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“GENDER VIOLENCE” IN LIGHT OF THE ISTANBUL CONVENTION.
THE ITALIAN LEGISLATION

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1. – Premise. “Gender violence”. Historical profiles and dogmatic framework in light of the Istanbul Convention

Recent statistics and actual inspections on violence against women – which, as comes from the policy’s inquiries, the judiciary’s reports, the newspapers articles, and the public opinion, is an alarming phenomenon constantly growing – inspire an historical study. As compared to the past, indeed, the denunciations of episodes of violence suffered by women, even if still few, are increased. Try to think as an exemplification to the gravest form of violence (after homicide) inflicted to the woman, the rape: it could be affirmed that, «passed from a relative silence to a loud exposure», this crime is present in the social reality as never has been[1].

Is the cultural evolution that explains the different sensitivity to the violence acted towards females subjects and the different legal frameworks provided for this kind of violence during the time. Mainly, the history of violence perpetrated against female individuals, of which the history of rape and sexual assaults represents an important chapter[2] goes at the same pace with the image of woman: «in this history changes are corresponding to the transformations of the systems of oppression exercised on women, to their permanence, to their refinement, to their moves»[3]. This could lead to read recent statistics in a cultural key or way: the recognition of more equality between men and women, the decline of the image of father and authority could have rendered less tolerable violence in the history accepted and let unpunished and could have contributed to the growth of the denunciations.

Violence against women is, in this view, historically, “gender violence”. If the concept of ‘gender’ must be intended in a minimum meaning, in the complexity of gender and feminist analysis, as «social definition of the sex identity»[4], it’s easy to understand as this concept consent to dogmatically frame a form of violence which is grounded in the social image of woman so as it is historically developed. Not only. The concept of gender reveals to be an instrument of analysis very useful also on the
criminal law and criminological field, as it consents to discover some of the worst forms of gender discrimination present in the history of criminal justice[5]. So as today, inspiring from the tradition of the South American criminology that we will refer to later, this deeply-rooted form of violence is called ‘femicide’, term which has to be intended as violence directed against woman «because of her being woman»[6]. In particular, according to the jurist Barbara Spinelli, this violence can assume different forms: physical violence, psychological violence, economic and institutional violence. «Femicide is present in every historic and geographic context, any time woman is subject to physical, psychological, economic, legal, social, religious violence, in the family and outside, when she can’t exercise “the fundamental rights of man”, because woman, that is because of her gender»[7]. This situation, according to the researcher Spinelli, will occur especially when the woman refuses the social role given to her in the patriarchal society[8].

It is evident that this definition, even if unable to indicate precisely to the jurist the limits of the protection to be predisposed, I think mainly on the criminal law field, in order to combat the violence against women, and even if it identifies a term, “femicide”, which is very indeterminate and vague, shows its value from an historical point of view (and also, is evident, on a political one). As sharply pointed out recently, «(...) in modern societies, in a certain historical phase, the monopoly of violence has passed from the individual to the State; however this is not happened for the monopoly of the control of violence on women, which is remained in the patriarchal family, with subsequent right for the pater familias, or for the husband, to practice violence»[9]. Without looking to the ancient history, and beginning from the European history, ancien régime represents the example of an epoch of tolerance of the violence against women. Think again to the crime of rape. Even if severely punished by the criminal codes of the time, the crime of rape is not prosecuted by tribunals and judges of the ancien régime show indulgence and tolerance regarding episodes of rape. Any kind of violence, physical or sexual, is threatened with negligence and indifference: the sensitivity towards brutality is attenuated. The criminal justice of the Eighteenth Century, it is well known, is characterized by cruelty, arbitrariness and savagery that doesn’t have equal: the art of torture, well described by Foucault, constitutes a permanent feature in the daily administration of justice and involves also woman[10].

In the view of the Enlightenment, it is affirmed the idea that woman has not to be recognised as a Subject of Rights and that she can’t receive any protection by the law[11].

It is only in the last decades of the Eighteenth Century that it manifests a first changing in the legal framework: in the jurisprudence of the Nineteenth Century we find a first differentiation of the different kind of violence against women and it is punished for the first time also the moral violence[12].

Profoundly different is the view of the Twentieth Century: the new equality man-woman transforms the attitude of the victims, guarantying more legitimacy to the denunciations and accuracy in the criminal process. Even if one fact remains constant in the recent history as in the less recent: the majority of the acts of violence against women is not denounced neither is registered by the judicial authority. In Italy, an inquiry made in 2006 by the National Institute for Statistics (Istat), with the method of the telephonic interview of more than 25.000 women between sixteen and seventy years of age, reveals that in our country remains without denunciation the 91,6% of the sexual assaults and the 94,2% of the tempted violence suffered by women during their life. The black number – that phenomenon, known to the criminological research,
according to which it exists an underground criminality that remains unknown to the judicial authority and that represents the amount of crimes which are not in the official sources – represents on the field of gender violence a very grave and serious problem[13].

All the way here the concept of gender violence has been used in historical and sociological meaning. The same definitions used – in the Anglo-Saxon literature – to indicate violence against women sign the progressive changing in the relation between sexes: from the definition of “battered women” used in the seventies, it has been passed to the one of “domestic violence” in the nineties, until the use of term “intimate partner violence”, to indicate that violence against women is no more only a product of hierarchic and patriarchal dynamics, but arouses often in the relationships of love[14], even if it occurs to remember that, as underlined recently, in the Italian debate is preferred the expression “gender violence” to the one “domestic violence”[15]. However it is necessary – in order that the term gender violence could be used in criminal law field – to define dogmatically the category of gender violence so as it is not violated the principle of legality and in particular the principle of precision which is a corollary of the principle of legality, fundamental in criminal law. In our opinion, the legitimacy and the dogmatic definition of the concept of gender violence today sanctioned, for the first time, from the Istanbul Convention, subscribed on the 11th of May 2011 and ratified from Italy by Law n. 77/2013.

Immediately after the Preamble of the Convention, there is an express recognition of the structural nature of violence against women, because based on gender and instrument of coercion of women in a position of subordination in respect to men and the declaration of the objective and purpose of the Convention, indicated in the will to protect women from any kind of violence and to prevent, persecute and eradicate violence against women and domestic violence. Mainly, after that is possible to find a definer part (art. 3)[16]. It is very relevant that in this part is explained the meaning of the concept we are speaking about. Art. 3, indeed, clears that:

«For the purpose of this Convention:

a “violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

b “domestic violence” shall mean 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;

c “gender” shall mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men;

d “gender-based violence against women” shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately;
e “victim” shall mean any natural person who is subject to the conduct specified in points a and b;

f “women” includes girls under the age of 18.».

