GENERE, SOGGETTIVITÀ, DIRITTI · 8

THE 10TH ANNIVERSARY OF THE ISTANBUL CONVENTION

Italian – Turkish conference

Pisa, 18th June 2021

edited by

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In copertina: Cover photograph by Elif Çakırlar & Barış Aras (Flufoto), representing the art installation 'İSİMSİZ' - 'UNTITLED' by Vahit Tuna, 2018, Istanbul/Turkey: 440 pairs of women's shoes, arranged in a regular grid on two walls, rises up as a femicide memorial, while pointing out to the number of murdered women by men in 2018 in Turkey. Vahit Tuna looks at the basics of violence, especially in this geography, in a world where, today, one in three women is the victim of physical or sexual violence.
(*http://www.yankose.org/isimsiz-en.html*)

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Introduction

The year 2021 marks an important moment in the fight against domestic violence and violence against women: it is *the 10th anniversary of the Istanbul Convention*, the Council of Europe Convention on preventing and combating violence against women and domestic violence. Ratifying countries have been implementing the Istanbul Convention at quite different levels: some have profoundly revised their legislations, allocated funds and built efficient networks, while others have yet to deal with political and cultural resistance, limiting their actions to marginal interventions. In this wide and heterogeneous framework, however, it is possible to find a common ground of analysis, which demonstrates how domestic violence and violence against women present common features within different social realities and different legal systems. The meeting and comparision between Italy and Turkey have represented an opportunity to remind us how the risk of a suddenn setback is high, suggesting that the results achieved so far should never be taken for granted. The anniversary is being celebrated with many initiatives taking place in adhering countries, including this academic program: the Turkish-Italian Conference was held virtually on June 18th, 2021, jointly organized by the Istanbul University and the Pisa University under the umbrella of the ELaN (European Law and Gender) Jean Monnet European Project and under the aegis of Rete delle Università italiane per la Pace – RUniPace.

To underline the international character of the meeting, as representative of the Council of Europe, *Mrs. Claudia Luciani* at-

tended our event and held an inspiring and enlightening opening speech.

The event, aimed at reflecting upon the Turkish- Italian experience in combating gender violence and affirming women's rights, saw the participation of the Vice President of the Italian Senate, *Sen. Anna Rossomando* who highlighted the importance of looking at the Convention through a cross-border perspective, in order to reflect upon Italian and Turkish experiences in terms of the results and targets yet to be achieved. This is all the more necessary now during the COVID-19 pandemic, which urgently requires us to focus on domestic abuse.

The Istanbul Convention is actually a unique tool for this purpose. Indeed, the Convention presents many peculiarities in various respects, which, of course, cannot be exhausted in these introductory remarks. However, some aspects to keep in mind when reading our proceedings book deserve to be highlighted. First of all, the close relationship between the contents of the Convention and the ECtHR's jurisprudence must be remembered. This raises the question of the meaning of the withdrawal from the Convention for a member state of the Council of Europe, which still comes under its jurisdiction.

Furthermore, the Istanbul Convention has peculiar contents, because it deals both with women's human rights, and with the instruments of protection linked to criminal law. These content features affecting human rights and criminal law brought together experts from both disciplines in our conference. Considering human rights perspective, the possibilities and limits of criminal law in contrasting violence and discrimination against women were the core focus of the event.

The intimate connection between the affirmation of the fundamental right to equality and to live free from violence on the one hand and the use of criminal law for the purpose of protection and

punishment on the other hand, suggested to open the reflections with a session dedicated to human rights. Hence, the first section was reserved to "*Violence against women and fundamental rights"* under the moderation of *Prof. Elettra Stradella* (*ELaN Coordinator*) from University of Pisa. In this section, *Valentina Rita Scotti*, from *Koç University* and *Sevgi Doğan*, from *Scuola Normale Superiore, Pisa – University of Siena,* discussed the withdrawal of Turkey from the Istanbul Convention. Whereas *Scotti* introduced some constitutional law assessments concerning the withdrawal, *Doğan* tackled the issue from the point of political science.

The second section was dedicated to the criminal law perspective, and it was the core of the meeting. Entitled "*Criminal law and contrast to violence against women*", the panel was carried under the moderation of *Assoc. Prof. R. Murat Önok*, from *Koç University*. Actually, beside acting as moderator, *Assoc. Prof. Önok* offered unique insights into his contributions and thought on stalking regulation attempts in Turkey a law. In this section, four speakers dealt with various topics, which were quite interesting and at the same time was well-coordinated with the whole session. Firstly *Prof. Francesco Cingari,* from *University of Florence* dealt with the evolution and characteristics of the Italian repressive apparatus in contrast to violence against women. He highlighted the state of implementation of the Istanbul Convention in Italy and discussed the possibilities and limits of criminal law in contrasting violence and discrimination against women. Then, *Prof. Lucia Parlato,* from *University of Palermo*, tackled some procedural topics and, in particular, legal aid and art. 57 of the Istanbul Convention. *Assoc. Prof. Eylem Aksoy Rétornaz,* from *Galatasaray University*, followed the Italian colleagues by discussing violence against women in cyberspace. She pointed out that the Istanbul Convention can also be an effective instrument both in the fight against and in the prevention of this new form of violence. *Asst. Prof. Rahime Erbaş,*

from *İstanbul University*, who spoke last in the session, shed light on the evidence issue which is a very important component of an effective criminal investigation. She dealt with the reasons why evidence issue is more problematic in domestic violence cases than it is in non-domestic related cases and how it reflects on the Istanbul Convention's provisions on the matter.

One of the unique features that characterized the Conference, making it quite genuine, was the students' involvement, who delivered presentations in the *pecha kucha* format in order to understand, argue, criticise, appraise and further develop the Convention on the account of a diverse range of topics such as stalking, gaslighting, honour killings, due diligence standard and re-victimization. Three students from both Turkey and Italy attended the event. On the Italian side, *Valentina Fredianelli* briefly addressed the topic of gaslighting, a type of abuse not formally mentioned by the Istanbul Convention but covered by its *ratio* nonetheless, as it is – more often than not – carried out on women. *Stefania Giammillaro* gave a speech on the effectiveness of legal protection against secondary victimization by comparing the Istanbul Convention and Italian Law no. 154 of April 4th 2001, and provided a brief overview of key historical data to understand the deep reasons for gender discrimination and its evolution into gender violence. *Cristina Luzzi* discussed what other international instruments can be applied to counteract violence against women, *in lieu* of a full-fledged provision against prostitution and then focused on voluntary forms of prostitution. On the Turkish side *Neslihan Can* talked about stalking by partner in the context of violence myths. She considered the role of the current/former relationship between the perpetrator and the victim and the gender role and the solutions for combating stalking. *Ege Kavadarlı* dealt with combating honour killings – one of the most dangerous forms of honour crimes and one of the most common types in terms of statistics –, which continues

uninterruptedly for a long time. He looked into the regulations of the Istanbul Convention, Turkish criminal laws on the issue and Grevio's Evaluation Report on Turkey regarding honour crimes. *Şeyma Kuş* discussed the due diligence standard and combating violence against women by considering it as a more practical rather than theoretical criterion.

The following session was dedicated to the perspective of the Council of Europe in the Grevio's Reports and moderated by *Prof. Valentina Bonini*, from *University of Pisa* – (*ELaN Teaching Staff*). *Prof. Bonini* gave us some insights into Italian criminal law aspects. She further elaborated her speech for this proceedings book under the title *The Istanbul Convention's Values and Its Implementation in Italy*. Also, *Mrs. Simona Lanzoni*, who is Vice-President of GREVIO emphasized «that the Istanbul Convention does not create new definitions of family or new standards with respect to how families should or should not be, whether they are traditional or other types, violence is always a violation of human rights». She further reminded the reality of the facts, by stating «that statistics speak for themselves, 70-80% of violence against women takes place in the context of intimate relationships, in a domestic context».

While the preparations for the academic program were still ongoing, Turkey came to the decision to withdraw from the Convention, taking in force on the 1st July of 2021. Ironically, the country whose city gave its name to the document pulled out of the Convention on its 10th anniversary. In his final remarks *Prof. Adem Sözüer*, from *Istanbul University,* evaluated the withdrawal of Turkey from the Convention and expressed his pleasure in observing that the withdrawal process has improved human rights awareness in Turkey.

Finally, it should be noted that a very crucial topic was extensively discussed, violence against women and domestic violence, by

considering the Istanbul Convention from the viewpoints of both human rights and criminal law. This event also represents a renewal of the Turkish-Italian cooperation which is a deeply-rooted tradition that has been further enriched after the Turkey's adaptation in 1926 of the Italian Penal Code of 1889, briefly known as *The Zanardelli Code*. Even though today Turkey has a brand-new penal code that came into force in 2005 and Italy adopted the adversarial penal procedural approach in 1989 by leaving the inquisitorial approach of the continental European system, the strong ties between the two Mediterranean countries are still strong. The time has come for us to resume and strengthen these ties over the challenging and emerging topics of criminal law following the footsteps of *Prof. Filippo Grispigni* who held a speech at the Istanbul University Faculty of law in 1952[1].

The Italian-Turkish Conference dedicated to "The 10th Anniversary of The Istanbul Convention" stands out as a first outcomes of this cooperation. Our wish is that a fruitful series of İstanbul-Pisa meetings on a variety of topics related to criminal law will continue to be held in the coming years, to reinforce a cooperation involving several academic activities. *Prof. Bonini* and *Prof. Stradella* contributed to the events organized by the İstanbul University, *inter alia*, the International Crime and Punishment Film Festival (2020 and 2021), Law on the Bosphorus International Summer School (2020 and 2021). Furthermore, *Asst. Prof. Rahime Erbaş*, from *İstanbul University,* attended the First ELaN International Workshop of

[1] That was the second speech by *Prof. Grispigni* at the Istanbul University Faculty of Law was published only by translating into Turkish by *Prof. Nurullah Kunter*. See Grispigni F., *Alman Doktrininde Yeni Bir Suç Nazariyesi (Gayeli Hareket Nazariyesi)*, Transl. by. Nurullah Kunter, in İstanbul Üniversitesi *Hukuk Fakültesi Mecmuası*, 1952, 18 (1-2), *https://dergipark.org.tr/en/download/article-file/96591* (accessed: 13.11.2021).

