RIVISTA DI
DIRITTI COMPARATI

# Editorial
# Access to Justice: a Gender Perspective

*Valentina Bonini and Elettra Stradella (eds.)**

TABLE OF CONTENTS: 1. Introduction to the Issue: the «access-to-justice approach». – 2. The main «Focus» of the Issue. – 3. Access to Justice, Gender and Multiculturalism. – 4. Access to Justice, Gender-based Violence and Institutional Violence (and the scenario of restorative justice). – 4.1. The criminal law framework against gender-based violence: a necessary but not sufficient condition to ensure full access to justice. – 4.2. Access to justice and victim's protection: a pivotal goal. – 4.3. Access to justice and secondary victimization: a limit to be overcome. – 4.4. What justice? Restorative justice and gender-based violence.

## 1. *Introduction to the Issue: the «access-to-justice approach»*

This issue focuses on a traditional topic, well-investigated by comparative scholars since the Seventies, represented by the access to justice as an instrument by which legal systems allow people to vindicate their rights or resolve their disputes, but also they pursue results that are individually and socially just. In these terms social justice would presuppose effective access to justice[1].

The European Law and Gender conference, whose proceedings are collected by this Issue, aimed at facing the vague concept of «effectiveness» of access to justice as a social right in a gender perspective, starting from the idea that gender asymmetries and deeply-rooted female and gender minorities subordination undermine by themselves the «equality of arms» that guarantees that the result of every dispute depends only on the relative legal merits of the positions, unrelated to other and extraneous differences[2]. Assuming that a perfect equality is utopian, a gender perspective challenges this possibility from its very origins, because it shows the fact that equality does not exist and concrete historical discriminations and oppression put women (and queer, not binary, or other gender non-conforming subjectivities) at a

* E. Stradella is author of the paragraphs 1, 2 and 3; V. Bonini is author of the rest of the Editorial. The Special Issue is the fruit of common reflection and joint coordination work by the Editors.

[1] G. Garth Bryant – M. Cappelletti, *Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective*, 1978, Articles by Maurer Faculty, 1142, and the essential reference is the fundamental work by M. Cappelletti (ed.), *Access to Justice*, Milano, Alphen aan den Rijn, 1978, European University Institute, The Florence Access-to-Justice Project.

[2] *Ibidem*

disadvantage position, both in the field of private (and family) relationships, where the oppression was born, and in the public sphere, where it reverberates.

The general approach of this joint interdisciplinary reflection, putting together legal theorists, constitutional, comparative, criminal law scholars and practitioners, embraces an «access-to-justice approach»[3] that characterized legal reforms since the Seventies of the last century, including but going beyond advocacy, focusing on the variety of institutions, legal devices, procedures, used to regulate conflicts (even processing and preventing them). The access-to-justice movement, grown also under the pressure of welfare reforms and the development of social rights and entitlements, required a more comprehensive approach to the relationship between procedural and substantial justice and underlined the need for making all the rights, old and new, effective, going beyond the mere legal representation, as much as it remains a crucial issue[4].

## 2. *The main «Focus» of the Issue*

The following essays will develop around three main «Focus» concerning: 1. Current Debates and Developments; 2. Access to Justice, Gender and Multiculturalism; 3. Access to Justice, Gender-based Violence and Institutional Violence (and the scenario of restorative justice). This editorial tries to draw some directions in the field of the relationship between access to justice and multiculturalism and in the specific scenario of access to justice in gender-based violence.

## 3. *Access to Justice, Gender and Multiculturalism*

The issue of the relationship between multiculturalism and women's rights is very important in political philosophy, in legal theory, but also from the point of view of constitutional and comparative law, criminal and private law. As we will discuss in this session, the conflictual approach that tended to characterize the debate, especially on some feminist sides, is today largely replaced by the attempt to decolonize the discourse on the compatibility of the protection of the rights of (religious and) cultural minorities with the empowerment of women's rights. In this Issue we will deal with many of the concepts that cross the reflection on the relationship between multiculturalism, as policy and as ideology, legal tools of interculturality, and the protection of women's rights when they belong to minorities in which gender roles construction defines phenomena of subordination.

[3] *Ibidem*, spec. in *The Third Wave: From Access to Legal Representation to a Broader Conception of Access to Justice. A New 'Access-to-Justice Approach'*, in *Buffalo Law Review*, p. 222 ff., 1978.

[4] *Ex aliis* M. Galanter, *The Duty Not to Deliver Legal Services,* 30, in *University of Miami Law Review*, 1976.

Three are the elements that we have to take into consideration, and they are strongly interconnected.

The first element is given by the multicultural fact, by the recognition of the not homogeneous composition of liberal democracies, within which different cultural and value systems now confront each other, not only for the ideological pluralism that is inherent to them, but due to the presence of minority communities carrying different legal cultures, which often translate into minority legal systems, giving rise to that legal pluralism that we are going to investigate during this panel.

