



RAPE, BLUE JEANS, AND JUDICIAL DEVELOPMENTS IN ITALY

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On June 10, 2008, the Supreme Court of Italy (*Corte di Cassazione*) affirmed a decision made by the Court of Appeal of Venezia condemning a defendant to one year of imprisonment for having repeatedly sexually assaulted a sixteen-year-old girl.¹ The appellant, who was in a relationship with the mother of the victim and cohabited with them at the time of the aggression, argued that the girl had slanderously misrepresented the facts. Particularly, the defendant claimed that since the plaintiff was wearing a pair of tight blue jeans at the time of the alleged episode of sexual violence, it is not conceivable that he could have inserted his hands underneath her pants without her consent.²

The reasoning offered by the defense harkened back to the controversial decision number 1636/99 issued by the Supreme Court of Italy on February 10, 1999. In that decision, the Court overturned a previous rape conviction on the grounds that “it is nearly impossible to slip off tight jeans even partly without the active collaboration of the person who is wearing them,”³ thus assuming that sexual intercourse must have occurred consensually. The decision provoked outrage among female representatives of political forces differently aligned in the Italian Parliament and public opinion. On the day following the Supreme Court’s ruling, female politicians paraded in protest before the Italian parliament, wearing blue jeans and holding placards that read “Jeans: An Alibi for Rape.”⁴

This case analysis revisits the judicial developments of the “jeans defense” for rape in Italy until the recent Supreme Court decision of 2008, placing the Italian struggle in combating sexual violence against women within the larger context of European human rights law.

I. THE JEANS DEFENSE FOR RAPE

On July 12, 1992, an eighteen-year-old student reported to the police that her forty-five-year-old driving instructor had raped her the previous day during a driving lesson.⁵ She recounted that the man had driven her to a secluded pathway outside the inhabited center, where, after flinging her down on the ground and slipping off her blue jeans from one leg, he had brutally raped her. A different version of the facts was reported to the police by the driving instructor once he was

¹ Cass., sez. III, 10 June 2008, n.01457.

² *Id.* at 3.

³ Cass., sez. III, 6 Nov. 1998, n.1636, Riv. Pen. 1999, 258.

⁴ *La “sentenza dei jeans” tra maschilismo e garantismo*, LA REPUBBLICA.IT, Feb. 12, 1999, <http://www.repubblica.it/online/fatti/jeans/tridico/tridico.html>; see also *Outrage at “Jeans Alibi” Verdict*, BBC, Feb. 11, 1999, <http://news.bbc.co.uk/2/hi/europe/277881.stm>.

⁵ Cass., sez. III, 10 Feb. 1999, n.1636. See also Samantha Frank, *Jeans: An Alibi for Rape*, 7 CIRCLES BU. W. J. L. & SOC. POL. 10 (1999) (discussing judgment n.1636/99); Rachel A. Van Cleave, *Sex, Lies, and Honor in Italian Rape Law*, 38 SUFFOLK U. L. REV. 427, 446 (2005).

arrested. Indeed, he confirmed having engaged in sexual intercourse with his student at the time and place she had recounted, but claimed that it had been consensual.⁶

The man was then initially charged with “carnal violence,” “private violence,” “sexual abduction,” “grievous bodily harm,” and “gross indecency in public.”⁷ On February 29, 1996, the Tribunal of Pomezia convicted the driving instructor only of gross indecency in public, acquitting him of the other charges. However, in 1998, the Court of Appeal of Potenza held the man accountable for all of the offenses and sentenced him to two years and ten months of imprisonment. As a last resort, the defense appealed to the Supreme Court, which quashed the previous conviction with its startling decision on February 10, 1999.

The Supreme Court reasoned in detail that the lower appellate court had failed to conduct an adequate and rigorous scrutiny of the trustworthiness of the plaintiff’s accusations and of those circumstances that were inconsistent with the alleged rape. In particular, the Supreme Court rebutted the appellate court’s decision that had evaluated the partial removal of the blue jeans as evidence of the victim’s lack of consent, stating, on the contrary, that it would have been peculiar for the girl to undress in the middle of the day even had she consented.⁸ Moreover, the Supreme Court pointed out that “it is a fact of common experience that it is nearly impossible to slip off tight jeans even partly without the active collaboration of the person who is wearing them.”⁹ Considering this, the Supreme Court conclusively quashed the previous conviction and remanded the case to the Court of Appeal of Naples, which ultimately acquitted the man.¹⁰

The judgment stirred up what the media coverage and scholars referred to as an “authentic political earthquake”¹¹ that “succeeded in making everyone agree. In opposition, unfortunately.”¹² Politicians and ordinary people felt outraged at the questionable rape decision and joined the swell of protest. Local and international media captured an array of female legislators wearing blue jeans on the doorstep of the Parliament, and this image soon made its way to the rest of the world.¹³ The following month, legislators, activists, and ordinary women and men from Italy, Europe, and the United States inaugurated the “International Jeans for Justice Day” to symbolize the global protest as well as their continuing endeavor to combat sexual violence.¹⁴

⁶ Cass., sez. III, 10 feb. 1999, n.1636, at 1.