Pisa University in 2020. Currently, a Turkish student graduated from the Istanbul University and PhD student at Galatasaray University, Research Assistant *Selin Türkoğlu*, is carrying out her one-year abroad doctoral research on the concept of dangerousness in criminal law with a criminological perspective under the supervision of *Prof. Valentina Bonini* at the Pisa University. Furthermore preparations are underway for an Erasmus Agreement between the Universities of İstanbul and Pisa which covers both student and academic staff exchange has already begun for the year of 2022.

We would like to express our profound thanks to those who participated in our event and made it possible for us to publish their presentations. Their contributions are precious and offer invaluable insight to support the debate on the actions that need to be taken to prevent and fight violence against women and domestic violence. Finally, a special thanks goes to Dr. Giovanna Spanò for her careful and helpful collaboration in the editorial review.

We hope readers will enjoy the book.

Valentina Bonini & Rahime Erbaş
Pisa - İstanbul, 2021

CHAPTER 1

VIOLENCE AGAINST WOMEN AND FUNDAMENTAL RIGHTS

Turkey's withdrawal from Istanbul Convention: demanding confessional, one-dimensional and homogenous society

Sevgi Doğan

1. Introduction

The withdrawal from the Istanbul Convention noticeably demonstrates that the current Turkish political structure relies on its hostility toward subjectivity and subjects as agents and conscious actors. Basically, the current Turkish political system propagates "hostility" and encourages violence, while it denounces plurality and diversity which is a characteristic of authoritarianism. The authoritarian current system does not only overlook or de-subjectivizes women, but also ignores them as victims when they are exposed to various crimes.

The basic argument of the Istanbul Convention is to fulfill equality between men and women and therefore «to promote and effectively implement policies of equality between women and men and the empowerment of women» (Istanbul Convention, art. 6). Even though those who oppose the Convention do not explicitly claim that the question of equality is a problem, one can witness this concern through the current government's political discourse believing that men and women are not equal. The Con-

vention underlines that the prevention of violence against women depends on the realization of legal and social equality between men and women. It defines violence against women «as a violation of human rights and a form of discrimination against women» (Istanbul Convention, art. 3a). The purpose of the Convention is not merely the protection and prevention but advocacy is another key element to raise awareness in the public about violence against women and gender equality.

Such international conventions are exceptionally important to protect more vulnerable subjects or persons against institutionalized violence, terrorization and intimidation. These international conventions or resolutions declare that «girls and women suffer from 'gender-based violence, particularly rape and other forms of sexual abuse' and women and girls have 'special needs [...] during repatriation and resettlement'»[1]. Since there is structural gender inequality in Turkey and this convention recognizes that violence against women is buttressed by unequal power relations between men and women, the withdrawal can be expected to lead to a renewed increase of violence against women.

My main assumption is that Turkey's decision to withdraw from the Istanbul Convention is coherent and compatible with the current political structure, political demands and targets. Particularly one can track this coherence in the latest developments or news about the relationship between the mafia/or a criminal organization and the State, which surfaced through a series of videos broadcast by a mafia leader who disclosed some important bureaucrats' involvement in cases of murder, rape, corruption and drug trafficking. This new development

[1] Thomson J., *The Women, Peace, and Security Agenda and Feminist Institutionalism: A Research Agenda*, in *International Studies Review*, 2019, no. 21, 598-613, 600.

is quite telling in terms of the new political direction that Turkey has been taking for some time now, including the government's decision to withdraw from the Istanbul Convention. AKP's (Justice and Development Party, the current government) policies about gender issue were/are always contradictory. At the beginning of its foundation and during the first period when it came to power in 2002, it followed a moderate political line claiming to be in tune with democracy and democratic demands. However, especially, in 2010s, AKP which described its political perspective as "conservative democrat" abandoned its democratic promises and got back its origin which was conservative, religious, traditionalist, authoritarian and patriarchal. Paradoxically, after the decision to withdraw from the Istanbul Convention signed exactly ten years ago in 2011, Fahrettin Altun, appointed as Presidency's Director of Communications, wrote on his social media (twitter on 20 March 2021) that «from yesterday to today under the leadership of our President R. T. Erdogan, we are resolutely continuing our struggle for women to participate more in social, economic, political and cultural life. Women are subjects, not objects of life!». On the one hand the government's organic intellectuals and spokesmen were talking about the protection and participation of women in social, economic and political life as above-mentioned, on the other hand, it withdrew from an international convention that already rests on these principles and protects women who have gained their rights after a long history of struggle. This decision would have a series of political and social consequences.

The paper tries to demonstrate that the current political power concentrates on, as Simon Weil wrote, the «passivity and disempowerment of subject»[2], which can be observed through AKP's

[2] Fulco R., *Soggettività e potere: Ontologia della vulnerabilità in Simone Weil*, Macerata, Quodlibet, 2020, 24. As Fulco wrote, Weil never systematically dealt

behavior towards and approach to women. The present paper will argue the Istanbul Convention in three levels in order to give a general idea of gender situation in Turkey through mainly the political and social point of views, by presenting a philosophical discussion on some crucial concepts such as violence and vulnerability and its relation to the international conventions. The first part of the paper will focus on the role of the presidential system in the decision to withdraw from Istanbul Convention; the second part overviews the impacts of the new political system on the human rights of women; and last part will discuss the reaction of conservative intellectuals. As methodology, the paper will conduct an extensive desk research based on a literature survey and theoretical discourses.

2. The concept of vulnerability and violence in terms of international conventions on human rights

2.1. Vulnerability

This latest news revealing the relationship between the mafia and the state, corruption and conflict of interest and power within the current government and its party (Justice and Development Party, AKP) noticeably demonstrates that the political structure of current government is characterized by violence and terrorization. Therefore, it is impossible not to refer to the concept of violence and vulnerability when we talk about human rights of women. Vulnerability and violence mean an exclusion and ignorance of sub-

with the question of subject even though it was a crucial element in her thought. However, the concepts and questions of passivity and disempowerment of subject were at the center of her last writings, but they can be found also in her first years' writings and research.

jects and subjectivity which damages the ontological existence of individuals.

The term, "vulnerability", originated from Latin, *vulnus* or wound, implies «the human potential to be wounded, that is, to experience physical trauma»[3]. But in its modern usage it signifies both physical and psychological harms[4]. «Vulnerability more generally includes our ability to suffer psychologically, morally, and spiritually rather than simply a physical capacity for pain from our exposure to the physical world»[5]. However, in social sciences, vulnerability is not only associated with the victimization and passivity but also with power. In this respect, even though these conventions regard the persons more vulnerable because of some social, economic, and political conditions, some argue that vulnerability cannot be «understood only as victimization and passivity» but «as one of the conditions of the very possibility of resistance»[6]. These scholars discuss about women's position to reduce the vulnerable circumstances in terms of the other's vulnerability, which signifies that women can fight against paternalistic logic and violence to create practices and found organizations or institutions to protect *other* women[7]. Women, as Judith Butler writes, first are vulnerable but then through their struggle against inequality and

[3] Turner B.S., *Vulnerability*, in *International Encyclopedia of The Social Sciences*, vol. 8, Macmillan Reference, 2008, 656. The concept of vulnerability became popular in social sciences from philosophy to feminist literature. The paper will not present a detail analysis of the concept but it will try to discuss its political and social implications in terms of international conventions.

[4] *Ibid*., 656.

[5] *Ibid*.

[6] Butler J., Gambetti Z., Sabsay L., *Introduction*, in *Vulnerability in Resistance*, J. Butler, Z. Gambetti, L. Sabsay, (eds.), Duke, Duke University Press, 2016, 1.

[7] *Ibid*., 2.

violence and domestic violence, they try to overcome this vulnerability by act of resistance[8].

This paper relates the concept of vulnerability to the social and historical circumstances which means that vulnerability does not only refers to the physically or bodily disable and therefore open to be harmed easily but the social and cultural conditions in which persons live and the opportunities and possibilities that the government agencies and society provide can determine the vulnerability. In the authoritarian and despotic regimes such as Afghanistan, as a recent example, under the Taliban regime, women are at risk and exposed to the great oppression that leads them to be more vulnerable. Under this sort of regimes, women are just slaves of men. Their passivity is celebrated and their subjectivity does not even exist.

The authoritarian regimes make a great effort to leave people vulnerable in order to avoid any struggle resulting from the vulnerable persons. In this regard, the international conventions or resolutions serve to prevent and remove the vulnerable situations damaging not only human beings but also society and its political structure. In other words, these conventions such as the Elimination of All Forms of Discrimination Against Women (CEDAW), UN Security Council Resolution 1325, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Council of Europe and the United Nations Conventions for the Prevention of Torture and Inhuman Treatment, Helsinki Summit Declaration on Human Rights, etc., which Turkey is also a party to, try to reduce social, political and economic vulnerability and violence. In order to remove vulnerabilities, the Istanbul

[8] Butler J., *Rethinking vulnerability and Resistance*, in *Vulnerability in Resistance*, J. Butler, Z. Gambetti, L. Sabsay (eds.), cit., 12.