The second element lies in the consideration that «the cultural feature of (national) law influences the substantial equality in the protection of fundamental rights of different people, according to the (legal) traditions that they followed in their actions and relationships. […] Indeed, the choices made by policy makers are necessary affected by historical, epistemological and ethical categories to which their legal culture refers»[5].

This means that the first element introduces in the legal systems a fragmentation that reverberates on the protection of rights and on the implementation of the principle of equality, at least formal, to be enforced through the substantial one. If it is true that equality, in its meaning of rationality, implies that the same situations must be treated in a uniform way, and situations that are different from each other in a different way, we believe that through the principle of participation, we could try to find a synthesis that pursues pluralism without causing a pulverization of rights, or a strengthening of asymmetries[6].

The third element concerns the approach that explains the relationship between multiculturalism and gender equality in conflicting terms, although it was fundamental to suggest a more sensitive approach to the actual condition of women belonging to certain religious and cultural groups, can lead only to the unacceptable solution of adopting assimilationist policies and refusing intercultural dialogue as potentially involving the «non-negotiable» value of gender equality[7]. The alternative is to use a gender analysis that focuses on how the universality of women's rights, and above all the conceptual, as well as political, centrality of emancipation achieved by participation

---

[5] See P. Parolari, *Legal Polycentricity, intergiuridicità e dimensioni 'intersistemiche' dell'interpretazione giudiziale. Riflessioni a partire dal caso inglese* Akhter v. Khan, in *DPCE online*, 2019, spec. p. 2115, wwwdpceonline.it.

[6] On the central role of deliberation, as a tool for inclusion and the quality of democracy, see M. Deveaux, *A Deliberative Approach to Conflicts of Culture*, in *Political Theory*, 2003, p. 780 ff., and S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton, 2002, S. Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *Democracy and Difference: Contesting the Boundaries of the Political*, Princeton, 1996, and *Deliberative Rationality and Models of Democratic Legitimacy*, in *Constellations. An International Journal of Critical and Democratic Theory,* 1994, p. 26 ff.

[7] We can refer, for instance, to the fundamental works by S. Moller Okin, *Recognizing Women's Rights as Human Rights*, in *APA Newsletters*, 1998; Ead., *Un conflitto sui diritti umani fondamentali? I diritti umani delle donne, la formazione dell'identità e le differenze culturali e religiose*, in *Filosofia e questioni pubbliche*, 1997, p. 5 ff.; last, Ead., *Feminism and Multiculturalism: Some Tensions*, in *Ethics*, 1998.

and deliberation, finds its grounds in the awareness of the universality of female oppression, hierarchization of gender relations, and affirmation of natural differences as a powerful instrument of inferiorization and exclusion of women from the social contract. In this view, the majority-minority dichotomy, dominant culture-minority cultures, becomes veiled. That does not mean adopting a feminism of equality that, we know, leveled the radical differences existing among women, which can and must be faced through the lens of intersectionality[8], but it means knowing how oppression acts in all places, times, and forms. Thus, the faces covered by Islamic veils meet, in multicultural societies, the bodies of commodified women that crowd commercial communication, pornographic contents and legal prostitution, and the question of self-determination, hard to solve, can be replaced by a different reconstruction of the role of woman in her context. Intersectionality, as well as representing an approach, can and should be a criterion - for dealing with conflicts - and a concrete anti-discrimination tool.

The instrument of agency[9], on the other hand, that will be discussed in this Issue, read from a philosophical point of view as the possibility for women to self-represent themselves inside and outside the family and the socio-cultural context, needs a legal meaning that can find its guiding principle in the participatory profile of equality: women must be part of the definition of the rules, both within minority groups and in the «general» – state- legal systems, and their voice must resound in decision-making processes, in particular those concerning their fundamental rights, and they should have the possibility to contribute in establishing the measure of the fundamentality of the rights themselves. Internal participation in minority groups seems apparently more difficult to achieve, because it requires negotiation between the majority, that it's supposed to be oriented towards the full implementation of gender equality, and the minority, that it's supposed to be unwilling to give up a hierarchy of gender relations centered on male domination. But the negotiation can take place, as many authors have pointed out[10] through the creation of incentives, which make the effective inclusion of women in participatory processes and the existence of internal rules that include their vision of religious or cultural belonging, conditions of the recognition of minority legal systems. Clearly a larger female presence is not sufficient, because it must join with the democratization of power and political institutions.

---

[8] C. A. MacKinnon, *Intersectionality as Method: A Note,* in S. Cho, K.W. Crenshaw – L. McCall (eds.), *Intersectionality: Theorizing Power, Empowering Theory*, in *Signs: Journal of Women in Culture and Society*, 2013, p. 1019 ff.

[9] Many are the possible references on the concept of *agency,* see A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge, 2001. S. Williams, *Democracy, Gender Equality and Customary Law: Constitutionalizing Internal Cultural Disruption*, in *Indiana Journal of Global Legal Studies*, 2011, p. 65 ff. See N. Stoljar, *Autonomy and the Feminist Intuition*, in C. Mackenzie – N. Stoljar (eds.), *Relational Autonomy. Feminist Perspectives on Autonomy, Agency and the Social Self,* Oxford-New York, 2000, p. 94 ff.; Ead. *Autonomy and Adaptive Preferences Formation*, in A. Veltman – M. Piper (eds.), *Autonomy, Oppression and Gender*, New York-Oxford, 2014, p. 227 ff.

