, 2025).

¹⁷ See *Ibid.*

other hand, reports of abuse decreased by 43.6%, suggesting both a rise in the actual phenomenon and more difficulty in accessing justice¹⁸. In 2022, the women who asked for help at CAV¹⁹ were 60,571²⁰ and the number of complaints increased as well, confirming that in Italy violence is widespread.

Domestic violence also has a social and economic “cost”²¹: not only does it cause pain and suffering to the victims, but it also places large costs on the economy and society as a whole. A recent study conducted by the European Institute for Gender Equality (EIGE) has highlighted how the cost of domestic violence in our country is around 23,445,910,204 euros²². However, the extent and the related costs of gender-based violence, encompassing loss of economic output, public spending on health, legal, social and specialized services to mitigate harms, as well as personal impacts on victims, are rarely seen.

¹⁸ ISTAT, *Violenza di genere al tempo del Covid-19: Chiamate al numero verde 1522* (ISTAT, May 13, 2020), available at <https://www.istat.it/comunicato-stampa/violenza-di-genere-al-tempo-del-covid-19-le-chiamate-al-numero-verde-1522/> (last visited November 19, 2025): To understand domestic violence during the period of the pandemic, see Barchielli, et al., *When “Stay at Home” Can Be Dangerous: Data on Domestic Violence in Italy during COVID-19 Lockdown*, 18 *International Journal of Environmental Research and Public Health* (2021), available <https://pmc.ncbi.nlm.nih.gov/articles/PMC8431219/> (last visited December 13, 2025).

¹⁹ Anti-violence centres established by law 119/2013 with the aim to prevent and contrast violence against women sustaining and protecting even their children.

²⁰ ISTAT, *I centri antiviolenza e le donne che hanno avviato il percorso di uscita dalla violenza* (ISTAT- November 24, 2022), available at <https://www.istat.it/it/files//2023/11/reportCAV.pdf> (last visited November 19, 2025).

²¹ Sofia Braschi, *Il contrasto alla violenza domestica: appunti per una politica criminale evidence-based*, 1 *Rivista Italiana di Diritto e Procedura Penale* 105 (2025).

²² European Institute for Gender Equality (EIGE), *The costs of gender-based violence in the European Union* (Vilnius, 2021), available at https://eige.europa.eu/sites/default/files/documents/mh0321358enn_002.pdf (last visited November 19, 2025).

Italy has developed over the years an extensive legislation to combat violence against women, including domestic and sexual violence, violence against minors, female genital mutilation, stalking and human trafficking. The most relevant legislative measure is law no. 154 of 4 April 2001 concerning measures against violence in family relationships, introducing new instruments to protect victims. Some of these are: removal from the family home (Article 282-bis of the Italian Criminal Code) and protection orders against family abuse (Article 343-bis of the Italian Civil Code), law no. 38 of 23 April 2009 that added the new offence of persecutory acts (stalking) under Article 612-bis of the Italian Criminal Code, the precautionary measure of the order to stay away from the places frequented by the victim (Article 282-ter of the Italian Code of Criminal Procedure), and the administrative measure of the formal warning given by the local police chief.

Italy also ratified the Istanbul Convention in 2013 and, after some months, the Legislative Decree no. 93/2013 intervened in criminal and procedural areas, and it included the periodic adoption of the Action Plan against gender-based violence. The most incisive measure is Law no. 69/2019 (Red Code), which reinforced legal protection of the victims of these violent crimes, especially domestic and sexual violence, introducing new crimes in the criminal code.

5. Analyzing the Decision: the Inertia and Underestimation of Authorities

5.1. Delay in the Action of the Italian Institutions in Criminal Proceedings: Precedents

As it has emerged from the judgment, one of the main problems related to the ineffectiveness of the protections for the victims of abuse is the delay of Italian courts in recognizing and condemning the crime, as well as the adoption of measures to prevent it. This

emerged in *Landi*²³, *De Giorgi*²⁴ and *M.S. v. Italy*²⁵; more specifically, the Strasbourg Court recognized a violation of Article 2 of ECHR in *Landi*, while in *De Giorgi* and *M.S.* it found a violation of Article 3. In *Landi*, the applicant and her two children suffered violence from the partner, which led to the murder of her one-year-old son and the attempted murder of the woman. The victim reported the assault to the authorities, but no investigation or proactive measures followed, so she withdrew the complaint. After other episodes of violence, the authorities reported the case to the prosecutor but even then, no proactive measures were taken. While the legal framework was adequate to guarantee protection against acts of violence, prosecutors remained passive, despite knowing the risk of a threat to Mrs. Landi's life. In *De Giorgi*, the Court affirmed that Italian authorities remained inactive in front of their duty to protect the applicant, despite the woman having endured documented domestic violence and threats from the partner over a long period. The authorities knew or should have known the danger but did not act with due diligence, creating a situation of impunity.