Convention takes as a goal, in principle, to empower women, to «design a comprehensive framework, policies and measures for the protection of and assistance to all victims of violence against women and domestic violence», to promote international co-operation and to «provide support and assistance to organizations and law enforcement agencies to effectively co-operate in order to adopt an integrated approach to eliminating violence against women and domestic violence» (Istanbul Convention, art. 1b, c, d, e). The Convention tries to forestall threatened harms and the particular circumstance making persons vulnerable including child victims. Such convention considers women, children, immigrants etc., more vulnerable and therefore tries to protect them from the particular vulnerable circumstances[9]. One can argue that on the one hand the Istanbul Convention relies on the protection and prevention, on the other hand, it tries to help women to establish their subjectivity by empowering them through taking necessary «measures to promote programs and activities» (Istanbul Convention, art. 12), by way of education on gender equality (Istanbul Convention, art. 14) and training «for the relevant professionals dealing with victims or perpetrators of all acts of violence» (Istanbul Convention, art. 15).

If one analyzes the Istanbul Convention in terms of its approach to the concept of vulnerability, s/he can see that vulnerability is framed around the social and historical relations; in other words, it refers to "particular circumstances" (Istanbul Convention, art. 12/3). It means that vulnerability of persons can be de-

[9] For further debates about how the International Human Rights evaluates vulnerability see: Morawa A.H.E., *Vulnerability as a concept of International Human Rights Law* in *Journal of International Relations and Development*, 6 (2), 2003, 139-155. Chapman A.R, Carbonetti B., *Human Rights Protection for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights*, in *Human Rights Quarterly*, 33(3), 2011, 682-732.

termined by the social and historical relations in which these persons find themselves. While the Convention considers women and children as vulnerable persons stressing on victimization, this does not signify that it ignores their subjectivity but rather it focuses on their ability to act as agency to protect their otherness, that is other women. This is important to underline that the Convention is against the idea of passivity, that is passivity of women.

2.2. Violence

The Istanbul Convention claims that (immigrant) women and children because of the violence and domestic violence against them or in a violence environment like war become more vulnerable. Violence has been usually «characterized as the use of force by and against one or more social subjects with the intention to inflict bodily harm»[10]. However, in the last three decades the studies and researches on violence has enhanced and elaborated the content of the concept by referring to its different forms[11]. Here there is not enough space to elaborate the various forms of violence resulting from the conflict between individuals and the state, interstate and civil war, the apparatus of the state, terrorism, ethnic conflict, colonization, *inter alia*, but the paper deals with the concept in relation to the Convention. The Istanbul Convention condemns all forms of violence against women along with domestic violence (Istanbul Convention, Preamble). It describes violence against women as «a manifestation of historically unequal power relations between women and men» (Istanbul Convention, Preamble). These unequal relations on the one hand lead to

[10] Valiani A.A., *Violence*, in *International Encyclopedia of The Social Sciences*, vol. 8, Macmillan Reference, 2008, 622.

[11] *Ibid*., 622.

«domination over and discrimination against women by men», on the other hand to prevent «the full advancement of women» (Istanbul Convention, Preamble). This description indicates that the Convention recognizes the violence against women and domestic violence as gender-based violence.

As a South Korean-born Swiss-German philosopher and cultural theorist Byung Chul Han claims, violence includes a relationship between self and other, friend and enemy[12]. He differentiates the violence of negativity from that of positivity. The violence of positivity is worse than negativity, according to Han, because it is not visible and evident. He defines this positivity as «the accumulation of the positive, which manifests as overachievement, overproduction, overcommunication, hyperattention, and hyperactivity» and positivity is «wielded without enmity or domination»[13] while negativity manifests itself «as expressive, explosive, massive, and martial. They include the archaic violence of sacrifice and blood, the mythical violence of jealous and vengeful gods, the sovereign's deadly violence, the violence of torture, the bloodless violence of the gas chamber, and the viral violence of terrorism»[14]. However, in contrary to Byung Chul Han's argument who claims that «violence is increasingly internalized, psychologized, and thus rendered invisible», I believe that violence is as visible as obvious which has augmented within societies in different manner[15]. According to Byung Chul Han, violence transforms itself into interior[16]. Both the externalized and internalized violence are used by the anti-dem-

[12] Han B.C., *Topology of Violence*, Cambridge Massachusetts, MIT Press, 2018, vii. It seems that Han has been influenced by Michel Foucault's theory of panopticism about which he talks in *Discipline and Punishment*.

[13] *Ibid*., viii.

[14] *Ibid*., vii-viii.

[15] *Ibid*., ix.

[16] *Ibid*., viii.

ocratic government to maintain their power. For the internalization of violence, the governments have resort to and work with the mafia and criminal organization whose task is fearmongering and which arouses public fear to avoid people from manifesting the government's policies. One of the examples can be given from Turkey in 2016 after the attempted coup, a mafia leader explicitly threatened the academics who signed the peace petition to death, calling on the government to take immediate action to stop the military occupation in the South-East Turkey where the Kurdish population live and to begin the negotiations for peace process.

Through negativity of violence, the political system engages in the physical violence. But it also aims at internalizing violence through producing a society relying on fear to be subjected to violence and be infringed their rights. The positivity and negativity of violence are two methods of mechanism of the political control to maintain power. As Han writes, «the internalization of violence also proves useful to the exercise of rule. It ensures that the obedience-subject internalizes the external ruling authority, making it a part of itself. This allows the authority to rule with far less effort»[17]. The internalization of violence results in self-censorship and therefore self-violence. The individuals begin to violent their freedom of expression without any apparent violence against themselves from the state apparatus or from outside. Another example can be the violent relationship between husband and wife or partners. After a certain point if the persons who are subjected to violence cannot be supported by the legal measures, they may accept the violent situation at home and do whatever their perpetrators want because of fear. This signifies that they perform violence against themselves by themselves. However, the main reason of violence against women

[17] Han B.C., cit., 7.

does not disappear. It is always gender-based violence and results from gender inequality which aims women to remain passive, victims, and therefore vulnerable.

Robert Goodin, in *Protecting the Vulnerable* writes that «we bear special responsibilities for protecting those who are particular vulnerable to us»[18]. The international conventions bear this responsibility for forestalling threatened harms. Similarly, Martha A. Fineman refers to the vulnerable subject and vulnerability in relation to the responsibility between the state and individual[19]. According to her, the state must be more responsive in front of the vulnerable subjects, which can realize this responsibility through «the establishment and support of societal institutions» and monitoring them against any sort of vulnerability like corruption[20]. The European Court of Human Rights on June 9, 2009 announced its judgment about the case of Nahide Opuz which condemned Turkey to fail to protect Opuz and her mother from domestic violence. The court regarded these persons to pertain to the vulnerable groups exposed to domestic violence[21] and therefore this led the positive obligation for the state to protect these vulnerable persons against violence[22]. It is important to underline that women are not placed in a vulnerable category simply because they are women but it is crucial to uncover the social regulations and legal deficiencies that lead women to find themselves in a vulnerable position.

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[18] Goodin R., *Protecting the Vulnerable*, Chicago, University of Chicago Press, 1985, 109.

[19] Fineman M.A., *The Vulnerable Subject and the Responsive State*, in *Emory Law Journal*, 60(2), 2010, 255.

[20] *Ibid*., 256.

[21] European Court of Human Rights, Chamber Judgment *Opuz v. Turkey*, 2009, *https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22003-2759276-3020932%22]}*.

[22] Celik E., *İnsan Haklari Bakimindan Kirilgan Kavramina Bir Giriş ve Kavramin AIHM Kararlarindaki Görünürlüğü*, in *Dokuz Eylül* Üniversitesi *Hukuk Fakültesi Dergisi*, vol. 22, no. 1, 2020, 57-77.

3. The situation of democracy in Turkey

The duty and responsibility of the states have changed throughout history. For instance, «the primary duty of the state in eighth century BC was to support religion to ensure the political unity of the community»[23]. In modern period, the individual became the center of the political discourses. The state had more responsibility toward its citizens. Rights and laws are indispensable elements of modern society and state. Hegel, as a modern philosopher, explains the relationship between the individual, the state and society in terms of duty and right relation in *Philosophy of Right*. In *Encyclopaedia*, Hegel underscores, «what is a right is also a duty, and what a duty is, is also a right»[24]. In this dialectical relation, the individuals have both right and duty in front of a state and the state in the same manner has duty and right in front of the individuals or its citizens. In this respect, Hegel writes «in the phenomenal range right and duty are *correlata*, at least in the sense that to a right on my part corresponds a duty in someone else»[25]. In the same paragraph, within this dialectical relation, he also reminds us that «he who has no rights has no duties and vice versa»[26]. If a state is not able to protect their citizens who have right to life and let them live in peace, the citizens cannot carry out their duties toward their state who make many promises to construct a livable society.

As Luca Ozzano and Chiara Maritato point out «when the AKP came to power in 2002, many envisioned that it would play a leading role in reconciling Islam and democracy by facilitating pi-

[23] Dogan S., *Marx and Hegel on the Dialectic of the Individual and the Social*, Lanham, Lexington Books, 2018, 19.

[24] Hegel G.W.F., *Encyclopaedia*, § 486, *https://hegel.net/en/enz3.htm* (accessed on 5.10.2021).

[25] *Ibid*.

[26] *Ibid*.

ous Muslims to participate in secular democracy»[27]. But especially after Gezi protests 2013 AKP demonstrated its essence. «[The withdrawal from Istanbul Convention] signals a huge setback for women's rights in a country with high rates of gender-based violence and femicides: Just in 2020, at least 300 women were murdered»[28]. The withdrawal is considered as violence and attack on human rights of women and the rule of law[29].

In the recent decades, there is a great interest in the concept of democracy and authoritarianism particularly after the rise of authoritarian regimes in different part of the world which came to power by a democratic election and populist policies. In this respect, some scholars who have studied on the Turkish case defined it hybrid in the sense that it is composed of both authoritarian and democratic elements[30]. AKP's (Justice and Development Party's; Erdoğan's party) regime also must be evaluated in tandem with its anti-intellectual, misogynistic, and neoliberal character.