[10] See for example S. Williams, *op. cit.*

These transformative incentives, however, must also concern the «external» participation to minority groups. The problem is not only the definition of the rules within minorities, an essential aspect to ensure the constitutional sustainability of regulatory pluralism, but also the participation of minorities more generally in the public space, and the inclusion of minorities in the constitutional scenario, achievable primarily through the sharing of the legal and political status of citizenship.

I do not want to talk here about the issue of the regulation of citizenship in Italy, but the reflections carried out lead us to believe that an essential step in the construction of the agency of «minority» women is recognition by the legal system of a status of full citizens, not only subjects worthy of protection and protection, to which to attribute, sometimes paternalistically, needs and aspirations, but subjects called to participate in political life, as well as economic and social, also through the instrument of the right to vote. The attribution of citizenship primarily to migrant women, girls, and children, born on the national territory, would be an instrument for substantial equality, for the achievement of self-representation, the overcoming of invisibility, and a true positive action, which would give «minority» women the opportunity to speak for themselves, but also to contribute to a fruitful hybridization of national law and to the development of a sustainable constitutionalism characterized by a substantial justice.

These very opening reflections contribute to show how the broader concept of «access to justice» can nowadays well represent the institutional processes by which women and gender minorities can obtain visibility and recognition, in addition to an effective entitlement of fundamental rights. To what extent this affect constitutionalism and its transformative wave will be discussed in the Focus dedicated to current debates and developments.

## 4. *Access to Justice, Gender-based Violence and Institutional Violence (and the scenario of restorative justice).*

### 4.1 *The criminal law framework against gender-based violence: a necessary but not sufficient condition to ensure full access to justice.*

For gender-based violence, as for other criminological areas, the construction of a legal system using criminal law is a necessary step toward the right to access to justice. In addition to the criminalization of the acts of physical, sexual, psychological, or economic violence against a person because of that person's gender, gender identity or gender expression[11], an adequate and timely response through criminal justice is

[11] This definition, which is used by the European Commission (https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/gender-equality/gender-based-violence/what-gender-based-violence_en#:~:text=Gender%2Dbased%20violence%20is%20violence,of%20a%20particular%20ge

required. It is within the criminal justice system that the recognition of the public relevance of the phenomenon and effective protection of victims from the risk of violence are welded together, thanks to a strong set of preventive and precautionary measures[12].

The purpose of this editorial is, recalling the analyses carried out within the criminal justice panel, to offer a quick glimpse on the limitations that access to justice suffers today in case of gender-based violence: as I will try to point out, beyond some normative shortcomings, the most pressing problems are determined by the difficulty criminal justice practitioners have in reading the phenomenon of gender-based violence, resulting in thwarting the scope of many tools offered by both domestic and supranational legislations, which are particularly important not only for the regulatory framework but also for the gender-sensitive lens they invite to wear.

A paramount track is drawn by the Istanbul Convention which, in defining violence against women as a violation of human rights, builds a system based on four pillars (prevention, protection, punishment, integrated policies) and assigns a crucial role to criminal justice in protection and punishment actions, setting precise conventional obligations of criminalization, prosecution and punishment[13].

On the other side, the case-law of the ECtHR has enumerated a series of measures to be taken by the member states in order to grant persons from violations of fundamental rights, setting down positive obligations that entail the duty to construct a legal framework to offer adequate protection against acts of violence committed by both authorities and private individuals: in this context, the protection stemming from articles 2, 3 and 8 ECHR is particularly intertwined with the phenomenon of sexual, domestic and intimate partner violence.

Differently, Article 6 ECHR refers only to the accused and does not expressly grant the victim's right to a fair trial, except in connection with civil damages actions (civil limb) [14]. Nevertheless, the recognition of fundamental rights also gives rise to

nder%20disproportionately.) is in line with the recital 17 of the Directive 2012/29/EU, establishing minimum standards on the rights, support and protection of victims of crime.

[12] The public relevance of gender-based violence emerges from supranational documents, through the recognition of the pivotal role of the criminal sanction that, according to article 45 of the Istanbul Convention, must be «effective, proportionate and dissuasive»; it must be recalled also article 55 of the same Convention, where it is provided that for numerous offenses referred to, it must be ensured that criminal proceedings «shall not be wholly dependent upon a report or complaint filed by a victim […] and that the proceedings may continue even if the victim withdraws her or his statement or complaint». The role assigned to criminal justice in punishment and protection does not exclude that other areas of justice (civil, administrative and preventive) are also called upon to deal with gender-based violence, offering additional and sometimes different responses to different justice needs.

[13] To the criminal matter are dedicate articles 33 ff. (obligation of criminalization) and 49 ff. of the Istanbul Convention (procedural obligation).