This last comprehensive definition in particular recall the definition of gender violence, of historic and sociological matrix, remembered in the beginning, showing as in the international place the dogmatic definition of gender violence as violence acted against woman “because woman” is unanimously accepted. From this point of view, the Convention represents an important achievement, even if we doesn’t ignore that still other international treaties have anticipated this goal: think in particular to the Inter-American Convention to prevent, punish and eradicate violence against women of 1994, so called Convention of Belém do Pará, and the well known Convention CEDAW. As underlined recently «in those international documents there is a passage from a wide and disordered debate, in which are cited and underlined the most extreme positions, to texts, improvable, but written with clear points and obligations taken from the subscribers», recognising that «violence against women is a real problem and of big wideness»[17]. And it is mainly from the point of view of precision, better from the point of view of the principle of precision, that the criminal law researcher must appreciate the Istanbul Convention: it permits today to frame dogmatically, not only the concept of “gender violence”, but also and over all the crimes that can legitimately be included in the wide concept of gender violence. On one hand, in the Preamble is declared in which acts gender violence can consist:

«Recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called “honour” and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men».

On the other hand, the Convention contains the Charter V, dedicated to the Substantial Criminal Law, where explicitly are indicated commitments of incrimination to which States subscribers are obliged and that represent a sort of ‘typify’ of gender violence since now left to the interpretations of doctrine and jurisprudence more sensible to the theme of “gender”. Are envisaged nine criminal conducts which must be subject to criminalization, when, as it happens in a lot of legislations, they are not just criminalized: Psychological violence (art. 33), Stalking (art. 34), Physical violence (art. 35), Sexual violence, including Rape (art. 36), Forced marriage (art. 37), Female genital mutilation (art. 38), Forced abortion and forced sterilisation (art. 39), Sexual harassment (art. 40). All conducts to be punished in the case of attempt and also in the case of aiding or abetting (art. 41) and irrespectively of the nature of the relationship between victim and perpetrator (art. 43). Referring to the next steps an inquiry on the correspondence of Italian criminal law to the obligations of the Istanbul Convention and underlining since now that the Italian legislation expiates, in the protection of women from gender violence, a cultural delay[18], we want to put the attention on the definition: the Istanbul Convention, although the confusion is large in the debate of the public opinion and of the criminal law doctrine, decides not to frame
gender violence in the concept of “femicide”, recognizing the specificity of this last terminology which, with a semantic ambivalence, as known, is born in the South-American context and is used before from the Mexican anthropologist Marcela Lagarde, as a neologism which indicates a lot of misogynist conducts and forged in occasion of some events occurred in the city of Ciudad Juarez in Mexico where in 1992 happened the disappearance, the torture, the rape and killing of over 4.500 women in the complete silence of the authorities[19]. A theory, the one of femicide, later developed from Diana Russell, an American feminist sociologist and criminologist[20] who has the merit to nominate the phenomenon and to include in the concept not only the killing of women because women, but also all the prodromal and symptom conducts of the lethal end of the female individual[21].

2. – The phenomenon in numbers

The phenomenon of violence against women, anyhow nominated, is a phenomenon which has in Italy a large diffusion. According to official statistics coming from the National Institute of Statistics – which, since 2006, has conducted newly, with the grant of Ministry for the equal rights and opportunities, some important researches, by the method of interview, on theme of violence against women (ISTAT, Violenza contro le donne, 2008, n. 7, at the site www.istat.it) and on domestic and outside family violence (ISTAT, La violenza e i maltrattamenti contro le donne dentro e fuori la famiglia, published the 21th February 2007, ibidem) – are around seven million, a third of the female population, Italian women between 16 and 70 years that have suffered in their life, in or outside family, a form of violence, or physical or sexual: the research indeed studied different forms of violence included psychological violence and stalking[22].

Looking to the gravest violence – in the scale of seriousness of crime second only to homicide – rape, it results that around 5 million of women (23,7%) have suffered in life sexual violence in different forms. If between sexual assaults you consider only rape and attempted rape, the percentage of victims is equal to 4,8% (over one million of women). In particular, 1 million and 400 thousand women have suffered, mainly in the age less than 16 years, an episode of violence.

Sexual violence can occur inside or outside family: when violence comes from a partner is often reiterated violence (the percentage of victims that has suffered more than one time is 78,7%), when the offender of the sexual crime is not a partner, but an unknown person for the victim, the multiplicity of episodes interest the 55% of women. The sexual assault in this last case – when the offender is not a partner, is mainly characterized by Sexual harassment (around 92%); when the offender is the partner (husband or cohabitant), sexual violence is in the form of rape suffered by the woman for fear of revenge (around 70%), so as domestic violence – for the frequency and gravity of episodes – is gravest than the one perpetrated outside the walls of the house.

The last alarming element is the sexual violence suffered before 16 years of age: a quarter of victims indicates as offender a parent and a quarter a relative or friend, rarely an unknown person. The cases of sexual violence more frequent are the ones committed by persons very close to the victim: the father, the brother, the family friend, the grand-father, the uncle, the priest. In those cases more than half of victims decide not to denunciate choosing the silence (which is weaker only in case of a
stranger offender).

What is amazing of statistics, in fact, is that only a very low percentage of women suffering physical or sexual violence decide to denunciate (7,3%); this seems to be explained by the fact that only a small number of women believe that sexual assault is a crime, in the South and also in the North of Italy. Only for rape, or attempted rape, the percentage of women who consider to be victim of crime and denunciate the rape grows (26,5%), but denunciations are still rare (4%).

Those empirical data are confirmed today by another recent research made by the Italian National Institute of Statistics on Sexual harassment suffered by women during life, realized with the method of the interview, in 2008 and 2009, on a sample of 24.388 women between 14 and 65 years (ISTAT, Le molestie sessuali. Anni 2008-2009, at site www.istat.it).

The research, financed by the Department of Equal Opportunities of Government Presidency, shows as an half of women (more than 10 million women) has suffered in life sexual harassment in their job place: such as following secretly, exhibitionism, indecent calling, until physical assaults. Mostly victimized are young and graduated women (14–24 years).

More difficult is to find statistics data on homicides of female victims, so called “femicides”. The only data come from a research made by Eures in December 2012 (Eures 2012, 4 ss.), recently updated in the Report Eures on murder in Italy of 2013 (Eures 2013, 3), from which is possible to know that from 199 femicides in Italy in 2000 we have 159 femicides in 2012 with a progressive growth and with a predominance of family femicides. In particular, from the report emerges that gender violence is inflicted to one woman every 12 seconds: in 2010, Eures registers 105 thousand “gender crimes”, around more than 290 per day, that is one every 12 seconds. Specifically, the Report 2013 counts denunciations of gender violence: in percentage, 90,5% of women are victims of rape, 77,4% are victims of stalking, 53,5% of injuries. Sequent of threat, of battery, of bodily harms, all conducts made in 90% of cases from male offenders to female victims. Every two days a woman is victim of homicide. From 2000 to 2012 there are 2.220 women victims of homicide in Italy, so as an average of 177 victims every year, 70% inside the family: we register more than 81 homicides in 2013. Definitively, even if Italy (index of risk equal to 0,5), is very far from Germany (with an index of risk very high, equal to 0,8 per 100.000 women residents), France and United Kingdom for episodes of femicide, Eures concludes that this phenomenon is rising and alarming in Italy and that it is necessary to get public opinion sensitive and an intervention from the legislator is desirable[23].