As Karakoç claims, AKP «adopted the economic aspects of liberalism more than its political aspects»[31]. Economically, the

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[27] Ozzano L., Maritato C., *Patterns of Political Secularism in Italy and Turkey: The Vatican and the Diyanet to the Test of Politics*, in *Politics and Religion*, 12, 2019, 457–477, 471.

[28] Aksoy H.A., *What lies behind Turkey's withdrawal from the Istanbul Convention?*, CATS Network, 29/03/2021, *https://www.cats-network.eu/publication/what-lies-behind-turkeys-withdrawal-from-the-istanbul-convention/*.

[29] *Ibid*.

[30] Stelgias N., *The Ailing Turkish Democracy: The Transformation and Perpetuation of a Hybrid Competitive System*, Cambridge, Cambridge Scholars Publishing, 2019; Oney B., Ardag M.M., *The relationship between diffuse support for democracy and governing party support in a hybrid regime: evidence with four representative samples from Turkey*, in *Turkish Studies*, 2021.

[31] Karakoç J., *Authoritarian Tendencies versus Democratization: Evidence from Turkey*, in *Authoritarianism in the Middle East*, J. Karakoç (ed.), London, Palgrave Macmillan, 2015, 42.

AKP follows a line between liberalism and conservatism during its power. Erdoğan's policies are marked by a mixture of nationalist conservatism, nativism and Islamism, and by an explicit aversion to elitism and western secularism. In this regard, the AKP believes to be representative of the periphery against an elitist minority. According to S. Erdem Aytac and Ezgi Elci, this is an aspect of parties of periphery based on «a majoritarian and moralistic understanding of democracy»[32]. Through this party policy, AKP considered only the conservative and religious majority of society as "people"[33].

At this point, it is important to take a closer look at the so-called "Turkish type" of presidential system, in order to understand the motives behind the AKP government's withdrawal from the Istanbul Convention. The same label was also used by Erdoğan to describe the new constitution, with the argument that the previous constitutions were imported, that is, they were not native. Here, he emphasizes on the term, "nativity" which is one of the fundamental principles of the AKP regime[34]. According to the president Erdogan, «all political powers – executive, legislative, judicial – should reflect the nation's identity and intentions, and should not come into conflict with one another»[35]. For the Turkish president, in contrary to the old one, the new presidential system is in harmony with the nation's values[36]. These values, in fact, are confessional ones demanding homogeneity. The issue of gender inequality in

[32] Aytac S.E., Elci E., *Populism in Turkey* in *Populism Around the World*, D. Stockemer (ed.), 2019, 91.

[33] *Ibid*., 91.

[34] *Hurriyet*, *Türk tipi anayasa modeli: Millet hazır* in *Hurriyet*, 29 January 2016, *https://www.hurriyet.com.tr/gundem/turk-tipi-anayasa-modeli-millet-hazir-40046600*.

[35] Adar S., Seufert G., *Turkey's Presidential System after Two and a Half Years*, in *Stiftung Wissenschaft und Politik Research Paper*, 2021, 8.

[36] *Ibid*., 8.

Turkey should be understood within the AKP government's overall emphasis on homogeneity and refusal of heterogeneity, that is diversity.

Especially after the coup in 2016, with the statutory decrees (OHAL) Turkey took a more explicit turn towards overt authoritarianism. The state of emergency continued from 21 July 2016 to 19 July 2018. With the 2017 referendum (16 April 2017), the Turkish political system has been changed. With the elections of June 24, 2018, Turkey passed to a new system called "Presidential Government System" and came into effect as of July 9, 2018. Afterwards the separation of power relied on the parliamentary system has been terminated and the president held all powers. The Council of Ministers was abolished. The president has been empowered to appoint almost all of the senior public officials, not just the ministers, but the members of the Constitutional Court, the Supreme Court and the Council of State, the Council of Judges and Prosecutors, Governors and the Central Bank. The parliament does not have any powers to approve the Council of Ministers, to interpellate, to vote for distrust about the ministers.

At the beginning of 2016, the president Erdoğan described this new constitution and presidential system as follows:

> At the heart of the long-standing problems between the judiciary, legislature and executive there is an understanding of the current constitution which is based on the conflict, but not on the harmony of powers. This distress will disappear on its own, when the spirit of the new constitution is formed by the logic of harmony and balance instead of conflict, by supporting each other instead of damaging each other. The Executive issue will be the nodal point of the new constitutional work. We believe that the parliamentary system has expired in our country[37].

[37] *Hurriyet*, *Türk tipi anayasa modeli: Millet hazır*, cit.

According to the president, the existence of different voices in the governmental institutions result in conflict and disharmony. In some sense, this new establishment destroyed checks-balances system. The new political structure indicates and demands homogeneity by eliminating diversity and silencing different voices in society and in politics. This is obvious in Erdoğan's rejection of the old system that relegated the governance to two different figures – the president and the prime minister – which he believes that their different political backgrounds or views might complicate state matters[38]. Therefore, according to the president of Turkey, one-single man government, that is presidential system can solve this conflict, which results in a one-dimensional political understanding along with a "one-dimensional society".

In 1960s, Herbert Marcuse talked about one-dimensional man and society in which human beings were socially and politically controlled and dominated in order to expand one type of thought and behavior. «*One-Dimensional Man* is an important work of critical social theory that continues to be relevant today as the forces of domination that Marcuse dissected have become even stronger and more prevalent in the years since he wrote the book»[39]. Marcuse states that the new tendencies in contemporary industrial society endangered «all genuinely radical critique»[40]. In this work, Marcuse, briefly demonstrates us how the authoritarian type of regimes - even though he did not refer to - damage the individual's critical and dialectical thinking by way of restrictions on human freedom, freedom of expression and violation of human rights. In-

[38] *Hurriyet*, cit.

[39] Kellner D., *Introduction to the Second Edition*, in Marcuse H., *One-Dimensional Man: Studies in the Ideology of advanced industrial society*, London, Routledge Classics, 2002, xii.

[40] *Ibid*.

stead of critical thinking that «seeks alternative modes of thought and behavior from which it creates a standpoint of critique», it constructs and celebrates uncritical thinking that «derives its beliefs, norms, and values from existing thought and social practices»[41]. A critical and dialectical thinking leads the individuals to establish and develop their subjectivity. Critical thinking requires a negative approach which means that the individuals can negate existing forms of thought, the imposed perspectives and values. In my view withdrawal from the Istanbul Convention is one of the ways to eliminate critical and dialectical thinking since the Convention paves the way for empowering women's position in society in order to have a powerful and critical voice to self-defend and defend other women, to make decision in the process of democratization and to establish peace in society.

Another example of establishment of one-dimensional society and politics is that with the transition to this system, the powers of Parliament were limited, while the powers of the president increased. The president became the head of the executive power. Now the presidential role is very active and functional. Under this system, the president can also be the leader of a party. Therefore, this gave possibility to Erdoğan to be also the head of the AKP.

Under this new system, ministers can also be appointed from outside of the Parliament (art. 106). In the old system, the head of government or the Prime Minister had the duty to propose a cabinet and present the list of the ministers to the president. But now there is no longer the figure of the Prime Minister. A member of the parliament who is asked to be a minister must resign from his/her post. President Erdoğan can hire and fire senior public administrators as he pleases. Moreover, the president can appoint or

[41] *Ibid*., xiv.

dismiss judges and prosecutors who will serve in the High Judiciary. Therefore, the President can easily control the bureaucracy without any intervention or involvement of the parliament.

He can declare a state of emergency (OHAL) at any time. The Parliament may lift the state of emergency if it considers it necessary. Due to this change in the system, law enactment by the Parliament has factually decreased, while the number of statutory decrees increased. Through statutory decrees, the president also exercises legislative authority. The president may also impose laws by issuing decrees. Two years into the presidential system, the number of decrees far exceeds the laws.

According to the report of Rule of Law Index in 2020, Turkey ranked 107 out of 128 countries[42] which means that a large number of judges and prosecutors who have lost their independence in Turkey are deciding on women's rights in line with the government policies, but not compatibly the rule of law[43]. The lack of an independent judicial system and the withdrawal from the Istanbul Convention may lead judges to make unlawful decisions that do not reflect the provisions of domestic law. According to the report of *Metropoll Stratejik ve Sosyal Arastirmalar* (Metropoll Strategic and Social Research), «the November 2020 findings [...] demonstrate that negative perceptions of the independence of the judiciary run very deep and that there is a strong public desire for root-and-branch reform»[44].

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[42] WJP Rule of Law Index, *Turkey*, 2020, *https://worldjusticeproject.org/rule-of-law-index/country/Turkey* (accessed on 5.10. 2021).

[43] Öztürk F., İstanbul *Sözleşmesi'nden* çıkmak *neyi değiştirdi, kadına* şiddetle *mücadelede iç hukuk yeterli mi?* in *BBC News*, 30 March 2021, *https://www.bbc.com/turkce/haberler-turkiye-56578226* (accessed on 4.10.2021).

[44] Metropoll Stratejik ve Sosyal Arastirmalar, *Turkey's Pulse - November 2020*, *http://www.metropoll.com.tr/research/turkey-pulse-17/1877* (accessed on 4.10.2021).

3.1. Why did Turkey withdraw from Istanbul Convention?

The signals of a planned withdrawal from the Istanbul Convention were already there in 2020; the «religious conservatives and various Muslim orders began an intense lobbying effort against the Convention»[45]. The government's withdrawal was motivated by a misogynistic concern that "the law No. 6284 on the protection of the family and the Prevention of Violence Against Women" and Istanbul Convention ensured women's public and political presence and representation. As such, the issue was not only about secular women but it is also about the religious or conservative women who became stronger than ever, especially after the removal of a ban on wearing headscarf in public area like university (in 2007) and public sector (in 2013)[46].

[45] Aksoy H.A., *What lies behind Turkey's withdrawal from the Istanbul Convention?*, cit.