[14] Article 6 ECHR therefore assumes importance in the civil limb, while having regard to the access of the victim to the criminal proceedings. In this regard, ECtHR, 7 dicembre 2017, *Arnoldi v Italy*, found the violation of Article 6 § 1 ECHR of the victim's right to a reasonable duration of the trial, since the excessive length of the preliminary investigation had prevented the applicant from entering

positive obligations of a procedural nature[15], which constitute fundamental guarantees not only of an effective punishment of criminal acts but also for ensuring timely and adequate protection of the victim.

Notwithstanding, the mere law in the book is insufficient to address such a deep-rooted phenomenon like gendered violence, especially in its declinations of domestic violence and sexual violence. As the Istanbul Convention points out, an integrated approach across several levels (public policies, education, specific trainings) is necessary, as well as intervening with effective measures that give substance to the legal provisions, which otherwise risk being as muscular on paper as they are evanescent in practice.

In fact, despite the fact that many reforms have in the last decade introduced articulated and strict legislative frameworks on the matter[16], the measures adopted so far have often proved insufficient to consistently combat violence, clashing with inertia, delays, superficial readings of the phenomenon that have frustrated the victim's access to justice: the consequence is not only to violate the individual right of the person who suffered violence, but also to perpetuate a dangerous message of impunity,

---

the criminal proceedings as a civil plaintiff. On the issue B. Occhiuzzi, *Il principio di costituzione sostanziale della parte civile nel caso Arnoldi c. Italia: un passo ulteriore verso la civilizzazione del sistema penale*, in www.diritticomparati.it, 19 marzo 2019. The decision of the Strasbourg judges, although relegated to a matter of mere fact by the Italian Constitutional (Cost. 4 November 2020, n. 249; see E.N. La Rocca, *Le due vie per il ristoro economico dell'offeso dal reato che escludono l'equa riparazione per irragionevole durata delle indagini preliminari*, in www.diritticomparati.it, 17 December 2020, has been recently confirmed in the sentence ECtHR, 18 marzo 2021, *Petrella v Italy*, ric. 24340/07 (see. E. Grisonich, *Il dirompente incedere delle garanzie processuali della vittima nella giurisprudenza di Strasburgo: il caso Petrella c. Italia, tra ragionevole durata del procedimento, diritto di accesso al giudice e rimedio effettivo*, in www.sistemapenale.it, 2021; A. Tarallo, *La CEDU interviene ancora sul diritto dela persona offesa alla ragionevole durata delle indagini preliminari: nota alla sentenza Petrella contro Italia*, in www.dirittifondamentali.it 2021, which found the violation of the right to a fair trial both in terms of the right of access and of the right to a reasonable length (in addition to a violation of the right to an effective remedy pursuant to Article 13) of the victim of crime who, in the case of investigations closed after five and a half years with a dismissal for the statute of limitations of crime, had been deprived the possibility of acting to obtain compensation for the damage caused by the crime. For a systematic framework of the issue, see already M. Chiavario, *Il 'diritto al processo' delle vittime dei reati e la Corte europea dei diritti dell'uomo*, in *Riv. Dir. proc.* 2001, p. 940.

[15] For a recent and helpful synoptic overview of the most significant pronounces of the European Courts on the subjects, see (with particular reference to the obligations arising from Articles 2, 3, 4, 8, e 14 ECHR), Victim Support Europe, *Overview of Judgements relevant for the rights of victim, European Court of Human Rights and Court of Justice of the European Union*, 2021 Report, in www.victim-support.eu. On the issue, see M. Montagna, *Obblighi convenzionali, tutela della vittima e completezza delle indagini*, in www.archiviopenale.it, 2019; K. Velcikova, *Violenza contro le donne e accesso alla giustizia*, in www.questionegiustizia.it,2019 (special issue, April 2019, «*La Corte di Strasburgo*»).

[16] For a recent picture drawn in a balanced way, see P. Maggio, *Rapporti familiari e tutela processuale penale*, in www.processopenaleegiustizia.it, 2022. In particular, about law n. 69/2019 (so-called «Codice rosso»), A. Muscella, *Forme di tutela cautelari e preventive delle vittime di violenza di genere: riflessioni a margine delle novità introdotte dal 'Codice rosso'*, in www.archiviopenale.it, 2020; P. Di Nicola Travaglini – F. Menditto, *Il Codice Rosso. Il contrasto alla violenza di genere dalle fonti sovranazionali agli strumenti applicativi*, Milano, 2020.

slowing down the evolution of society toward effective equality and freedom from violence.

Hence, while a comprehensive regulatory framework is pivotal for addressing and counteracting gender-based violence, it is not only in criminal law that the answer can be found, as policies and practices in the administration of justice have a crucial role. On the one hand, criminal justice offers not only a belated but also partial response, as it is unable to operate as a tool for promoting cultural change nor it is able to eradicate the hierarchical and patriarchal logics that fuel violence. On the other hand, criminal justice itself, as «justice of men», is permeated (and sometimes soaked) by sexist stereotypes and gender prejudices still rooted in our society: thus, within criminal proceedings, the needs of victims are not only not listened to but sometimes they are used as a weapon against themselves with traumatic effects of secondary victimization.