Finally, the wide view coming from statistics, even if some caution is necessary, especially in relation to data on femicide in which is still in doubt if are included only gender homicide or all the homicides of female subject, is a view very distressing: although a lot of legislative reforms and of feminists battles, the reality of violence against women is deeply rooted in the Italian society.

3. – Criminological profiles beginning from the South-American experience of femicide

Although the stigmatization of the phenomenon of gender violence is increased in recent time, thanks to a wide political debate on the theme promoted by feminist movement, there is a constant regarding this form of violence: the omnipresence of laws against violence. This is true especially for sexual violence: «if sexual violence is
universal, similarly are laws against sexual violence»[24].

Another constant in this field is represented by presence of a double law, «expression of a double morality»[25], one for man and one for women. Think, for example of double law, to adultery, crime existed in Italian criminal law until 1970 and reserved only to the infidelity of woman and not of man: with the punishment of adultery was criminalized the violation of the right of property of man on woman[26]. Considering again the example of rape, often this crime has not the meaning of violence, but the meaning of sexual relationship with a woman property of another man and for long time, until 70's, the marital sexual violence was not a crime[27]. So as for long time rape was a crime involving three persons and not two: the offender, the victim, and the one who on the victim has a right of property[28].

Before describing the evolution of the discipline of gender violence in the Italian legislation and the actual legal framework, also in light of the recent ratification from Italy of the Istanbul Convention, some insights on criminological profiles and on researches made by criminologists on sexual and gender crimes are important, in order to complete the historical view.

The gender perspective in the criminological studies starts from the knowledge of the “double law”, expression of the “double morality” to which we referred to. It is essentially in the American context (specifically in the South-American one), in the feminist criminology, that develops the first gender analysis applied to criminological studies. According to the Italian feminist literature, is Carol Smart the first criminologist to conduct empirical researches in order to study female victimization, which, even if present in traditional criminology, assumes, in the American criminology, an important and main role[29]. And is merit of an American criminologist, Caputi, the idea that “the patriarchal domain” has a big role in the motivation of sexual crimes, and also the origin, as we said, of the term femicide which, according to Russell, excludes killings of man by a man (classified as homicides) and includes only killings of woman by a man and is distinguished in different categories according to the nature of the crime if happened in the family or outside[30].

In the American criminology, mainly, we have the first systematic empirical inquiries on femicide, intended as homicide of the female subject because woman, and also including all prodromal conducts of the lethal event of woman, the last one, a wide concept, accepted today from the Istanbul Convention, as gender violence: thanks to Marcela Lagarde and the Special Commission on femicide in Mexico, which she has presided, there has been an increase of the criminological researches on femicide[31]. Subsequently American criminology has developed a rich tradition of studies, empirical inquiries and legislations: think to Guatemala, whose criminal code envisages today femicide as autonomous crime, so as other 8 Latin-American States, as Brazil, as Chile, Costa Rica, Honduras, Peru etc.[32], a tradition completely absent in European criminology, as shown by the few inquiries found in Italy.

Thanks to American criminology we have the most important empirical researches on rape, the gravest form of gender violence after homicide. It is possible to highlight researches on social perception of sexual criminality. Researches have shown that rape is considered a very grave crime in the public opinion perception. Through the method of interview, some studies on indexes of criminality and gravity of crimes, in particular the study of Thurstone, in 1920, showed that the interviewed (students) considered sexual violence as the gravest crime absolutely, more than homicide, and between sexual crimes the most serious[33]. In this tradition of studies,
we highlight also the study of Sellin and Wolfgang which tried to evaluate the gravity of some behaviours as sexual assaults, prostitution, incest, corruption of minors, homosexuality, adultery, exhibitionism, sexual harassment and indecent callings. This research has been replied in the same way by some Italian criminologists (Delogu e Giannini), at the beginning of ‘80 years: with a very wide sample (students from university and college, police, judges, politicians and priests, prisoners and common people), the two researchers find that the sexual violence followed by homicide is considered as the gravest crime and sexual violence second for gravity after homicide[34].

It is so a criminological acquisition that sexual violence, expression, according to feminist criminology, of the “patriarchal domination” of man on woman, and statistically more frequent (think to Eures data on the sexual victimization at 90,5%), perfect example of gender violence, differently from the past, also recent, is today perceived as a very grave crime, probably the gravest. This could explain the attention of public opinion and of mass-media for gender violence.

In particular, criminology and psychiatry have studied the gravity of effects which sexual assaults can provoke on victims. Under this aspect, has been observed that sexual violence produces on victims a lot of pathological damages (as for example mainly post-traumatic stress disease), in long and short period[35]. Damages are of different nature in relation to the entity of violence and also in relation to capacity of victim to elaborate the trauma suffered and to react[36].

Criminology, on the other hand, studies the sexual offenders, looking for the “normality” or “pathologic” personality of them. The question is if sexual offenders are affected by mental disorder. The answer is negative. The motivation of rape is normally to be explained by power and fear (as partially underlined by feminists movements) and rarely by sexual pathologies. It has been written that mainly the sexual offender is moved by a particular cultural conception of sex as an instrument of power and domination on weaker persons[37].

The criminological research, finally, considered the weakness of official statistics, on which some note of caution must be advanced (often sexual assault is not noted, sometimes statistics are collected inaccurately), has tried also to measure the incidence of sexual violence, attempting to calculate how many man are willing to admit a sexual assault. Researches show an high female victimization. In this kind of research, the two most known studies are Koss and Russell’s studies. The first researcher, observing a wide sample of men and women in 32 American colleges, sees that more than 27% of female students older than 14 years has suffered rape (15%) or an attempt of rape (12%). The 8% male students admitted to be responsible of rape. Similarly Russell chooses a sample of 900 women older than 18 years drawn from residents of the city of S. Francisco. The 24% of women declared to be victim of rape, the percentage arose to more than 40% if the researcher considered attempts of rape[38].

The tradition of criminological studies, here briefly treated, reveals a complex phenomenon, the one of gender violence – term in our view to be elected not only for the recent reception by the Istanbul Convention, but also for the “confusion” which dominates actually the Latin-American debate (and today also the European one) on femicide[39] –, which indeed induces to a deep study of gender violence: as seen in the present essay, gender violence does not have an unique form, often different kind of crimes can integrate “gender violence”.

There is no other way than study the law for a deep analysis of this
criminological phenomenon. Even if legal definitions are apparently very precise, however they are in this field, as we will see, particularly fragile and hardly adherent to the empirical reality of gender violence. By the way, legal provisions and definitions remain the essential point of departure.


If we evaluate the Italian legislation on gender violence[40], we can find a grave inadequacy of criminal law to discipline in the field of sexual criminality and on violence based on gender. In front of the necessity to adequate criminal laws to the cultural evolution, the Italian legislator has shown not to be able to overcome the social conflict caused by traditional culture and by gender contrapositions[41]. This judgment is valid mainly in the discipline of sexual violence, but it is correct for the discipline of all forms of gender violence. It must be underlined in fact the delay with which have been disciplined all the phenomena that involve gender: only in 1996 the law on sexual violence, only in 2009 a law against stalking, considered by criminological doctrine a conduct which precedes rape and homicide, often conducted from man against female victims, only in 2006 a law on female genital mutilation.