[46] According to the 5th article of the Regulation on the Dressing of Staff working in Public Institutions and Organizations determined by the Council of Ministers formed by the National Security Council, the heads of women in the public should always be open. In the 1980s, both the Ministry of Education and the Council of Higher Education (YÖK) issued a circular letter. The period in which the headscarf issue became most severe was the struggle against reactionary forces on the 28 February 1997. After this period, the headscarf was banned in the universities with the circular letter issued by the Rector of Istanbul University on the February 23, 1998. The students accessing with headscarves the university were discouraged in doing so in the persuasion rooms. The lawsuits had been filed against those who continued to wear the headscarf. The students had two choices: they would either leave the headscarf or the university. Those who did not want to leave the university continued to study by wearing things like skullcap or wig. Some preferred studying abroad as much as possible. The headscarf issue was not resolved immediately during the AKP period, which came to power in 2002. The issue was still very sensitive, and although some practices were involved, no legal regulation was made. In 2007, the ban on headscarf was lifted for the universities and through a democratization package on October 1 2013 it was lifted also in the public sector. A change was made in

Signing the Istanbul Convention and withdrawing from it is just a result of a political interest. First, the AKP (Justice and development party) decided to be a part of Convention due to the then political needs such as the support of European Union in 2011 since the Convention was considered as a means of the legitimacy; AKP had to appear like democratic. Now, it lost the support from European Union and for its existence it needs the support of religious order and groups who demanded to withdraw from the Istanbul Convention.

According to government's representatives, the rights of women are protected by national law so, Turkey does not need an international law. Similarly, according to AKP's bureaucrats, in order to increase the reputation of the Turkish woman in society to the levels she is worthy of, Turkey does not need to search for a solution outside the country and there is no need to imitate others; Turkey can find the solution in its traditions and customs, in its own essence. Another justification for the withdrawal came from the Directorate of Communications who found it dangerous for the existence of family and discourses about homosexuality by claiming that «the Convention was 'hijacked by a group of people attempting to normalize homosexuality'», which is not compatible with the structural values of society and family[47].

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the 5th article of the dress code. Al Jazeera, *Türkiye'de başörtüsü yasağı: Nasıl başladı, nasıl* çözüldü?, in *Al Jazeera Turk*, 30 December 2013 *http://www.al-jazeera.com.tr/dosya/turkiyede-basortusu-yasagi-nasil-basladi-nasil-cozuldu*. See Aksoy M., *Başörtüsü-türban: batılılaşma-modernleşme, laiklik ve* örtünme, Istanbul, Kitap Yayinevi, 2005, 279-280.

[47] Aksoy M., *op. cit.*, 279-280.

4. Violence of human rights of women

One of the most important principles of the Istanbul Convention is that it defines violence against women as a violation of human rights and a form of discrimination (Istanbul Convention, art. 3a). With the presidential system, women's rights in Turkey have worsened. According to data gathered by the Human Rights Foundation of Turkey, 260 women were killed in the first 11 months of 2020. At least 92 women were raped, 136 women were harassed, and 731 women were abused[48]. Quarantine conditions have increased sexual violence and mistreatment. According to the report of the platform called "we will stop the murders of women", between April and May 2020, the number of people calling support and help numbers increased as compared to the previous months. Many activities organized for March 8th have been banned. As a result of an increasing pressure from civil society, especially after 2013, the Pride march has not been allowed since 2014, notwithstanding being organized every year since 2003. In addition to blocking LGBTI+'s rights to manifestation and assemblies, all LGBTI+ themed events, including the screening of films, were banned by the Ankara governorship with the justification of the state of emergency. According to the 2021 Rainbow Europe Map on human rights of LGBTI people, among the 49 countries covered by the LGBTI+ human rights assessment, Turkey is again at the 48th place as in 2020[49].

[48] Türkiye İnsan Haklari Vakfi, *Verilerle 2020 Yılında Türkiye'de* İnsan *Hakları* İhlalleri, 10 December 2020, *https://tihv.org.tr/basin-aciklamalari/verilerle-2020-yilinda-turkiyede-insan-haklari-ihlalleri/* (accessed on 05.10.2021).

[49] Ilga Europe, *Rainbow Europe 2021*, 2021, *https://www.ilga-europe.org/rainboweurope/2021* (accessed on 11.06.2021).

Şükran Eroğlu, President of Istanbul Bar Association Women's Rights Center, refers to the violation of women's human rights by this withdrawal and argues that the lawyers used to refer to the Convention especially in cases of femicide. Specifically, the articles of the Convention enabled the lawyers to intervene in such cases as a non-governmental organization. The withdrawal from the Convention effectively robbed them of the right to bring charges against a suspect of crime[50]. In addition, Eroğlu refers to the parallels between the Convention and the law No. 6284 on the Elimination of Violence against Women and the Protection of Family, which provides physical protection, psychological, vocational, and legal support, childcare facilities, residence and identity. Therefore, according to her, many women who have been abused and protected are in an incredible state of panic and wonder if their acquired rights will be taken away[51].

5. Intellectuals' and institutions' roles

Another important element about the withdrawal from the Convention is the role of intellectuals. The intellectuals close to the AKP government played a significant role in the decision to withdraw from the Convention, along with other governmental institutions like the Diyanet İşleri Başkanlığı (Religious Affairs Directorate). What ignited the discussions on the Istanbul convention was that the President of Religious Affairs targeted

[50] DW, İstanbul *Sözleşmesi'nin feshi: Bundan sonra ne olacak?*, 20 March 2021, *https://www.dw.com/tr/istanbul-s%C3%B6zle%C5%9Fmesinin-feshi-bundan-sonra-ne-olacak/a-56939678* (accessed on 04.10.2021).

[51] *Ibid*.

LGBTI+ individuals with discriminatory statements in 2020[52]. The Amnesty International Report 2020/2021 explains the situation as follows:

> In April, a senior state official at the Religious Affairs Directorate (Diyanet) blamed homosexuality and people in extra-marital relationships for the spread of HIV/AIDS. He urged followers to combat this "evil" in a Friday sermon focusing on the COVID-19 pandemic, a call supported by the President. Bar associations criticizing the statements faced criminal investigation under Article 216/3 of the Penal Code that criminalizes "insulting religious values"[53].

As Ozzano and Maritato also state:

> the Diyanet has been a tool and an opportunity for all governments in Turkey. This is because governments can use the agency's extensive network of mosques to diffuse its own ideas of values and morality among society: in the case of the current AKP government, this is a religiously conservative outlook. However, the institution is also the instrument by which governments control religion in its daily manifestations and in the formulation of dogma[54].

Through Diyanet and its president, the government opened the Istanbul Convention up for discussion in his re-opening speech of Haghia Sophia as mosque in 2020.

In May 2020, as the organic intellectuals of the government, the Turkish Platform of Thought submitted a report to presi-

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[52] Ozgur E., İstanbul *Sözleşmesi hakkındaki efsaneler ve gerçekler*, in *Teyit Dosya*, 13 May 2020, *https://teyit.org/istanbul-sozlesmesi-hakkindaki-efsaneler-ve-gercekler* (accessed on 05.10.2021).

[53] Amnesty International Report 2020/2021, *Türkiye: 2020 yılı raporu, insan hakları noktasında Türkiye'nin en acil ihtiyacının yargı bağımsızlığı olduğunu ortaya koyuyor*, 7 April 2021, *https://www.amnesty.org.tr/icerik/turkiye-2020-yili-raporu-insan-haklari-noktasinda-turkiyenin-en-acil-ihtiyacinin-yargi-bagimsizligi-oldugunu-ortaya-koyuyor* (accessed on 05.10.2021).

[54] Ozzano L., Maritato C., *cit*., 470.

dent Erdogan to demand withdrawal from the Istanbul Convention. The report clearly focused only on the aspect of sex, while the Convention focuses on a variety of issues from gender equality to violence and domestic violence. According to this report, with the concept of gender, the Convention dictates «an ideology that leads to sexlessness in the relations of men and women» to the countries that signed the Convention[55]. In addition, the report claimed that the Convention aims to desexualize society by erasing the concept of biological sex entirely. According to the report, the Convention aims at distorting the religious, social and cultural codes of the society, rather than ensuring equality between men and women[56]. Moreover, the report stated that the Convention strives to weaken the institution of family with its gender conception. With these arguments and false claims, both the Islamist intelligentsia and Islamic sects, communities and groups forced the government to withdraw from the Istanbul Convention.

In contrary to these uncritical and undialectical perspectives of the government's organic intellectuals, through a critical approach the secular and religious women corporate on defending the Convention.

Therefore, along with the secular and feminist women, Muslim and conservative women oppose the government's decision. A theologian, human rights activist, and writer Hidayet Şefkatli Tuksal criticized the speech of the president of the Religious Affairs Directorate (Diyanet) and claimed that the government utilizes Diyanet as a supporter of its own policies like other bu-

[55] Yetkin M., İşte *Erdoğan'dan fesih isteyen İstanbul Sözleşmesi raporu*, in *Yetkin Report*, 23 July 2020, *https://yetkinreport.com/2020/07/23/iste-erdogandan-fesih-isteyen-istanbul-sozlesmesi-raporu/* (accessed on 05.10.2021).

[56] *Ibid*.

reaucratic institutions[57]. Therefore, the president of Diyanet took on this task to bring Istanbul Convention into discussion. She believed that «discourses against Istanbul Convention intended to suppress the increasing opposition of religious or conservative women. The government and its intellectuals tried to intimidate conservative women from openly expressing their opinions on violence, alimony, women's rights in different media channels»[58]. According to Tuksal, conservative men, religious groups and sects are not only afraid of empowered secular women, but also from an increasing empowerment of religious-conservative women, who gained more access into the public sphere in the aftermath of the abolition of the headscarf ban in 2013. Tuksal claims that the main problem of the conservative groups with the Convention is not gender and homosexuality, but rather their fear and discomfort to lose their male privilege once the patriarchy gets questioned[59]. The fear of losing their supremacy over women leads them to be violent against women.