### 4.2. *Access to justice and victim's protection: a pivotal goal.*

Dealing with gender-based violence, access to justice for victims is closely linked to their need for protection, which becomes particularly intense because of the relational context where violence is acted and to its cyclical pattern, making the danger of experiencing new violence higher[17].

As pointed out, mere criminalization is insufficient to ensure full access to justice, while their need for protection may be jeopardized whether the prosecuting authorities minimize and/or fail to recognize the violent dimension of a reported offence, qualifying it as a mere conflict between partners, and omit or delay to intervene[18].

[17] At a closer inspection, the protection of the victim is not necessarily placed within the criminal process, being given specific tools also to the civil judge and other public authorities: even the Italian framework, where the protective measures are mainly implemented in the criminal justice system, protection orders can be issued by the civil judge pursuant to articles 342-*bis* ff. civil code and other protection measures, such as public warning and special surveillance, can be adopted by the Questore or by the judicial authority outside of the criminal proceedings (see E. A. Dini, *Ammonimento del questore e violenza di genere: un anello debole della catena protettiva?*, in www.sistemapenale.it, 2022; V. Bonini, *Il sistema di protezione della vittima e I suoi riflessi sulla libertà personale*, Padova, 2018).

[18] The assertion is confirmed by the pronounces of the ECtHR, which often, while assessing the satisfactory regulatory framework, notes the violation of conventional canons due to omissions, delays, and underestimations of the phenomenon by criminal justice professionals and authorities. For these conclusions, referred to Italy, see ECtHR, 27 May 2021, *J.L. v Italy*, n. 5671/16, § 122; ECtHR, 7 April 2022, *Landi v Italy*, n. 10929/19, § 80, where the Court observes that, from a general point of view, the Italian legal framework was suitable for ensuring protection against acts of violence which may be committed by private individuals in a given case, but the authorities did not react wither immediately as required in cases of domestic violence, or at any other time to a proper risk assessment (§ 91); the same arguments can be read in ECtHR, 16 June 2022, *De Giorgi v Italy*, n. 23735/19, § 71.

A timely and thorough investigation is therefore a key action to ensure that victims receive protection appropriate to the scale of the danger to which they are exposed. Therefore, both the Istanbul Convention and the ECtHR jurisprudence reserve high attention to this issue. The Istanbul Convention opens its provisions dedicated to criminal proceedings, precisely by stating the obligation to conduct investigations and criminal proceedings «without undue delay while taking into consideration the rights of the victims during all stages of the criminal proceedings» and to «ensure the effective investigation and prosecution of offences» (Article 49), so as to respond «promptly and appropriately by offering adequate and immediate protection to victims». Protection of the victim during criminal proceedings is a core action in the construction of the Istanbul Convention, which requires judicial authorities to make an accurate «assessment of the lethality risk» (Article 51) in order to timely adopt the most appropriate protection measures (Article 52 and 53).

Access to justice for victim of violence is undermined when the inadequacy and the delay of judicial authorities and police determine gaps in protection that expose the person to new violence: effectiveness is a dear topic in the case-law of the ECtHR, which has recently stigmatized violations of the fundamental rights under Articles 2 and 3 ECHR in various pronounces interesting Italy despite the adequacy of the legal framework[19]. In spite of the several protection measures introduced in the Italian legal system, the delay or omission of a risk assessment carried out by the authorities, due to an underestimation of the violence between partner, results in a violation of the protection duty, with the effect of exposing the victim to dangerous escalations of violent behaviors, as well as creating a climate of impunity that encourages the perpetuation and rooting of violence within the social context.

A specific training for police and justice professionals is essential to ensure adequate knowledge and awareness of the peculiarities of gendered violence, in order to avoid any minimization of danger and to ensure appropriate and timely evaluation of the current situation: these basic conditions should be accompanied by the construction of adequate risk assessment procedures, which effectively respond to the need for protection from violence that is designed by criminal law and criminal procedure[20].

---

[19] In the last two years Italy has been condemned for numerous violations in the field of protection of victims from the risk of reiteration of relational violence: after the ECtHR, 2 March 2017, *Talpis v Italy*, n. 41237/14, which trigger a comprehensive reform with the so-called Red Code (law n. 69/2019), the violation of the duty of protection has been stigmatized specifically for the lack of operative conditions by ECtHR 7 April 2022, *Landi v Italy*, n. 10929/19; ECtHR 16 June 2022, *De Giorgi v Italy*, n. 23735/19; ECtHR 7 July 2022, *M.S. v Italy*, n. 32715/19; ECtHR 10 November 2022, *I.M. v Italy*, n. 25426/20. In this regard see R. Rossi, *Access to justice and right to victim's protection in the case-law of the European Court of Human Rights about domestic violence*, in this Journal, infra p. 184 ss.