The Italian legislative evolution in the field of gender violence comes from the first unitary code, Codice Zanardelli of 1889, which envisaged sexual crimes (artt. 331-344) in the Book II, chap. I and II of Title VIII, dedicated to crimes against morality and family's order. There were different crimes: rape, distinguished by minor sexual assaults, corruption of minors, incest relationship, offences to decency and abduction for marriage or for libido. This legal framework is the same as in Codice Rocco of 1930: in Book II, Title IX, dedicated to crimes against public morality and decency are envisaged in the chap. I crimes as rape (519-526), minor sexual assaults, abduction for libido or marriage, seduction with promise of marriage, qualified as crimes against sexual liberty. In the Codice Rocco, initially the logic of reproductive aim of sexuality induced for long time jurisprudence not to consider rape between spouses or against prostitute as crimes, on the base of the idea that the body of woman «is property of husband or of men»[42].

Those conceptions were early abandoned by doctrine and jurisprudence, but the code was unreformed.

It is on this situation that was born the Law 15th February 1996, n. 66, a law originated by a long debate, according to female movements, lasted to long (five legislatures), a law promoted by female movements, by women politicians, even if a law opposed by a part of those movements and also by a lot of jurists. A law, indeed, opposed by many, but voted at the end unanimously in Parliament before the termination of the Chambers. This law, recalling the criminological suggestion on the social perception of the high gravity of rape and remembering the growth of this crime in last years, considers the necessity of reform absolute, so that the Law n. 66 has changed the discipline: first, there is a move of dispositions on rape from Crimes against public morality and decency to Crimes against persons (Book II, Title XII, Chap. III, Section II, art. 609-bis ss.), so it is underlined that is no more public morality, a collective interest, but, according to a more modern view and in line with the changed social and cultural perception, an individual interest, the sexual liberty to be protected.
This systematic move has the merit, in theory, to overcome definitely that authoritarian and paternalistic vision which impeded the protection of women as a person, heritage of archaic conception of woman and of violence against female subject.

It is possible to note, incidentally, that, with respect of the asset protected by sexual crimes, in other European countries, has been followed a different way from the Italian one. I think to Croatian criminal law which – on the example of the German criminal law model – has envisaged a criminal discipline in which delicta carnis, in art. 188-9 of the Chap. XIV of Croatian Criminal Law, protect expressively two different assets: sexual liberty (rape and other forms of sexual assault, as rape with incapable, constrictio to rape, rape with abuse of power, rape with minor, less grave sexual assault) and also sexual morality (libido in front of child or minor, procuring of prostitution (so called lenocinio), use of children or minors for pornography, induce minors to pornography, incest). In other words, at least formally, in our country legislator tried to eradicate every reference to sexual morality, in other countries has been chosen to refer expressly to it[43]. In the Italian legislative evolution on gender violence, as we said, even with grave delay, sign of a cultural retardation and, in the words of the Istanbul Convention, of insensitivity to gender, are intervened different other laws. To show this delay there are the examples of more recent reforms of the Italian legislator in this field: non only Law 1998, n. 269 against use of prostitution, pornography, sexual tourism with minor victim, as new forms of slavery, and Law 2006, n. 38, against the sexual use of children and pedo-pornography also by Internet, lately integrated by the ratification of Lanzarote Convention which has introduced art. 414-bis in the criminal code, so as to nominate paedophile (609-undecies c.p.), but specially the recent reform, inside a so called “Pacchetto Sicurezza” in 2009, aimed to discipline the crime of stalking, considered by criminological doctrine often conduct that precedes rape and acted by men on women in most of the cases[44].

Stalking – which in 80% of cases is directed to female subjects from an offender who is a partner or an ex partner and which is included in the concept of gender violence – is a phenomenon well known in the society since long time: in the last decade, the increased number of denunciations and judiciary decisions has revealed that the syndrome of stalker has become a grave and serious problem, in some countries (United States, England, Canada and Australia) still well known. Despite that, the law, certainly useful, has been passed in Italy only in very recent time, sign, in our view, of a cultural delay in the protection of woman.

With the aim, from a criminal-policy point of view, to give adequate answer to the crime of rape, Italian Government has indeed passed Legislative Decree 2009, n. 11, converted in Law 2009, n. 38, in which are included a lot of provisions against gender violence. On the substantial criminal law, this law introduces a reform of art. 576 c.p., which discipline murder, with the provision of punishment of life imprisonment in case the homicide is committed on the occasion of the commission of some of the sexual crimes punished in art. 609-bis (sexual violence), 609-quater (sexual violence with minor), 609-octies (sexual violence committed by a group)[45] (a logic similar to the American felony-murder doctrine). The Law n. 38 introduces also reforms on criminal procedure, with the provision of a prohibition to go in the places frequented by the victim and also with provisions on free legal and public aid in favour of the victim of sexual crimes, financial grants for assistance to victims of sexual violence and gender violence and, mainly, the law introduces the crime of stalking, as we said, with measures to help victims of this last crime, and a green number in favour

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of the victims.

Without describing, for economy reasons, the elements of this crime[46], we want to underline the nature of typical gender crime of stalking. A lot of cases of stalking are perpetrated inside domestic walls. In this cases the spouse or cohabitant who suffers conducts damaging her body, her moral integrity or liberty can ask to the judge for the adoption of the so called “protection orders” (order to stop the conduct, banishment from the family house, prescription not to go in the places frequented by the victim as the job place, the house of the family, the children’s school).

Often, the stalker does not only bother the victim but has other illicit behaviour, making crimes autonomously punished such as: rape (art. 609-bis c.p.), grievous bodily harms (art. 582 c.p.), insult (art. 594 c.p.), defamation (art. 595 c.p.), assault (art. 610 c.p.), menace (art. 612 c.p.), housebreaking (art. 614 c.p.) injury (635 c.p.), and also homicide (art. 575 c.p.)(47). The stalker, even if it is difficult to profile him and the relationships in which he chooses the victim, is generally a man. The persecution and the harassing behaviour can come also from a woman, but in 70-80% of cases comes from man, partner o ex partner of the victim. Often those behaviours occur at the end of a love relationship, when the stalker, feeling alone and lost, insists to continue the relationship. Those behaviours must be capable to create psychological and physical disease and a reasonable fear, anxiousness and fright in the victim.

An hint, in the Italian legislation on gender violence, merits also Law 2012, n. 172, which ratifies Lanzarote Convention, with reference to norms on crime of sexual violence[49].

Important is the designation of an authority for the registration of national data on condemned for sexual crimes, in the Home Ministry. News very important is the doubled prescription terms provided for crimes of Section I, Chap. III, Title XII (Book II): not only for different crimes of paedophile, but in particular for sexual crimes, and for the new crime of family abuses. A reform very useful because consents to victims of rape and abuses to have time necessary to choose the way of denunciation and also for complexity of investigations in those cases. Useful is also the growth of the terms provided by this law if we consider that the Istanbul Convention today makes this terms mandatory (art. 58).