In *M.S. v. Italy*, the applicant did not receive protection from the State despite several allegations of ill-treatment and injuries inflicted by her husband. Moreover, many proceedings were time-barred due to delays in the investigations and procedural defaults.

Recently, in *P.P. v. Italy*²⁶, Italy was again condemned: the Court, recognizing the physical and psychological consequences of violence aimed at P.P., found a lack of willingness of the state authorities to hold the offender accountable for his actions. In this case, the woman denounced her ex-partner since she suffered domestic violence, physical and psychological abuse, threats, and stalking from him between 2007 and 2009 after the end of their

²³ *Landi v. Italy*, ECHR 10929/19 (2022).

²⁴ *De Giorgi v. Italy*, ECHR 23735/19 (2022).

²⁵ *M.S. v. Italy*, ECHR 32715/19 (2022).

²⁶ *P.P. v. Italy*, ECHR 64066/19 (2025).

relationship. She complained about the excessive length and lack of effectiveness in the criminal proceedings initiated against her ex-partner, since the final judgment in this case was delivered ten years after she had filed her complaint. The Court recognized a violation of Article 3 of the ECHR, stating that the woman was denied the protection such a situation required, because of the delay and the absence of procedural guarantees, since the authorities did not intervene with the diligence and promptness required.

It emerged that States must establish a system of repression for all forms of domestic violence, to ensure protection also from a procedural point of view, operating with the required diligence.

5.2. *The Quality of Risk Assessment and the Preventive Measures*

Risk assessment in gender-based violence is crucial since it helps to understand the existence of the crime and allows for the taking of preventive measures. Without a correct evaluation of the risk, the consequences could be serious: this is clear looking at the judgment under examination, where the authorities did not conduct a proper risk assessment, despite the constant state of fear that characterized the daily life of the woman, making the continuous violence possible.

The “need” for protection, for the victim of domestic violence, becomes a “right” to protection, related to an “obligation” of protection over public authorities²⁷. The centrality of the protection activated by public authorities is recognized in Article 18 of the Istanbul Convention²⁸, according to which it is necessary to plan the

²⁷ Valentina Bonini, *Protezione della vittima e valutazione del rischio nei procedimenti per violenza domestica tra indicazioni sovranazionali e deficit interni*, Sistema Penale, file 3/2023, available at <https://www.sistemapenale.it/it/articolo/bonini-protezione-della-vittima-e-valutazione-del-rischio-nei-procedimenti-per-violenza-domestica-tra-indicazioni-sovrnazionali-e-deficit-interni> (last visited November 19, 2025).

²⁸ Article 18, Council of Europe. *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, OJ L 143i (November 2014).

required legislative action or other measures to protect all the victims of violence. This involves imposing procedural duties on the States, with prompt initiation of criminal proceedings, and the guarantee of adequate protection, as prescribed by the Articles 49²⁹ and 50³⁰ of the Convention. Article 51 is an essential norm that points out the necessity of protection, according to which the competent authorities must conduct a risk assessment prior to the adoption of adequate measures to handle that kind of situation. Risk assessment represents a fundamental component in the process of observing the duty of protection of the victim. Even in *Kurt. v. Austria*, the Court observed that the “assessment of the nature and level of risk constitutes an integral part of the duty to take preventive operational measures where the presence of a risk so requires”. Once again, it is emphasized that it is imperative to conduct a punctual and complete risk assessment and to consequently adopt the required preventive measures. The Court indicates the elements which are related to the existence of risk of repetitive acts of violence:

“the history of violent behaviour of the perpetrator and the non-compliance with the terms of a protection order, the escalation of violence representing a continuous threat to the health and safety of victims and repeated requests for assistance from the victim through emergency calls, as well as formal complaints and requests addressed to the head of the police”³¹.

The Scuderoni case is the opportunity for the Court to rebuild the procedure of risk assessment, together with the previous ECtHR’s jurisprudence. The action must be punctual and immediate; there is the need to employing a standardized instrument, as recognized by

²⁹ See *Id.* Article 49.

³⁰ See *Id.* Article 50.

³¹ Paras. 88, 76, 123 *Landi v. Italy* (2022) (cited in note 23); *De Giorgi v. Italy* (2022) (cited in note 25); *M.S. v. Italy* (2022) (cited in note 25).

the international community³², using guidelines and clear criteria for the authorities and autonomous, global and proactive risk assessment. The panorama is quite complicated since it is necessary to ensure adequate training of law enforcement officers and judicial authorities on the characteristics of domestic violence.