[20] On the issue of risk assessment procedure in the Italian experience, see V. Bonini, *Protezione della vittima e valutazione del rischio nei procedimenti per violenza domestica tra indicazioni sovranazionali e deficit interni*, in www.sistemapenale.it, 2023.

4.3. *Access to justice and secondary victimization: a limit to be overcome.*

While the criminal trial responds to the basic right of victims to be protected from further violence, at the same time it is a hostile place for the victims themselves. In fact, with its dynamics of conflict and its due system of guarantees of the defendant, criminal justice calls the victims to a participation that is inevitably painful and can become dangerous because of the way in which justice professionals address the victims, replying and amplifying the trauma of violence suffered due to the use of sexist stereotypes which are the main vehicle of victim blaming.

In this sense, secondary victimization[21], in its meaning of trauma resulting from contact and interactions with the police and the judicial authority[22], represents a limit to a full access to justice for the victim of gender-based violence, fueling fears and resistance to embarking on the judicial pathway: the effects are, on the one side, that victims are deprived of protection and, on the other side, that domestic violence and sexual violence are often unreported.

Furthermore, the danger of secondary victimization runs through the entire criminal procedure[23], starting from the filing of the complaint in the police station (where often violence is downplayed and the victim is improperly invited to reconsider the choice to report in favor of a settlement of the conflict with the partner), throughout the preliminary investigation (often carried out slowly and without detecting the danger signs), to be particularly amplified during the court trial (on the occasion of the meeting with the accused and on the occasion of the testimony of the victim) and also to involve the moment of the decision (when the motivation enhances the same stereotypes at the base of violence).

---

[21] In this regard, T. Bene, *Forme di* bias *nel sistema di tutela delle donne vittime di violenza*, in www.sistemapenale.it, 2021; Osservatorio sulla violenza contro le donne n. 1/2022, *La vittimizzazione secondaria*, www.sistemapenale.it 2022.

[22] Cass. civ., S.U., 17 November 2021, n. 35110 (https://www.retedafne.it/wp-content/uploads/2021/12/Cass.-Civ.-S.U.-17.11.2021-n.-35110.pdf) clarified that secondary victimization consists «in reviving the conditions of suffering to which the victim of a crime has been subjected, and is often attributable to the procedures of the institutions subsequent to a complaint, or in any case to the opening of a judicial proceeding», noting also how «secondary victimization is an often underestimated consequence precisely in cases where women are victims of gender-based crimes, and the main effect is to discourage the victim from filing a complaint».

[23] Secondary victimization, moreover, can materialize on every occasion of contact with the authorities, not only the criminal ones, becoming particularly insidious in civil procedures concerning the family, divorce and child custody that intersect with violent behavior. In this regard, ECtHR, 10 November 2022, I.M. it's at. v Italy (for a comment L. Pelli, *Art. 8 C.E.D.U. e obblighi positivi in tema di violenza domestica*, in www.archiviopenale.it, 2022), condemning our country for allowing unprotected meetings between minor children and the abusive father and for suspending the parental responsibility of the mother who opposed such meetings. On the subject, recently, see Parliamentary commission of inquiry into femicide, Report III/2022, *The secondary victimization of women who suffer violence and their children in proceedings governing custody and parental responsibility*, Rome 2022

The transversality of the risk of secondary victimization has found only apparent recognition in the Italian legal system which, in transposing Directive 2012/29/EU on the subject of procedural rights of the crime victim, has regulated in art. 90-*quater* Code of Criminal Procedure the individual assessment of the victim's vulnerability, providing a general tool to be used «for the purposes of the provisions of this code»: on closer inspection, however, the only protection of the vulnerable victims is connected to their statements in front of the police (art. 362 c.c.p.), of the public prosecutor (art. 351 c.c.p.), of the defender (art. 391-*bis* c.c.p.) or of the judge during the preliminary investigation (art. 398 c.c.p.) or in occasion of the testimony in trial (art. 498 c.c.p.).

Of course, particular caution must be observed when the victim is called upon to answer questions from the authorities or other procedural parties, as it is necessary to reduce the number of statements and limit the conflictual dimension, which normally characterizes each testimony since its performative moment, in view of the scrutiny of reliability and likelihood which, when it comes to sexual violence and in close relationships, often allow the use of sexist stereotypes to filter in terms of evaluation criteria.

However, the risk of secondary victimization is not limited to these occasions, as it could materialize in numerous actions and/or inactions by the judicial authorities. In this regard, also the ECtHR confirms the crossing nature of secondary victimization, detecting a violation of Article 8 ECHR in the words used by the Italian Court in the reasoning of the sentence, where inconsistent sexist stereotypes had been recalled for the purpose of the evaluation of the credibility of the victim[24].

From this point of view, it clearly emerges how access to justice for the victim of gender-based violence risks being seriously compromised, if there is no awareness of the structural nature and cultural roots of the phenomenon, with the effect of making the judicial place a place where the inequalities and sexist stereotypes that are at the basis of violence filter, perpetuate and are relaunched.