The reform modifies the norm on family abuses, denominating the crime abuses against relatives and cohabitants and making the punishment for the crime harsher and including in the protection of the norm the cohabitants. This reform seems to be very important because punishes domestic violence in a way more coherent to the principle of proportion, so as showing to know the criminological acquisition according to which family, in all cultures, is a place where woman (and also children) is victimized and is the place where woman has risks of being damaged[50].

It is confirmed also between the aggravating circumstances of homicide, the fact to have committed the killing on the occasion of crime of sexual violence (609-bis, 609-quater, 609-octies), as still provided by Law n. 38/2009, and also in the occasion of the crime of abuses against relatives and cohabitants (art. 572), and also of minor’s prostitution and pornography (art. 600-bis and ter).

It is also envisaged, in case of condemnation sentence or plea bargaining for the crime of female genital mutilation[51] – another crime, as we said, which is related to gender because mainly suffered by female subjects – the interdiction measure of the decadence of parental authority, and also the perpetual interdiction from tutelage, protection and aid.

With respect to this other case of gender violence, only with Law 2006, n. 7 has
been introduced for the first time in the Italian criminal system the crime of genital female mutilation. The norm specifies the crime of bodily harms, envisaging the particular phenomenon of mutilation of organs of woman. It is, as well known, a phenomenon culturally characterized because diffused mainly in some African, Arab and Asiatic Countries. Because is a culturally motivated phenomenon, it is connected to the problematic relationship between criminal law and multicultural societies: the question is how is possible to punish one fact which is contrary to values of the juridical system of the arrival country, but which is deeply-rooted in the culture of the country of the provenience of the offender and if it is possible to concede justifications or excuses for behaviours completely accepted in those culture and which are firmly opposed to values of the juridical system of the arrival country[52]. The answer to this question is, for the criminal doctrine, very complex. In any case, prevails at international level – and today also in European place, considered the opposition of the Istanbul Convention to any consideration of the cultural factor as justification – a view contrary to practices of female genital mutilation for the serious risks for the health of woman. Think to Resolutions of United Nations n. 48/104 and 53/117 of 1998, to Recommendations of the Council of Europe n. 1371/1998 and n. 1450/2000, to Resolution of Parliament of European Union of 2001, where is asked to States members to condemn genital mutilations introducing ad hoc norms because practices contrary to fundamental human rights. The legislator of 2006 has indeed accepted this suggestion of the international community envisaging two different crimes: crime of mutilation (art. 583-bis, comma 1 c.p.) and crime of injury to female genital organs (comma 2), even if the punishment is unanimously judged too harsh.

This legislative evolution in the field of gender violence, here summarized, is today completed by a new law: is the Decree law 14th August 2013, n. 93, converted in Law n. 119/2013.

With Law of 27th June 2013 n. 77, Italy has ratified the Istanbul Convention. The Convention, is known, is not still in force, because it is not still ratified by an enough number of States, however «its policy function is certain»[53]: with the Decree Law n. 93/2013 in fact has been given concrete application, at least in theory, to the Istanbul Convention.

Limiting our study to the news on the field of criminal law, and in particular on gender violence, it is necessary to underline as the legislative reform intervenes on three of the gravest forms of gender violence studied here: reforms of crime of abuses, sexual violence and stalking. The first crime, the crime of family abuses (art. 572 c.p.), recently, as we said, reformed by Law of ratification of Lanzarote Convention (Law 1st October 2012, n. 172), is modified by Law n. 119/2013: the second provision of art. 572 c.p. is no more law and it is introduced a new common aggravating circumstance in the text of art. 61, paragraph 11-quinquies, according to which «to have, in the crime not committed with malice against life or integrity or liberty and in the art. 572 of the criminal code, committed the fact in presence or with damage of a minor less than eighteen years old or against a pregnant woman»[54]. This is an open reception of the disposition of art. 46, d) of the Istanbul Convention, where is required the obligation to design an aggravating circumstance when the fact is committed in presence of youngest (even if the age of eighteen cannot be considered exactly as the age of the youngest). The common aggravating circumstance provide in this way a protection for two subjects very vulnerable: the minor and the pregnant woman. It is necessary to underline that Directive EU n. 29 of 2012 on the protection of victims of crimes and in particular of victims of gender violence has introduced a special attention

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to victims particularly vulnerable which are subjects to secondary victimization between whom there are victims like minors, persons with handicaps, and victims of gender violence. The disposition has introduced so the case of “assisted violence”, or the violence committed in presence of the minor and not only with damage of the minor. This kind of violence is a violence which can be suffered also by a minor who assists to the abuse against the mother and so suffers a form of psychological abuse because the violence which surrounds the family context. This is, as well known, an habitual crime, committed with reiterated conducts. This common aggravating circumstance should have been extended also to the crime of stalking (art. 612-bis c.p.), a crime against the moral liberty, even if, as we will see, those aggravating circumstances (except the one of the “assisted violence”) are envisaged also for the crime of stalking[55]. The aggravating circumstance is criticized also because of the consideration of crimes like “omission of aid” (art. 593 c.p.) or “illegal arrest” (art. 606) which are not necessarily committed, even if it could be possible, in presence of the minor[56]. The second reason of critique that must be outlined is the fact that this common aggravating circumstance interfere often with other special aggravating circumstances provided in the criminal code.

For the crime of sexual violence, are introduced by the Decree Law, correctly, two others aggravating circumstances (over the ones of art. 609-ter c.p.): the first is the hypothesis in which sexual violence is perpetrated against a woman pregnant; the second is differently the hypothesis in which sexual violence is acted against person of which the guilty is the spouse, also separated or divorced, or who is or has been related by a love relationship also without cohabitation to the guilty. The first aggravating circumstance, not different from the common aggravating circumstance of minor defence, seems to recall the disposition of art. 46, c) of the Istanbul Convention and it is correct in light of the vulnerability – a fundamental concept in the Convention where art. 12 recognize for the first time explicitly «specific needs of persons in situation of particular weakness», as female subjects, and the necessity to concentrate, with particular attention to victimology, on «human rights of all victims» – of pregnant woman. The aggravating circumstance however creates problems when the pregnancy is not evident, with subsequent complexity in the configuration of the psychological element with respect of the aggravating circumstance.

The second aggravator provision is also a sigh of the recognition of the “gender” view and of potentiality of victimization present for woman in the affective relationships: non only sexual violence recurs in case of violence between relatives, a violence, as underlined, not admitted by jurisprudence for a long time, but also in any kind of relationship, also not preceded (or no more) by cohabitation[57].

Art. 609-bis c.p. has been reformed definitely by the Law of conversion 119/2013 with the introduction of: the point n. 5 which provides that is aggravated the rape committed against minor of eighteen instead of sixteen years, when the crime is committed by the parents; point 5-ter when the crime is committed against a pregnant woman; point 5-quater when the crime is committed by the spouse, also separated or divorced, or related to the victim by an affective relationship, also without cohabitation. There is evidently a duplication of the norms if we consider the aggravating circumstance of art. 61, 11-quinquies c.p., introduced by the Law 119/2013, even if the latest is a common aggravating circumstance and the other one a special aggravating circumstance. This provision is, in any case, a reception of the criminological acquisition according to which the love relationships, institutional or not, are examples of minor defence: are situations more insidious for the victim and the
crimes committed reveal a criminal inclination of the guilty[58]. The disposition is criticized by the doctrine for the possible violation of the principle of legality, in particular the principle of precision, because the vagueness of the expression «love relationship without cohabitation»[59].