⁷ *Id.*

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Kitty Calavita, *Blue Jeans, Rape, and the “De-Constitutive Power of Law*, 35 LAW & SOC’Y REV. 89, 93 (2001), (quoting Antonio de Florio, *Il Giudice: “Ma che Stupro? Lei dopo lo invito a pranzo,”* IL MESSAGGERO, Feb. 12 1999).

¹² *Id.* (quoting Francesco Mauro Iacoviello, *Toghe e Jeans. Per una Difesa (Improbabile) di una Sentenza Indifendibile*, CASSAZIONE PENALE (1999)). See also *Dieci Firme Contro: “Sentenza che Offende,”* LA REPUBBLICA.IT, Feb. 12, 1999, <http://www.repubblica.it/online/fatti/jeans/appello/appello.html>.

¹³ See *La “sentenza dei jeans” tra maschilismo e garantismo*, *supra* note 4; *Outrage at “Jeans Alibi” Verdict*, *supra* note 4.

¹⁴ Calavita, *supra* note 11, at 95.

II. RAPE UNDER EUROPEAN HUMAN RIGHTS LAW

The Council of Europe adopted Recommendation 1450 (on violence against women in Europe) and Recommendation 1582 (on domestic violence against women) in 2000 and 2002, respectively. These recommendations complemented the European Convention on Human Rights of 1950 (European Convention), which was not an instrument specific to women and did not explicitly refer to gender-based violence. In particular, Recommendation 1450 “condemns violence against women as being a general violation of women’s rights as human beings.”¹⁵ Two years later, with Recommendation 1582, the Council of Europe specifically acknowledged that “domestic violence should be treated as a political and public problem, and a violation of human rights.”¹⁶ Hence, member states were called upon to recognize “that they have an obligation to prevent, investigate and punish all acts of domestic violence and to provide protection to its victims.”¹⁷

Pursuant to the terms above and to the correspondent evolutionary interpretation of the European Convention, the European Court of Human Rights (European Court) has imposed positive obligations on Member States to protect women from gender-based violence. For example, in *M.C. v. Bulgaria*, the European Court found that the investigation of the applicant’s case fell short of Member States’ positive obligations under the European Convention “to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.”¹⁸ In this case, the applicant alleged that she had been raped by two acquaintances who had invited her out to a bar and other places on the night of July 31, 1995, when she was sixteen years old. The girl reported the assaults, but confessed that she “had been scared and at the same time embarrassed by the fact that she had put herself in such a situation” and that “[s]he had not had the strength to resist violently or to scream.”¹⁹

After about two years of investigation, the district prosecutors eventually closed the case on the grounds that no resistance on the applicant’s part had been verified, and thus no conclusive evidence on the use of force or threats had been established beyond a reasonable doubt. The prosecutors stated that “the young age of the applicant and her lack of experience in life meant that she was unable . . . to demonstrate firmly her unwillingness to engage in sexual contact.”²⁰ Following the rejection of her appeal by the regional prosecutor’s office, the applicant lodged a complaint with the European Court.

In response, the European Court found violations of Article 3 (prohibition of torture or inhuman or degrading treatment or punishment) and Article 8 (right to respect private or family life), reiterating that Member States are required to take appropriate measures to ensure that individuals within their jurisdiction are not subjected to ill-treatment by both public officers and private

¹⁵ PARL. ASS. COUNC. EUR., Recommendation No. 1450, Violence Against Women in Europe (Apr. 3, 2000), ¶ 5.

¹⁶ PARL. ASS. COUNC. EUR., Recommendation No. 1582, Domestic Violence Against Women (Sept. 27, 2002), ¶¶ 1, 2.

¹⁷ *Id.* ¶ 4.

¹⁸ *M.C. v. Bulgaria*, App. No. 39272/98, 2003-XII Eur. Ct. H.R., ¶ 185.

¹⁹ *Id.* ¶ 17.

²⁰ *Id.* ¶ 64.

individuals.²¹ The European Court further stated that, while the choice of measures to secure compliance with Article 8 should fall within the State's margin of appreciation, "effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal law provisions."²² By imposing positive obligations on Member States to enact adequate means for the investigation and prosecution of rape cases regardless of the victim's active resistance, the European Court has acknowledged that evidence of the lack of consent should not necessarily entail the use of force and threats, and thus has ultimately protected women's right to sexual autonomy.