Hence, to contain secondary victimization in cases of gender-based violence, specific training of criminal justice practitioners is necessary, to make them capable to recognize violence, intervene promptly and adequately with the tools offered by the system and avoid giving misinterpretations of violence due to prejudices and false myths.

Finally, because secondary victimization is amplified by the vulnerability of victims of violence, the role of victim support services becomes particularly important, to accompany those who have suffered relational violence in a path of self-empowerment necessary to break out of the cycle of violence, to support them in their

[24] ECtHR 21 May 2021, *J.L. v Italy*, ric. 5671/16; for a comment, see M. Bouchard, *La vittimizzazione secondaria all'esame della Corte europea dei diritti dell'uomo*, in *Diritto penale e uomo*, 2021; C. Frassoni, *La Corte di Strasburgo sulla vittimizzazione secondaria*, www.dirittodidifesa.eu, 2021.

choice toward judicial initiative, and to give the victim the «resistance» to cope with the painful judicial experience[25].

4.4. *What justice? Restorative justice and gender-based violence.*

Lastly, while there is much to be done to ensure full access to justice, I must observe that traditional criminal justice inevitably and dutifully assigns an ancillary role to the victims and a very little space to their needs: the risk of secondary victimization occurring during criminal proceedings can be countered and eliminated, but the courtroom will never become a welcoming place for the victim. Despite recent victim-sensitive provisions, criminal trial remains a hostile space for victims, who do not receive sufficient recognition during the proceedings and are heard only to the extent that it serves the justice system, since the trials are structurally focused on the defendant[26].

In this context, it is not difficult to understand why victims are often requesting to access to different justice paradigms, as restorative justice, which overcomes the accused-centered structure of traditional criminal procedure: in fact, restorative justice is usually recognized as highly beneficial for victims, enabling empowerment and supporting needs for voice, validation, accountability.

Despite these general features, which make restorative justice a way to address the needs and interests of both victims and authors on an equal footing, there are strong arguments against its use in cases of gendered violence because of the hierarchical structure of violence and its public relevance.

Skepticism toward the restorative response to gender-based violence is made clear in the Istanbul Convention, whose Article 48 provides that the State parties shall prohibit «mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence» covered by the Convention itself. At a closer inspection, Article 48 does not pertain to restorative justice, as it only bans compulsory mediation, while any restorative program can only be initiated under the condition of an informed and free will of all the participants[27]: nonetheless, reading the

[25] In this regard see A. Ivankovic, *Supporting victims of gender-based violence: a way to justice for victims*, in this Journal, p. 194 ss.

[26] J. Barbot – N. Dodier – . Raillard, *Rethinking the Role of Victims in Criminal Proceedings. Lawyers' Normative Repertoire in France and the United States*, in *Revue française de science politique*, 2014, p. 407-433.

[27] See ECOSOC Res. 2000/14, Basic principles on the use of restorative justice programmes in criminal matters, whose § 7 provides that «restorative processes should be used only with the free and voluntary consent of the parties. The parties should be able to withdraw such consent at any time during the process. Agreements should be arrived at voluntarily by the parties and contain only reasonable and proportionate obligations». In a quite similar way, § 16 of the Council of Europe Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters, provides that «restorative justice is voluntary and shall only take place if the parties freely consent, having been fully informed in advance about the nature of the process and its possible outcomes and implications». Voluntariness is a core

Explanatory Report of the Istanbul Convention and the GREVIO Reports makes it clear that many doubts and perplexities also involve restorative justice.

Indeed, in the Explanatory Report, the drafters illustrate the meaning of Article 48, arguing that mediation can have negative effects in cases of violence covered by the scope of the Istanbul Convention and observing that «victims of such violence can never enter alternative dispute resolution processes on a level equal to that of the perpetrator», as «it is in the nature of such offences that victims are invariably left with a feeling of shame, helplessness and vulnerability, while the perpetrator exudes a sense of power and dominance»[28].

Moreover, Article 48 is explained as aimed at «avoid re-privatization of domestic violence and violence against women and to enable the victim to seek justice»[29]. Since domestic violence for centuries has been seen as a private matter, to be handled within the family, and treated as a mere conflict between the spouses that did not deserve to be punished with criminal sanction, any diversion from criminal justice in court should not be allowed, as it can dilute the public relevance and dimension of the phenomenon.

The concerns expressed in the Explanatory Report are solid, but they deserve further investigation in relation to their absoluteness: it is worth asking whether, under specific conditions, victims of gendered violence can access restorative justice seeking answers that cannot be provided by traditional criminal justice[30].

The very same concerns of the Explanatory Report are reiterated in the GREVIO national Reports[31], where they are not, however, considered as insuperable as it sounds on the base of the words used in the explanatory document: in fact, the monitoring body on the implementation of the Istanbul Convention, though positively assessing the choices of those countries excluding all forms of alternative justice[32], also suggests procedures and safeguards that make restorative justice available, where offered by the national system, without infringement of the conventional provisions.