Finally, the reform intervenes, again on the aggravating circumstances, modifying the norm of art. 612-bis c.p., which discipline the crime of stalking. The norm, still reformed with a harsher punishment by Law of 2013 n. 94 (change from 4 to 5 years of imprisonment as maximum punishment), today envisages two aggravating circumstances wider: one applicable non only to fact committed by the «spouse legally separated or divorced», but also «by the spouse also de facto separated or divorced», to clear that the aggravation of punishment intervenes in any case also if the separation or divorce is not legal, so also in case of de facto divorce. The reform, however, will render difficult to distinguish between the crime of family abuses and the crime of stalking (art. 612-bis c.p.)[60]. A second aggravating circumstance is provided in case of cyberstalking, or stalking committed with informatic instruments (think to the alarming phenomenon of stalking committed through the so called social networks). Even if this reform is useful, considering the certain negative value of those conducts, capable to compromise seriously the moral liberty of victim, can be observed however as still before jurisprudence considered this insidious form of stalking, whose more gravity is not always present - even if the crime interests a big community of persons and so the crime, often committed with other crimes like defamation through internet, is very diffusive and serious - so as to justify invariably the aggravating punishment[61]. The crime is committed usually posting comments, photos, films, and defamatory phrases on the so called social networks. It must be underlined also that stalking is aggravated until an half when the fact is committed against a minor, a pregnant woman, against a person with handicap (art. 612-bis, 3 c.p.).

Finally, the Decree Law introduces the principle of irrevocability on the field of the regime of the action for crime of stalking. One question, this last one, fundamental and object of a wide debate also before and after the reform of the crime of sexual violence: art. 609-septies envisages, as in the previous regime, the regime of an irrevocable action of the victim with a term longer than the traditional and common one of three months. The term is, in fact, of six months from the commission of the fact. This provision is originated by the knowledge that because of the strong trauma suffered by victim of sexual violence – which often does not consent to react in short time – it is necessary to concede a longer time to the victim, in order to privilege the wilfulness of the victim, making the public interest to repression of crimes in second place respect the concrete interest of the victim. However there are still some cases of de plano action, which remain very frequent. Moreover the action is irrevocable to avoid indecent pacts. The irrevocability however seems today disputable. The extension to six months of the term to present the action is also disputable if we think that reality of rape is complex. Woman can decide to denunciate immediately or can decide in a long time often more than 6 months: think to the case of woman who has suffered violence during the infancy and only when adult find the courage to denunciate. For the law this has no more value. So the action should be consented always, even if in the terms of prescription.

As for the irrevocability of the action the indication should be to change it in a revocable action, to be more respective of the principle of self-determination of woman. Indeed, the risk for the woman to be subject of menace and blackmail is not a
consequence of the revocability of the action, but of the same nature of the crime which sees the woman free to nominate the act as violent or not. The woman must be free to evaluate, as correctly affirmed, «her relationships and for example decide to continue the cohabitation or relationship interrupted because of the violence. This often happens. It is more coherent a woman who procedurally declares that she wants to renounce to the action previously initiated than a woman who in the tribunal risks the calumny changing her testimony and minimizing the violence suffered»[62]. Similar considerations should be valid, in our view, also with respect of the regime of irrevocability today provided for stalking. It is necessary to observe, however, the contrary position recently expressed by the Strasbourg Court on this theme: on this point the Istanbul Convention doesn’t take a position, prescribing only the ban of alternatives dispute resolution as method to overcome conflicts or alternative measures to the mandatory punishment (art. 48)[63].

In fact it cannot be denied that often the stalker can use heavy menace to induce the woman to retire the action: is good that the Law 119/2013 has today introduced «the irrevocability with remission only in the process»: in this way the process will be celebrated and only the judge will be able to ascertain if the remission of the action is really spontaneous[64]. The action is again irrevocable if the fact is committed with reiterated menace (art. 612 c.p.), by persons together or with anonymous paper, or in a symbolic way, or using the force of secret associations, real or supposed or with pyrotechnic tools dangerous for the people.

It must be underlined that the same European Court of Human Rights has very recently accepted the dogmatic framework of gender violence, so as here reconstructed, showing in particular as this form of violence represents a violation not only of art. 8 of the European Convention on Human Rights, but also and mainly of the art. 3 of the Convention: recognising expressly the nature of inhuman and degrading treatment of gender violence, a manifestation of the violation of human rights of female victims (see European Court of Human Rights, section II, 26th March 2013, Valiuliene v. Lithuania)[65].

Definitely, in our opinion, in the Italian legislative evolution, the instruments to combat gender violence are grown, as it was necessary, in recent time, even if according to an evolution line which certainly betrays a cultural delay.

4.1. – The admonition and the other penal provisions of Law 119/2013

It must be underlined that there is also the possibility, before the proposition of the action by the victim, of the admonition by the Commissioner, after the victim has explained the facts and with the request of an admonition to the guilty. The Commissioner can make the admonition and can evaluate if it is necessary to take some decision on weapons and munitions. The Commissioner can do the admonition, after the assumption of testimony and hearing the authority. The warning can come also from others, but they don’t have to be anonymous, or directly from the victim who can make a warning to police, to doctors and to public institutions. Measures for the victims, like assistance from Agencies against violence and public defence, and measures for the guilty, like the audition at family counselling, are envisaged.

The other penal provisions in the Law 119/2013 are related to the reform of the crime of menace (art. 612 c.p.) for which is today foreseen the fine of 1.032 Euro; the crime of robbery, for which the aggravating circumstance of the commission of the
crime in private houses is extended to the crime committed in places where the public or private defence is obstructed and also the aggravating circumstance when the fact is committed against a person over than 65 years old.

The crime of theft is also interested by the reform: it is envisaged the aggravating circumstance of the theft of metallic tools. Receiving stolen goods, extortion, and informatics fraud are crimes also interested by the reform with aggravators provisions and the growth of the punishment.

5. – Lights and shadows of recent legislative reforms

If we would now confront the legal framework construed by the Italian legislator with the recent reforms with the prescriptions of the Istanbul Convention, we should confirm our last judgment only partially.

First, disputable seems the fragmentary of the legal reforms developed during the time, often with decree-law made with urgency, and mainly the lack of an organic reform of the matter of gender violence, a reform which the Istanbul Convention – on whose historical importance we just said – in our view makes necessary. The Istanbul Convention, in fact, defining for the first time dogmatically the gender violence in a paradigm not different from the one still drown by the American criminology and in accord to the principle of legality, asks for a law reform which discipline in a more organic way the phenomenon of gender violence, nominating it, defining it, and restricting the number of crimes capable to integrate this kind of violence, also eventually taking a position with respect of discussed hypothesis of femicide as autonomous crime (hypothesis excluded from the Convention, so as excluded is the hypothesis of an aggravating circumstance when the victim is a woman), providing also for adequate financial resources in order to implement those measures which form an important part of the Istanbul Convention.