6. Concluding remarks

In this paper, I tried to concentrate on some philosophical and sociological concepts also bearing political implications such as violence, vulnerability, critical thinking and one-dimensional society, and therefore what these concepts signify in relation to the

[57] Tuksal H.Ş., *Diyanet, İstanbul Sözleşmesi, dindar kadınlar ve gençler - Konuk: Hidayet Tuksal*, in *Medyascope*, 2 August 2021, *https://www.youtube.com/watch?v=L9mRMV97JBk* (accessed on 05.10.2021).

[58] *Ibid*.

[59] Tuksal H.Ş., *Kadınları zapturapt altına almak uğruna*, in *Serbestiyet*, 26 March 2021, *https://serbestiyet.com/yazarlar/kadinlari-zapturapt-altina-almak-ugruna-55099/* (accessed on 05.10.2021).

international conventions and the current Turkish regime. In my view, vulnerability does not necessarily mean passivity or victimization, but the vulnerable persons can be active agent in protecting and defending other's rights. The individuals and the institutions within society and state have responsibility for providing a secure environment and therefore avoiding the threatened harms for the more vulnerable persons. For this purpose, there are international conventions and there are national laws and civil organizations or non-governmental organizations to fight against violence against women. I argued that Turkish political structure has been designed to eliminate the critical and negative thinking that enables persons to negate the conservative, anti-democratic and violent actions and views from the state apparatus.

At this point, what we can do to take Istanbul Convention back is to continue to put pressure on the government and opposition parties, and fight for our rights, even though it would be a difficult task to be accomplished and take it back under this current government and political atmosphere. We have to do four things at the national and international level: 1) to unite and work with nongovernmental organizations, like foundations and organizations of human rights, feminist organizations at the national and international level; to work also with religious women's organizations who defend the Convention and find it crucial for human rights of women; 2) to put pressure over the parliament and opposition parties to keep the discussion ongoing; 3) nongovernmental organizations have to communicate and work also with the political parties, especially with the oppositional political parties, it is not important from which political, cultural or religious background we are coming but we can unite for our human rights together; 4) to engage both the secular and the islamist intellectuals in favor of the Istanbul Convention in the discussion for advocating, in order to prevent the government from changing the agenda. Turkey's political and social agenda is always full and for this reason we need to talk about it very often in order to avoid

letting it slip into the depths of public memory, since the latter is notoriously short-lived.

Lastly, while we could not protect the human rights of women adequately and prevent violence and domestic violence against women under the Istanbul convention due to a lack of implementation, it is hard to believe that the government's national and local policies will prevent violence at all, since so far the government has had a terribly unsuccessful record in terms of human rights and freedom of expression guarantees.

The Istanbul Convention in Turkey from ratification to withdrawal: a constitutional law assessment

Valentina Rita Scotti

1. Introduction

The present article aims at analyzing the impact of the Istanbul Convention on the Turkish legal system, focusing on the content of the 2012 Law on the Protection of the Family and the Prevention of Violence against Women and questioning whether it complied with the standard set by the IC. It also deals with the procedure of withdrawal underscoring its controversial elements and anticipating possible consequences on the protection of women's rights in the country deriving from it. Concluding remarks finally highlight how the decision of withdrawal is included in a wider political project aligning Turkey eastwards and distancing it from the European standard of rights protection.

Indeed, the condition of women's rights in Turkey is a touchstone for assessing the health of Turkish democracy both in a diachronic analysis and with regard to the current constitutional regression that the country is facing. Since the last decades of the Ottoman Empire, women's emancipation has been perceived either as a fundamental achievement for the modernization of the whole Empire by then became "the sick

man of Europe", or as the main reason of the Empire's sickness. When the Republic was established (1923), the Kemalist elite adopted a progressive approach, aimed at empowering women and opening to them the public sphere in order to support the emancipation of the whole country from traditionalism. In this vein, the parity between men and women was recognized in several fields and women's exclusion – already challenged when women entered the working field during the First World War – was abolished through legal changes and cultural campaigns. First, women were enfranchised[1] and, although respecting the limits of the Kemalist single-party system, they could enter the political arena. The civil and criminal codes were consistently reformed to abolish koranic-based rules and introduce secular norms[2]. Second, devoted educational trainings were elaborated for fighting women's analphabetism. To cope with resistance in rural areas, female-only classes were established and school programs included trainings on domestic chores. This allowed for a first step in women's education, then conducive to an empowerment and leading some of them entering in the job market. Third and final, cultural programs were launched to encourage women's detachment from traditional values, namely from the religious tradition of wearing the veil[3].

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[1] Law n. 2599/1934.

[2] The new Codes were strongly inspired respectively to the Swiss and Italian ones into force at the time, although a process of adaptation occurred in order to avoid a sudden rejection of these legal transplants. This is, for instance, the case of the rules on marriage "transplanted" from the Swiss code. Differently from the original, indeed, the Turkish Code refused any recognition to marriages celebrated by religious authority, in line with the idea of secularism on which the Republic was going to be build. On the legal transplants of the Codes, refer to Scotti V.R., *Il costituzionalismo in Turchia fra identità nazionale e circolazione dei modelli*, Sant'Arcangelo di Romagna, Maggioli, 2014, 93-100.

[3] It is worthy to remember that the removal of the veil has never been imposed through a law, but has been progressively achieved through the mentioned cultural program and also through specific administrative measures preventing its use in pub-

Due to these reforms, women obtained wider margins of protection, though parity was not achieved. Conversely, the main features of state feminism configured, according to which the "new female citizen" is emancipated with the aim of ensuring the loyalty of future generations to the ruling elite and of assisting her husband in supporting the country's modernization[4]. At a closer look, indeed, it is possible to underscore that political participation was limited. In this vein it is possible to read the 1923 prohibition of establishing the Women's People's Party, because it was considered as a risk for the cohesion of the coevally established Republican People's Party (CHP), which thence became the only gathering place for women interested in politics. Similarly, the decision of disbanding the Turkish Women's Federation founded in 1924 proves the will of keeping the control on women's agency.[5] There-

lic offices, including schools and universities. This approach marks a clear difference from the prevention to wear the *fez*, which was imposed by the law n. 671/1925. For further details on the evolution of sumptuary regulations at the beginning of the Turkish Republic, see Doğaner Y., *The Law on headdress and regulations on dressing in the Turkish modernization*, in *Bilig*, 2009, 51, 33-54.

[4] State feminism is not intended here like the alliance between women and state theorized in Hernes H.M., *Welfare state and Women Power: Essays in state Feminism*, Oslo, Aschehoug, 1982, 201-202, but like the control, or, more properly, the creation, of the feminist's movement directly from the state with the scope to abolish one of the causes of backwardness. See Ennaji M., *About North African Women's Rights after the Arab Spring*, in *Women's Movement in Post-'Arab Spring' North Africa*, F. Saddiqi (ed.), New York, Palgrave, 2016, 97-108, 100. For the sake of clarity, it should be reminded that some scholars contest the inclusion of Turkey among the countries having developed forms of state feminisms (see Arat Z., *Turkish women and the republican reconstruction of tradition*, in *Reconstructing gender in the middle east: tradition, identity and power*, F.M. Goçek, S. Balaghi (eds.), New York, Columbia University Press, 1994).

[5] The decision occurred in 1935, after the 12th Congress of the International Federation of Women held in Istanbul, when the appeals to peace of the British and French delegates monopolized the debates and overshadowed the declarations of

fore, "the republican regime opened up an arena for state-sponsored 'feminism', but at one and the same time circumscribed and defined its parameters"[6].

In the private sphere, emancipation was limited as well and the reforms "did not alter the patriarchal norms of morality and in fact maintained the basic cultural conservatism about male/female relations"[7]. Indeed, the codes continued to subject women to the head of the family and kept ancillary roles inside it. Furthermore, women were still conceived as the bearer of family honor and therefore they were strongly controlled in their sexuality whose violation was deemed as a crime against the family. Finally, with aim of providing means for restoring this honor, similarly to other European codes, the criminal code allowed for the reparatory marriage, through which the punishment for the violence against a woman could be remediated. Quite obviously, there were no rules for punishing domestic violence, being parental relationship deemed as completely private facts[8].

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foreign representatives belonging to states previously under the Ottoman control celebrating the recognition of the right to vote to Turkish women. Hence, the government in Ankara thought it was unpleasant to have a feminist organization claiming overtly for peace while it was deciding whether to take part to the war and on which side (see Toprak Z., *1935 Istanbul Uluslararası 'Feminizm Kongresi' ve Barış'*, in *Toplum-Dünüş*, 24, 1986, 24-29).

[6] Kandiyoti D., *End of Empire: Islam, Nationalism and women in Turkey*, in *Women, Islam and the state*, D. Kandiyoti (ed.), Berlin, Springer, 22-47, 42.

[7] Durakbasa A., *Kemalism as identity politics in Turkey*, in *Deconstructing Images of 'The Turkish Women'*, Z. Arat (ed.), Basingstoke, Macmillan, 1998, 140.

[8] For further details on the Kemalist conception of gender equality and women's emancipation, refer to Arat Z., *Turkish women and the republican reconstruction of tradition*, in *Reconstructing gender in Middle East: tradition, identity, and power*, F.M. Gocek, S. Balaghi (eds.), New York, Columbia University Press, 1994, 57-80.