---

principle of restorative justice even in the Italian legal framework offered by the recent d.lgs. 150/2022, as pointed out in article 48 (consent to participation in restorative justice programs is personal, free, knowing, informed, and expressed. It is always made possible to withdraw such consent also by conclusive behaviors).

[28] See Explanatory Report of the Istanbul Convention, § 252.

[29] Ibidem.

[30] Regarding the benefits of restorative justice in addressing trauma and enhancing victims' self-empowerment and agency,s see T. Chapman, *Restorative justice: offering access to justice for victims of gender-based violence*, in this Journal, p. 206 ss.

[31] Twentynine national report have been adopted by GREVIO so far in order to monitor the state of implementation of the Istanbul Convention among the State parties: https://www.coe.int/en/web/istanbul-convention/country-monitoring-work.

[32] In Spain Organic Law 1/2004 expressly prohibits mediation in cases of intimate partner violence; in Andorra mediation is possible only in civil proceedings, but it is forbidden when the freedom of decision of the parties is not guaranteed following situations of violence; regarding Malta, GREVIO welcomes the fact that mediation and conciliation are not applicable to criminal proceedings; the same applies to Montenegro, Portugal, and San Marino.

Keeping in mind that «violence against women is a manifestation of unequal power relations», GREVIO requires additional controls aimed at «ensuring that victims consent freely to the reconciliation and that no coercion or intimidation is used upon them»[33] and that the «use of criminal mediation in cases of violence against women is based on full respect for the rights, needs and safety of victims»[34].

To ensure a free will of victims and to avoid the risk of secondary victimization due to unequal power relations, GREVIO sets additional precautions, which, in line with the basic principles of restorative justice[35], deserve a more intense attention when dealing with gender-based violence. In this perspective, it is necessary that victims are clearly informed of their rights, making clear in particular the non-mandatory nature of mediation[36], and restorative programs should be offered only to victims who are in a position to decide freely to enter the procedure[37]; in line with a principle generally stated also for criminal justice, it is underlined the importance of a specific training in the field of gendered violence for all the professionals and authorities involved in the decision to use restorative justice[38], so that they are able to carry out an assessment about the feasibility of program, keeping in the due account the features of the phenomenon and their effect on the victims' agency. As a broad recommendation, when mediation and restorative programs are used, GREVIO urges the authorities to introduce clear protocols and guidelines as a tool to make sure that the previous precautions are strictly observed[39].

If the free will and participation of the victim is a core concern when assessing the feasibility of restorative justice, asking for an accurate case-by-case evaluation, another argument pointed out by the Explanatory Report seems to exclude definitively restorative justice in cases of gender-based violence. The goal to avoid any re-privatization of gendered violence and, in particular, of domestic violence is pursued by an unbreakable link between adversarial court trial and violence, so rejecting

[33] GREVIO Baseline Evaluation Report on Albania, § 172.

[34] GREVIO Baseline Evaluation Report on Belgium, § 170.

[35] Many conclusions reached by GREVIO in its Reports finds echo in the UNODC *Handbook on Restorative Justice Programmes*, second edition, Wien 2020, p. 75, where concerns about safety, power imbalance, risk of revictimization are dealt with in light of the particular features of intimate partner violence by setting a rich set of criteria that should be followed in risk assessment in domestic violence cases.

[36] GREVIO Baseline Evaluation Report Belgium (§170); France (§211 and §212); Finland (§193); Turkey (§270). GREVIO noted that victims sometimes perceive mediation as compulsory due to lack of information on the procedure.

[37] GREVIO Baseline Evaluation Report Belgium (§170); France (§212); Slovenia (§299); Turkey (§269).

[38] GREVIO Baseline Evaluation Report Belgium (§169); France (§212); Poland (§244 specifies that «without robust training for all parties involved, in particular those in the criminal justice sector and mediators, recognition of the violence experienced by women at the hands of their intimate partners as a deeply gendered phenomenon resulting in an imbalance of power will not take root»); Slovenia (§299); Turkey (§270).

[39] GREVIO Baseline Evaluation Report on Finland, § 193

different forms of legal response. At this regard, it can be useful to remind that, though restorative justice is an autonomous paradigm of justice, it does not aim at replacing traditional criminal justice and can be used without any discontinuation of the criminal proceedings, offering to the participants a safe place to manage with the consequences of the crime to reach a closure and overcome the condition of victim without any consequences on punishment.

Considering the positive effects that restorative justice can offer to the victim (even of gender-based violence), the generalized exclusion of the possibility of entering a restorative process sounds as a limitation of the right to access to justice, which frustrates the needs of the individual victim to be listened to and to be recognized on the altar of general punitive ambitions.

* * *

**About the Editors:**

**Valentina Bonini –** Associate Professor of Criminal Procedure Law, University of Pisa, valentina.bonini@unipi.it

**Elettra Stradella –** Associate Professor of Comparative Public Law, University of Pisa, European Women's Law and Gender (EUWONDER) Jean Monnet Chair Holder (2022-2025), former European Law and Gender (ELaN) Jean Monnet Module Coordinator (2018-2021), elettra.stradella@unipi.it