III. JUDICIAL DEVELOPMENTS AT THE ITALIAN SUPREME COURT

In light of the *M.C. v. Bulgaria* judgment, the controversial decision of the Italian Supreme Court in 1999 raises a few questions. Although the investigation and prosecution had been fairly conducted, the Supreme Court's scrutiny primarily focused on the victim's conduct to verify her credibility. In particular, the Supreme Court rejected the argument that the partial removal of the girl's jeans could signify her lack of consent. Indeed, it contested that the difficulty of slipping off the garment and the fact that the intercourse had occurred in a public place were inconsistent with such a presumption.²³

The Supreme Court further noted that neither signs of struggle between the student and her instructor nor evidence of the victim's active resistance had been found. Crucially, the lower appellate court had asserted that "it is not necessary that the victim had suffered violence to establish rape and that, in this case, the girl had not resisted because she feared greater harm to her physical safety."²⁴ In response, the Supreme Court claimed that "it is instinctive, especially for a young woman, to resist with all her strength one who is trying to rape her, and it is illogical to argue that a girl would supinely submit to rape . . . in fear of other hypothetical and certainly not more serious harm."²⁵ The Supreme Court's reasoning, crafted on the assumption that the lack of consent requires the use of force, differs radically from the European Court's position in the *M.C. v. Bulgaria* judgment.

Three other decisions regarding rape cases and referring to the "jeans defense" opinion have ensued from 1999 to date at the Italian Supreme Court. In 2001, a defendant appealed to the Supreme Court claiming that sexual intercourse with his former wife was consensual since she was wearing blue jeans at the time of the alleged aggression.²⁶ The victim reported that, in the middle of the night, the defendant broke into the house where she was staying with a girlfriend and forced her violently to follow him into his car. Questioned by the police, the other woman confirmed the facts.

In contrast to its previous decision, the Supreme Court reasoned that "the fear of further consequences in addition to the 'slaps' her former husband had already inflicted on her facilitated

²¹ *Id.* ¶ 149–50.

²² *Id.* ¶ 150.

²³ Cass., sez. III, 10 feb. 1999, n.1636, at 2.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Cass., sez. III, 6 nov. 2001, Foro it. 2002, II, 287.

the removal of her jeans.”²⁷ On such grounds, the Supreme Court conclusively confirmed the defendant’s conviction, finally acknowledging that rape should be established regardless of the victim’s active resistance. In this specific case, however, it has been argued that the eyewitness testimony that corroborated the victim’s account of the assault probably made it easier for the Supreme Court to reach a conviction decision.²⁸

A few years later, in 2006, another defendant appealed to the Supreme Court denying the accusation on the basis that his presumed victim was wearing jeans at the time of the alleged aggression.²⁹ The victim recounted that, on the day of the alleged rape, she was with a friend at the coffee bar where the aggressor was working. At his request, she followed the man to the upper floor flat to help him deliver some drinks. On their way back, he stopped the elevator, dragged her out to the landing, and raped her. The victim reported having been initially bewildered by the entire situation, and then having resisted and begun to cry. Her friend testified that, upon her return, she looked distraught and revealed the assault, showing bloodstains on her underwear.

The Supreme Court confirmed the conviction of the appellant and, making express reference to judgment number 42289/2001, stated that “the credibility of the rape victim cannot be invalidated by the fact that she was wearing jeans at the time of the rape, since the fear of further consequences could have determined the possibility to remove the jeans more easily.”³⁰ Although the deposition of the victim’s friend might have played a role in the Supreme Court’s decision, it was still a positive development that the victim’s credibility was evaluated regardless of an eyewitness testimony of the aggression and of the victim’s resistance.

A further step forward was made by the recent decision number 1457/2008 taken by the Supreme Court on June 10, 2008. In this case, a sixteen-year-old girl reported having been sexually assaulted by her mother’s partner, with whom she was also cohabiting at the time of the aggression.³¹ Her declarations were further confirmed by her fiancé, to whom she had later recounted the facts, and her father, who had been promptly informed. In contrast, the alleged aggressor contested that on the day of the assault the girl had herself invited him home for lunch and had sat next to him and watched television. The defense claimed that since the victim was wearing blue jeans and was sitting down, it would have been impossible for the man to wedge his hand underneath her pants and touch her intimate parts.

The Supreme Court confirmed the lower appellate court’s decision stating that an assessment of the victim’s credibility had been accurately conducted and that the fact that the girl was wearing blue jeans was not an impediment for the man to touch her intimate parts, since he could have still forced his way underneath the garment, which “cannot be compared to a chastity belt.”³² With such a decision, the Supreme Court finally overturned its own ruling of 1999,

²⁷ *Id.* at 1.

²⁸ Van Cleave, *supra* note 5, at 453.

²⁹ Cass., sez. III, 19 may 2006, n.22049.

³⁰ *Id.* at 1.

³¹ Cass., sez. III, 10 june 2008, n.1457, *Foro it.* 2009, 2, 99.

³² *Id.* at 3.

acknowledging that, as a matter of fact, wearing blue jeans cannot prevent a woman from being raped or imply her consent to sexual intercourse. On a larger scale, after over a decade of struggle and slow developments, this last decision has closely aligned the Italian Supreme Court with the European Court of Human Rights' dictates, and ultimately has marked a step forward towards gender equality and women's right to sexual autonomy.