In spite of the creation of an independent women's movement moreover in the '90s, this continued to be the legal framework until the beginning of the XXI century, when the codes were reformed also thanks to the process of accession to the EU and adaptation to its *acquis*. The results were modern constitutional provisions and codes entrenching equality between men and women in the legal system and almost completely deleting honor as a relevant legal concept[9]. In the same period, Turkey committed in the promotion of equality also at the supranational level, strongly supporting the drafting and approval of the Council of Europe's Convention on preventing and combating violence against women and domestic violence[10]. The latter is indeed best known as Istanbul Convention (IC) because it was approved on 11 May 2011, when Turkey led the Presidency of the Committee of Ministers[11]. Turkey is also the first country having ratified it by a unanimous vote of the Grand National Assembly in 2012. The ratification of the Convention represented an important event for the country, moreover in the light of the contrast to the high rate of gender-based violence. Nevertheless, the constitutional retrogression Turkey is experiencing at least since a decade has deeply affected the condition of women, entailing a progressive marginalization and a diminished rights'

[9] See Parla A., *The "Honor" of the state: Virginity examinations in Turkey*, in *Feminist Studies*, 2001, 27, 1, 65-88.

[10] For the full text of the Convention, see *https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=210*.

[11] Some scholars however argued that «the effort of the government in making the Treaty to be opened for signature in Istanbul was motivated by the desire to improve the deteriorated image of Turkey after the affair of Nahide Opuz before the European Court of Human Rights» (see Tutku A., *Protecting the Woman or the Family? Contradiction Between the Law and Its Practice in Violence Against Woman Cases in Turkey*, in *Marmara University Journal of Political Science*, 2017, 5, 137-162, 141).

protection. The last step in this path has been the July 2021 decision to withdraw from the Convention.

2. The societal and legal landscape at the moment of the withdrawal

Although the Kemalist approach to women's emancipation respected the spirit of its time, the conception of gender equality as sameness between men and women[12] and the attempts of framing women's rights only in the context of the family seem constant features of the Turkish legal system in spite of the evolutions occurred meanwhile. It is therefore relevant to assess the level of participation with regard to gender-related issues as well as the legal framework into force before the withdrawal from the IC in order to understand why some parts of the population greeted it with great astonishment.

2.1. How many feminisms in Turkey?

Indeed, the state feminism has not hampered the development of an "independent" feminism and, since the '80s of XX century, a strong feminist movement claiming the respect of the international standards of equality which lobbied for the ratification of the CEDAW (1985) and then for the elimination of the reservation to it (1999). Meanwhile, also an Islamic feminism developed, building on the experience of women's charity group. This feminism is strongly supportive of family issues and kin to accept forms of gender complementarity, in line with the AKP's heteronormative binary interpretation of equality between men and women that excludes

[12] On the different meanings of gender equality, see Verloo M. (ed.), *Multiple meanings of gender equality: A critical frame analysis of gender policies in Europe*, Budapest, CEU Press, 2007.

the possibility of recognizing rights to the LGBTIQA+ community. Understanding the relevance of Islamic feminists, indeed, the AKP has increasingly involved them in electoral campaigns[13] and for supporting some of their conservative claims grounded on freedom of religion, such as the right to wear the veil in public offices including the universities. In brief, an alliance established between Islamic feminism and the AKP elite[14], which resulted also in the financial assistance to think-tank and female organizations ideologically close to the party, such as KADER, KADEM, KASAD-D[15].

It is worthy to note, however, that these diverse feminist groups often joined for common battles. This is for instance the case of the reform of the civil code in 2001 and of the criminal code in

[13] See Aksoy H.A., *Invigorating Democracy in Turkey. The Agency of Organized Islamist Women*, in *Politics and Gender*, 2015, 11, 146-170, 154.

[14] The former president Abdullah Gul and his wife Hayrunnisa, leader of the headscarf movement, clearly represent this alliance.

[15] For instance, Fatma Bostan, a headscarved woman and a founder of the AKP in 2001, acknowledging the discriminating policies toward women in the selection of candidates, decided to made public her application to AKP for a candidacy as MP, along with a threatening statement that if the party leaders were not ready or willing to nominate her, she would resign from the party and run as an independent. Other 50 AKP's women then followed and the Women Meet Halfway group supported them launching the campaign "If no headscarf wearing candidate, then no vote", threatening to boycott the major parties that do not nominate headscarved women, a threat mainly directed against the AKP. Being the dress code for MPs still into force, the campaign did not succeed and none of the candidates, including AKP's, was a headscarved woman. However, their engagement in 2011 certainly is among the main reason leading to the ban's uplift in November 2013. For a specific analysis of the presence of veiled women in the AKP at the beginning of its activity and on the internal dynamics of women's branch of the party, see Ayata A.G., Tütüncü F., *Party Politics of the AKP (2002–2007) and the Predicaments of Women at the Intersection of the Westernist, Islamist and Feminist Discourses in Turkey*, in *British Journal of Middle Eastern Studies*, 2008, 35, 3, 363-384, and Zibak F., *Is Turkey Ready for a Headscarved Deputy?*, in *Today's Zaman*, 27 March 2011, *http://www.todayszaman.com/diplomacy_is-turkey-ready-for-aheadscarved-deputy_239331.html*.

2004 as well as of 2012 law on violence against women, when single-tasked feminist "platforms" drafted bills and submitted them to the government[16]. More recently, these groups challenged the Executive together with the 2020 "challenge accepted campaign"[17] and in the 2021 protests for the withdrawal from the IC. The latter case is noteworthy because the Executive's decision was blamed also by the daughter of the President, Sumeyye Erdoğan Bayraktar, who declared the opposition of the Women and Democracy Platform (KADEM) she co-founded in 2013[18].

2.2. The legal framework

It would be wrong to affirm that there is a complete lack of protection; more accurately, it can be said that women are protected in the framework of the guarantees either of weak groups or of the family, pillar of the society *ex* art. 41 of the Constitution, failing to receive adequate protection as individuals[19].

Indeed, art. 10 of the Constitution entrenches the anti-discrimination principle and, since the 2004 and 2010 constitutional reforms, conceives of the achievement of the equality between men

[16] See Dedeoğlu S., Elveren A.Y. (eds.), *Gender and society in Turkey: The impact of neo-liberal policies, political Islam and EU accession*, London, I.B. Tauris, 2012, 155-173.

[17] According to it, thousands of young girls published on their social profiles black-and-white pictures mocking the ones used during funerals in order to raise the attention on femicides.

[18] See BBC News, *KADEM'den* İstanbul *Sözleşmesi'ne destek: "*Şiddete *başvurup bir tarafa zulmedilen bir ilişkide artık 'aile'den bahsedemeyiz"*, 1 August 2020, *https://www.bbc.com/turkce/haberler-turkiye-53623077*.

[19] See Kiliç A., *Gender, family and children at the crossroads of social policy reform in Turkey: Alternating between familialism and individualism*, in *Children, gender and families in Mediterranean welfare states*, M. Ajzenstadt, J. Gal (eds.), London, Springer, 2010, 165-179.

and women as a duty of the state that may be reached also through affirmative actions. The same form of emancipation can be used for reaching the equality of other weak groups such as children, aged, disable individuals, widows and orphans of martyrs, invalids and veterans. A similar inclusion of women among these groups is provided in the 2003 Labor Code (LC), i.e. at art. 48 on the prohibition of discriminations in the work environment[20].

The Code can be also used for instantiating the approach framing women only as a member of the family. Indeed, by providing a clear difference (art. 74 LC) between the amount of days available for the maternity leave (16 weeks) and the paternity one (10 days), it shows a general legislative approach still considering women as the main family actor devoted to care chores[21]. This approach is confirmed by the norms allowing women to receive an increased severance pay if they quit their job in the first year after the marriage.

Despite the constitutional provision stating the equality among spouses (art. 41) and the inclusion of this equality in the Civil Code, the patriarchal conception of "the head of the family" still appears in the complex procedure required for allowing women to use their maiden surname. According to the original version of the Civil Code, women had to acquire the husband's name after the marriage, thus losing their maiden one, as this, in the words of the Constitutional Court, would have ensured the unity of the family[22].

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[20] See Scotti V.R., *Promotional, Neutral or Discriminative? An assessment of Turkish norms on women's economic rights*, in *Tutela e Sicurezza del Lavoro*, 2021, 3, *forthcoming*.

[21] For a wider analysis of policies emphasizing women's role as caregivers, see Çitak Z., Tür O., *Women between tradition and change: The justice and development party experience in Turkey*, in *Middle Eastern Studies*, 2008, 44, 3, 455-469.

[22] See Turkish Constitutional Court, E2009/85 K2011/49, 10 March 2011.

Afterward the decision of the European Court of Human Rights in the Tekeli case[23], instead, women can either add their husband's surname after theirs or shall apply to the Constitutional Court in order to be authorized to use only their maiden one[24]. In any case, the possibility of freely deciding without having to bear the costly and time-consuming judicial procedure is not an available option.

Finally, the centrality of the family is confirmed in the provisions for combatting domestic violence into force before the ratification of the IC. In this regard, it is worthy to remember that until the revision of the criminal code in 2003, the law conceived rape and physical violence as a crime against the family honor, and only afterwards they became a crime against the individual. Meaningful is also the content of the 1998 Law on the Protection of the Family[25], which provided measures to punish domestic violence meant as tools for ensuring the unity of the family. Its original content was modified for the first time in April 2007 in order to increase the power of Family Courts, which thence acquired the competence of deciding precautionary measures against the abusive spouse, including sending him away from the family's house and order him to apply to a healthcare institution for examination or treatment. A further reform, described below, occurred in 2012.

In spite of these reforms, recurring attempts of weakening women's protections and of reducing men's punishments occur. For instance, in 2013, a bill, withdrawn only thanks to the harsh reaction of the public opinion, proposed to exonerating men convicted of having sex with underage girls if they subsequently marry

[23] Grand Chambre, Ünal Tekeli v. Turkey, n. 29865/96, 16 November 2004.

[24] On the evolution of the discipline for the use of women's surname, see Peschke S.G., *The Surname of Turkish Women: A Question of Identity?*, in *Journalism and Mass Communication*, 2015, 5, 12, 658-665.