5.3 Effectiveness of the Investigation

In the judgment, the effectiveness of the investigations conducted by public authorities was questioned, as it had taken too much time and had led to further abuses and violence. According to the Court's case law³³, to evaluate whether investigations are effective or not it is necessary to consider the adequacy and speed of the measures adopted, as well as the independence of the investigators.

In this regard, the *Opuz v. Turkey*'s case becomes relevant, since the Turkish government was held liable for not taking action in a situation of domestic abuse. In particular, it failed in protecting Mrs. Opuz and her mother from the violence perpetrated by the applicant's husband, which eventually led to the death of the mother. This case is considered to be a landmark decision, since it recognized that States must adopt a proactive approach in serious cases of violence and must prosecute those responsible for such forms of violence³⁴. Even if the victim withdrew the complaints, the legislative framework should have allowed the prosecuting authorities to continue a criminal investigation against the abuser, taking into

³² The most famous are B-SAFER (brief spousal assault form for the evaluation of risk), DASH (domestic abuse, stalking and harassment and honour-based violence), SARA (spousal assault risk assessment), MARAC (multi-agency Risk Assessment conference), VioGen, DVSI (domestic violence screening instrument), ODARA (Ontario domestic assault risk assessment).

³³ *Nicolae Virgiliu Tănase v. Romania*, ECHR 41720/13 (2019); *R. and R.D. v. Slovakia*, ECHR 20649/18 (2020).

³⁴ Patricia Londono, *Developing Human Rights Principles In Cases Of Gender-Based Violence: Opuz V Turkey In The European Court Of Human Rights*, 9 Human Rights Law Review 657 (2009).

consideration the seriousness of his behavior. However, they failed to set up and apply a system in which all forms of domestic violence can be punished.

In a later judgment, *Volodina v. Russia*³⁵, it was confirmed that an effective investigation is an “essential element of the State’s obligation” and needs to be conducted for “all acts of domestic violence”. According to reports concerning domestic violence and the situation of women in Turkey by NGOs, such as *the opinion of the Purple Roof Women’s Shelter Foundation* (Mor Çatı Kadın Sığınağı Vakfı – “the Mor Çatı Foundation”) on the implementation of Law no. 4320, dated 7 July 2007, and *Amnesty International’s 2004 report* entitled “Turkey: women confronting family violence”³⁶, when victims reported such abuses to the police, officers failed to properly investigate their allegations, instead, sought to persuade the victims to return home and withdraw their complaints.

According to a 2014 ISTAT survey on domestic violence, almost 30% of victims do not disclose their experience to anyone, 12% report the event to the police, and only 4% report it to an anti-violence center³⁷. These data directly substantiate the findings highlighted by the United Nations Committee on the Elimination of Discrimination against Women, which, as noted in the *Scuderoni v. Italy* judgment³⁸, identified a systemic lack of reporting due to victims’ fear of stigmatization or retaliation, poor awareness of the law, language barriers, or a general distrust of the police. It emerges that the persistence of stereotypes obstructs the effective possibility for obtaining protection and developing effective legislative measures for this problem. Scuderoni’s ruling highlighted that the State failed to sufficiently meet its procedural obligation to ensure the violence

³⁵ *Volodina v. Russia*, ECHR 41261/17 (2019).

³⁶ *Opuz v. Turkey*, ECHR 33401/02 (2009).

³⁷ ISTAT, *Violence against women in and outside the family, Anno 2014* (ISTAT, June 5, 2015), available at https://www.istat.it/it/files//2019/11/Violence-against-women-_2014.pdf (last visited December 13, 2025).

³⁸ *Scuderoni v. Italy* (2025) (cited in note 7).

suffered by the applicant was appropriately addressed. This occurred since it did not condemn the abuser but instead dismissed his conduct as mere "nastiness" that occurred during family disputes.

6. *Conclusion*

Domestic violence as well as gender-based violence, is a phenomenon that still characterizes our society and still persists because of the lack of data and the delay in the action of authorities, which demonstrates a failure in the system of protection. Despite the seriousness of Valentina Scuderoni's situation, the authorities have not intervened immediately to understand her problem, to find preventive measures to tackle it and in the end to impose an effective and proportional sanction to the seriousness of the situation. The most striking aspect of the case under exam is that, even if there was an allegation of bodily injury, the domestic court justified the conduct of the abuser saying that it had been driven by the state of conflict due to the end of the relationship, while in reality the victim was constantly controlled, threatened, abused and had to fight just to ensure that her voice was heard by the Italian institutions.

While the implementation of effective legislative measures is necessary, what is even more important is the action of the institutions that need to protect abuse victims, engage in investigations to find the cause and elaborate adequate sanctions.

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