Financial resources in primis in order to collect data on gender violence, with statistical inquiries on «frequency and percentage of condemnations» (art. 11, a e b of the Convention) on whose lack, in the European context, with confront to the American one, we have said. Furthermore, financial resources with the aim of promote prevention activities of the phenomenon (Charter III of the Convention), through an action for sensitize and training of professional figures, and activities of protection and aid (Charter IV), through information, assistance for the denunciations, predisposition of house refugee and telephonic lines for help and support to victims, included minors, testimonial of violence. Financial resources, finally, dedicated to compensation of the victims of gender violence, provided explicitly by art. 30 of the Convention[661]. Resources which today in Italy, even if there are still laws to prevent the phenomenon, are very scarce explaining why the protection of victims of gender violence in our country is very fragile.

On the point of view of criminal law, strictly, the problem is the one of the commitment of incriminations foreseen in Chapter V of the Convention. As said in the beginning they are commitments which are related mainly to nine crimes: psychological violence (art. 33), stalking (art. 34), physical violence (art. 35), sexual violence, included rape (art. 36), forced marriage (art. 37), female genital mutilation (art. 38), forced abortion and forced sterilization (art. 39), sexual harassment (art. 40).

If we look carefully to the Italian criminal legislation, we cannot say that it was• • • • • • • • • • • • • • • • • • • http://www.dirittoestoria.it/12/contributi/Goisis-Gender-violence-Istanbul-convention-Italian-legislation.htm
not still providing a criminal law protection to interests protected by those crimes. It is a fact that the punitive approach contained in the Decree Law n. 93/2013, converted in Law 119/2013, «does not add decisively to the previous legal framework, because the previous criminal norms and connected process norms (...) covered, just before, the totality of the needs of punishment (...) receipted in the international and European legislation»[67] (probably the only lack is an express criminalization of the forced marriage, protected however by a complex of other norms of the criminal code as art. 558, 573, 574, 574-bis, 610 c.p.)[68].

The question which is now open and that the Istanbul Convention renders today very urgent is another one: if those common crimes – think to bodily harms, psychological violence, or again paradigmatically homicide, in the discussed figure of femicide that someone would like to envisage as autonomous crime, contemplated for example in the Guatemala’s criminal legislation, in the form of killing of woman “because woman” (and also, with symbolic value, in Chile, in the form of parricide, and in Mexico and other South-American countries)[69] – must be declined in a gender way: if in other words is useful to nominate gender in the norms of classic criminal law.

If it is accepted the view, declared in the Istanbul Convention at art. 12, of the necessity to answer to needs of victims particularly vulnerable and fragile (a view not different from the one accepted by OSCE to protect victims of homophobia because of their sexual identity and mainly sanctioned expressly in Directive EU n. 29 of 2012 on the protection of victims of crimes and in particular of victims of gender violence)[70], the answer seems to be affirmative. At the same time if we discuss the problem in light of the substantial equal protection of law clause, declined according to principle of reasonableness, it could induce to an affirmative answer.

If we does not understand the opinion of who underlines that «the tendency to construe particular and privileged criminal frameworks seems index of juridical particularism typical of neo-corporative post-modern society» and example of «legal paternalism»[71], however, we think, as written in the feminist literature, that discipline bodies and sexuality or relationships between genders through the law is a very complex and delicate task. To norm is a task which always involves abstractions which are not in accord to a field as complex as the one of communication between genders[72]. This is the reason why we think that the suggestion according to which, in the field of gender violence, «the legislative reform must be persecuted with a lot of caution. And is not possible to reach ambitious female liberty goals through the criminal law»[73], is still actual in a debate which remains open, especially to suggestions coming from the comparative analysis and from criminological researches. As underlined recently about the opportunity to envisage a crime of femicide in the Italian criminal system, and for us the judgment is valid for all forms of gender violence, «a healthy principle of caution (...) must (...) impose to the legislator to wait that the doctrine, with the help of comparative legal analysis, studies more profoundly the question. We know very few; we have not still reflected enough on negative consequences that the introduction of the crime of femicide could have on fundamental principles of the legal system»[74].

It is true, however, in this debate still in fieri, a fact unanimously recognised: criminal law has been and is still today «an instrument to confirm gender inequalities present in other field of the legal system and of society»[75]. It is not possible, in fact, to deny that the actual structure of crimes against person confirms situations of gender inequalities. It is now time, also in light of the Istanbul Convention, to upset this
acquisition. «To engage the problem correspond fully to the roles which criminal researchers should carry out in the society».

Mainly is time, in our view, to adequate juridical concepts to the changed scientific framework, declared by criminological science and legislative international science, of which the Istanbul Convention represents the higher expression.

The Italian legislator, with the recent legislative reforms, has lost the occasion to operate (or at least initiate) a transition towards a criminal law more equal.

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Abstract

The essay deals with the theme of “gender violence” from an historical point of view and try to reconstruct the dogmatic framework of the theme in light of the recently approved Istanbul Convention. Special attention is given to the data on the phenomenon in Italy and to the criminological profiles since the category of gender violence comes from the South-American criminological and feminist experience. The last part of the essay is dedicated to a critical evaluation of the legal instruments which the Italian legislator has passed in order to combat the phenomenon of gender violence. The conclusion is that the Italian legislator, with the recent legislative reforms, has lost the occasion to operate (or at least initiate) a transition towards a criminal law more equal because he has not tried to adequate juridical concepts to the changed scientific framework, declared by criminological science and legislative international science, of which the Istanbul Convention represents the higher expression.

[Per la pubblicazione degli articoli della sezione “Contributi” si è applicato, in maniera rigorosa, il procedimento di peer review. Ogni articolo è stato valutato positivamente da due referees, che hanno operato con il sistema del double-blind]

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[8] *ibidem*.


[12] VIGARELLO, cited, 100 ss.


[16] For the text of the Convention, see the site of the Council of Europe, www.coe.int/conventionviolence.


[22] GOISIS, cited, 1 ss.

[23] Ibidem, 4. On the other side, some mass-media releases as updated to the year 2012, releases made by the organization «House of the Women Not To Suffer Violence» in Bologna, show similar numbers. In a recent Report of March 2013 this organization reveals that from 2005 to 2012 femicide cases recorded by the press have a progressive increase. See CASA DELLE DONNE PER NON SUBIRE VIOLENZA, Femminici in Italia: i dati raccolti sulla stampa relativi al 2012, Bologna, 8th March 2013.


[26] FADDA, cited, 8.

[27] PINKER, cited, 397.


[29] SPINELLI, Il femminicidio, 87.


[31] SPINELLI, cited, 89.


[34] Id., ibidem.


[36] According to the more recent psychiatric studies, the negative effects on the victim are independent from the immediate reaction: strong sudden reactions not always are related later to damages to the psychic life of the victim, instead episodes of violence experienced with composure often can lead during the time to very grave pathogenic effects. The dimension of the traumatic result depends also by other factors as the reaction of the person to whom the violence is revealed for the first time, eventual problems psychopathological of the mother or the father: the probability of sexual violence to be transformed in a trauma responsible of psychopathology in an adult age depends proportionally by the quantity of negative factors present in the family or in the original social context. In any case, in the age of adolescence or in the infancy time violence generates a lot of suffer which will be very grave also for the psychological result. When violence occurs in an adult age, instead, will occur symptoms like the post-traumatic disturb from stress, existentially or psychological (as for example the tendency to have an unconscious idea of the trauma, as diseases, fear, difficulty of memorization and concentration). This is due to the fact that sexual violence violates more then any other crime the sense of personal dignity and the liberty of auto-determination of the victim, as evidenced by the sense of guilt and the shame, typical symptoms of the victim of violence. FIANDACA-MUSCO, cited, 199, and also COSTA-FORTUNATO-VENTURINO, Violenza sessuale: postumi psico-fisici evidenziati all’esame psicodiagnostico e medico-legale in utente donna, in Zacchia, 2010, 3, 409 ss.


[39] CORN, 2. However this term today is used by Italian jurisprudence: PAVICH, Le novità del decreto legge sulla violenza di genere: cosa cambia per i reati con vittime vulnerabili, in Diritto Penale Contemporaneo, 2013, 2.

[40] See in general on sexual crimes in the Italian legislation before the Law n. 66/1996, BERTOLINO, *Libertà sessuale e tutela penale*, Milano, 1993. On the legislation since this last law and in particular on the repressive orientation of the more recent Italian legislation, see Id., Il trattamento del delinquente sessuale tra legislazione e prassi. Introduzione al focus, in Riv. it. medicina legale, 2013, 4, 1805 ss.


[44] With the Law 23 April 2009, n. 38, the legislator has chosen to criminalize some conducts often prodromal of sexual violence very frequent in the social reality: has introduced the crime of "stalking", at art. 612-bis c.p., according to which: «If the fact is not a more serious crime, it is punished with the imprisonment of six months up to four years, who, with reiterated conducts, menace or take harassment to somebody in a way capable to ingenerate a very grave and prolonged anxiety or fear or to ingenerate a profound fear for his physical integrity or the one of a relative or persons to him related by a relationship or to force him to change his way of life. The penalty is harsher if the fact is committed by the spouse legally separated or divorced or a person who is related by a relationship to the victim. The punishment is increased until an half if the fact is committed against a minor, a pregnant woman or a person with disability of art. 3 Law 5th February 1992, n. 104, or with guns or a person travisated. The crime is punished by action of the victim. The term for the action is of six months. The action however is ex officio if the fact is committed against a minor or of a person with disability of art. 3 Law 5th February 1992, n. 104, and when the fact is connected with another crime for which it is necessary to proceed ex officio». Studying the disposition, it must be observed that the norm is a subsidiary one, being applicable only where the fact is not an harsher crime. Collocated systematically between the norms that protects the moral liberty, concept which can be connected to the liberty of self-determination, or liberty without
any kind of bias. The author could be anyone, it is therefore a common crime (made often by a man against woman). The aggravating circumstance is when the author is the spouse legally separated of divorced or a person which has been related to the victim. The conduct consists in menace (the presentation of a future and unjust damage) or harassment (this change the physical and psychical status of a person). The norm envisages a reiteration of conducts so as to produce a persecution capable to strongly and permanently affect the quality of life of the victim, on a psychological side and also on a material one. On the subjective plane, the crime is punishable when committed with malice. VALSECCHI, Il delitto di "atti persecutori" (il cd. stalking), in Riv. it. dir. e proc. pen., 2009, 1377 ss.

[45] Just before this reform, however, the doctrine believed that, even if in presence of abolitio criminis made by Law of 1996, there was a sequence of criminal laws in the time and the lack of modification of art. 576 of the criminal code must be considered only a lack of legislative coordination.

[46] From a criminological point of view, mainly, it could be said that the stalking (the term stalking according to some researchers comes from hunting, because to do the post give the idea of the behaviour of the stalker and the physical and psychic reactions that this can provoke in his victim), is a phenomenon well known in the praxis: in the last decade, the multiplication of denounces and judiciary decisions has revealed that the syndrome of the stalker is become a very serious problem.


[48] Io, cited, 1385.


[50] FADDA, cited, 7 s.

[51] The Law 9 January 2006, n. 7 concerning "Female Genital Mutilation” has introduced in our criminal system, in the code, the art. 583 bis c.p. which explicitly says: "Pratiche di mutilazione degli organi genitali femminili”. «Anyone, in the absence of therapeutic needs, causes a female genital mutilation is punished with the reclusion from four to twelve years. For the present article, must be intended as female genital mutilations clitoridectomy, excision and infibulation and any other practice that causes same effects. Anyone, in absence of therapeutic needs, causes, with the aim to damage the sexual functions, harms to the female genital organs different from the one indicated in the first paragraph, from which comes a physical or mental disease, is punished with the imprisonment from three to seven years. The penalty is reduced until two third if the harm is not grave. The punishment is increased of a third when the practices of the first and second paragraph are committed against a minor or if the fact is committed for lucrative reasons. The dispositions of the present article are applied also when the fact is committed abroad by an Italian citizen or by a stranger resident in Italy, or against an Italian citizen or a stranger resident in Italy. In this case, the guilty is punished by request of the Ministry of Justice».

[52] BASILE, Immigrazione e reati culturalmente motivati. Il diritto penale nelle società multiculturali, Milano, 2010; Io., La nuova incriminazione delle "pratiche di mutilazione degli organi genitali femminili”, in Dir. pen. proc., 2006, 6, 680 ss.


[56] PITTARO, cited, 717.

[57] PAVICH, cited, 7-8.

[58] PITTARO, cited, 719.

[60] Recchione, cited, 2 ss.

[61] Pistorelli, cited, 4; Pittaro, cited, 720.

[62] Virgilio, last citation, 168.

[63] So in the case Opuz v. Turkey, of 9th September 2009, where the European Court of Human Rights has invited, with reference to gender violence, to change the regime of proceed from the will of the victim, because it is necessary to protect the right of life and the physical integrity which is an objective of the States. See Recchione, cited, 6.

[64] Pittaro, cited, 721.

[65] Parodi, La Corte di Strasburgo alle prese con la repressione penale della violenza sulle donne, in Diritto Penale Contemporaneo, 2013, 1 ss.

[66] Battarino, Note sull’attuazione in ambito penale e processuale penale della Convenzione di Istanbul sulla prevenzione e la lotta contro la violenza nei confronti delle donne e la violenza domestica, in Diritto Penale Contemporaneo, 2013, 4 ss.


[69] Corn, cited, 11 ss.


[73] Virgilio, cited, 169.

[74] Corn, cited, 22.

[75] Corn, cited, 8.

[76] There are countries, as South-America, but also European countries as Spain, where this transition is today in development: there is in fact a change from a neutral approach of criminal law with respect to “gender” to another one which is sensible to gender and which reveals on the field of the reformulation of the language and of juridical concepts, in adherence to the recognition of the gender differences.
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