[25] Law n. 4320/1998.

their victims. This example instantiates a general trend of Turkish policy-makers, increasingly interested in entrenching traditional familial values in the legal system even at the risk of marginalizing women[26]. The 2018 GREVIO Report[27] has finally underscored that, in spite of the existence of specific provisions, there are several factors undermining the protection of women from violence. Beside the "tendency to emphasize women's traditional roles as mothers and caregivers, which do little to challenge discriminatory stereotypes concerning the roles and responsibilities of women and men in family and society", GREVIO found a lack of systematic assessment of the impact of policies on gender equality and violence against women[28]. Finally, the report has highlighted the authorities' tendency in victims' blaming, which is highly conducive to decisions not to report abuses and consequently to re-victimizations.

The decision to withdraw from the Istanbul Convention resonates with this approach and probably represents a final step in the Turkish detachment from European values in the field of rights.

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[26] On this evolution, see Acar F., Altunok G., *Understanding gender equality demands in Turkey: Foundations and boundaries of women's movement*, in *Gender and Society in Turkey*, cit., 31-47.

[27] GREVIO Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) – Turkey, 15 October 2018, GREVIO/Inf (2018) 6, *https://rm.coe.int/eng-grevio-report-turquie/16808e5283*.

[28] The lack of such an assessment is even more relevant when considering that Turkey has established a devoted parliamentary committee, the KEFEK, tasked with this assessment. For details on this committee and its activities, see Scotti V.R., *With a different name, the rose is not a rose anymore: legislative quality and gender equality in the AKP's Turkey*, in *Theory and Practice of the Legislation*, 2021, *https://www.tandfonline.com/doi/full/10.1080/20508840.2021.1942368?scroll=top&needAccess=true*.

3. The Istanbul Convention in Turkey from ratification to withdrawal

The Grand National Assembly, which is the Turkish unicameral Parliament, unanimously ratified the Convention on 12 March 2012. In that period, the European standards of rights' protection were still considered as a relevant target in the process of modernization through Europeanization and, in spite of the difficulties in the implementation of the Court's decisions, the system of Strasbourg's authority was still respected. Furthermore, in 2012, Turkey was still in an active phase of the process of accession to the European Union and the dialogue for the adaptation to the EU *acquis* had been relaunched through the Positive Agenda[29]. In that period, EU was still convinced of the reformist wishes of the Turkish ruling elite and the latter was still trying to present itself as an actor able to take the regional leadership and to provide for a moderate version of Islam reconcilable with the tenets of constitutional democracy. It was before 2013 Gezi Park protests[30] and the consequent – probably definitive – split between Turkey and the EU, coeval with the

[29] It was officially launched in Ankara on 17 May 2012 with the aim of solving the still pending issues on the Turkish path for the accession to the European Union. For further details, see Aktar C., *The Positive Agenda and Beyond: A New Beginning for the EU-Turkey Relations?*, in *Insight Turkey*, 2012, 14, 3, 35-43.

[30] They began as a peaceful local protest campaign against the demolition of trees in the Taksim Gezi Park in İstanbul for building a shopping mall according to the urban renewal project of Taksim Square and, after the brutal reaction of the police, turned into a protest against the AKP Executive involving around three million citizens. See Özen H., *An Unfinished Grassroots Populism: The Gezi Park Protests in Turkey and Their Aftermath*, in *South European Society and Politics*, 2015, 20, 4, 553-552, and Gençoğlu Onbaşı F., *Gezi Park protests in Turkey: from 'enough is enough' to counter-hegemony?*, in *Turkish Studies*, 2016, 17, 2, 272-294.

substitution of US and European partners with eastern ones[31]. It was also before the vetting having followed the failed 2016 military coup, which has seriously limited academic and press freedom and has clearly showed the main characteristics of a competitive authoritarianism[32] grounding its legitimacy on Islamic populism.

3.1. The 2012 Law on the Protection of the Family and the Prevention of Violence against Women

Turkish commitment in the prevention and punishment of violence against women dates back to the first decade of XXI century, namely to the 2007 Action Plan on Human Rights, providing special measures for women. The Action Plan then became an ordinary measure the Executive approves for designing the priorities in the field of human rights and has always included a devoted section for women's rights. Since the entry into force of the Convention, the Action Plans became also tools for coordinating at the national level its implementation, according to the prescription of the 2012 Law on the Protection of the Family and the Prevention of VAW[33].

This law has been approved on 8 March 2012 after consultations between the Minister of Family and Social Policies and the Stop Violence Platform gathering around 250 women's organizations with the aim of incorporating the content of the IC in the domestic framework and of updating the 2007 law on the same topic. Building on the Convention, indeed, the 2012 Law has allowed for important achievements. It widens the definition of

[31] See Tufekci O., *The Foreign Policy of Modern Turkey: Power and the Ideology of Eurasianism*, London, I.B. Tauris, 2017.

[32] About this notion, see Levitsky S., Way Lucan A., *Competitive Authoritarianism: Hybrid Regimes after the Cold War*, Cambridge, Cambridge University Press, 2010, and *Id.*, *The New Competitive Authoritarianism*, in *Journal of Democracy*, 2020, 31, 51.

[33] See Law n. 6284/2012.

violence, including economic and psychological violence together with physical and sexual one. Furthermore, it considers as a domestic violence also the violence perpetrated in non-marital relationships, thus eliminating the requirements of being married and sharing the same house in order to configure the crime that was instead provided in the 2007 version of the law, and no longer requires victims to have proofs. It finally provides for housing and economic support for victims as well as for nursery service for their children.

Nevertheless, the 2012 Law has entailed also relevant shortcomings, mainly deriving from the fact that it again avails a focus on the family and not on women as individuals and that its main target is to protect the former. Comparing its first draft with the approved version of the Law, the decision that the protection of the family should continue to be a priority is evident from the fact that in the law's name the protection of the family is mentioned between the protection of women from violence. Furthermore, the removal of the article prohibiting reconciliation or mediation for VAW cases as well as the lack of measures for prevention and references to gender terminology stands out. Another shortcoming is connected to the provision imposing the duty of providing the economic support directly to the abusive partner. This provision entails a two-fold danger. On the one side, it can favor the continuation of the abusive relationship because of the economic dependency of the victim or can represent a reason of femicide for the perpetrator of violence. The risk of femicide is increased also by the provision imposing victims to reapply for restraining orders against abusive partners every six months, the provision allowing for indefinite order the draft of 2012 law provided having been abrogated in the final version.

On the side of the implementation the criticalities of the law are even more evident. The possibility of seeking for reconciliation

favors the attempts of shelters operators and police forces to facilitate meetings with the abusive partner. These attempts not only are totally against the approach the Istanbul Convention requires to the operators supposed to assist victims of domestic violence, but, in a sociological perspective, makes extremely difficult for the latter to break the so-called cycle of violence[34]. Furthermore, the huge load of bureaucratic requirements can discourage women, moreover from less wealthy and educated groups, to apply; a phenomenon that may interest even more women belonging from ethnic minorities, such as Kurds, who cannot perfectly speak Turkish and cannot receive adequate assistance from the state given the limited number of available interpreters[35].

The abovementioned case of the reconciliatory approach in case of domestic violence is just an instantiation of the difference with the European conception. Indeed, the more Turkey detached from Europe, the more the content of the Convention and the very idea of gender equality as defined according to the European standards were neglected. The AKP ruling group increasingly declared its will to pursue a strategy for the implementation of equality before the law between men and women, meant as complementarity in several fields and grounded on biological differences on which the women's duty to motherhood and children care is also built[36].

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[34] Walker M.U., *The cycle of violence*, in *Journal of Human Rights*, 2006, 5, 1, 81-105.

[35] See Human Rights Watch, *He Loves You, He Beats You: Family Violence in Turkey and Access to Protection*, 2011, *https://www.hrw.org/report/2011/05/04/he-loves-you-he-beats-you/familyviolence-turkey-and-access-protection*.

[36] The then Prime Minister Erdoğan anticipated this legal approach to women's issues at the 16th Consultation and Assessment Meeting (17 October 2010): «Certain ladies go on TV to demand 'equality between women and men'. Such an equality is acceptable as far as rights are concerned. However, anything going beyond that is against creation». Later that year, at a meeting with the representatives of women's organiza-

This approach has won to the AKP the support of the most conservative sectors of the society that television preachers imbue with Islamic patriarchy proclaiming not only the adherence to the religious sources of religious complementarity but also providing a constant misinterpretation of the IC as requiring the recognition of specific rights to the LBTQIA+ community. Though the IC is grounded on the principle of gender equality, it however does not require such a recognition leaving to states the decision in this regard. Nevertheless, those opposing to the IC, not only in Turkey, have accused the IC to disseminate a "gender ideology" undermining the values of the traditional family. This point was lastly recalled in an interview to the spokesperson of the AKP Numan Kurtulmus on 2 June 2020, when he declared that the Convention introduced in the Turkish legal system concepts far from the national traditions concerning family and was forcing the recognition of non-binary gender identities.

4. Is the presidential decree unconstitutional? An assessment of the withdrawal from a constitutional law perspective

The decision to withdraw is controversial not only for the detachment from the European values it entails, but also because it raises important doubts of constitutionality and of consistency with the pillar principles of contemporary constitutionalism, namely with the principle of the separation of powers.

tions, he stated «Men and women cannot be equal, they are different. They complement each other. I am not in favor of equality, but equality of opportunity». Then, at the 2013 International Women's Labor Meeting, he affirmed: «Motherhood is a higher status, a more special status in femininity» and, talking to *mukhtars* in 2015, said «women are God's entrust to men and for this reason they should be protected».

Indeed, a first controversial point derives from the use of a presidential decree for the withdrawal basing its legitimacy on a previous presidential decree (issued in 2018) stating that this source can be used for withdrawing from international treaties[37]. However, this statement seems in contrast with art. 90 Const., according to which only a law of the parliament can be used for ratifying international treaties, and implicitly inferring that the same source shall be used for withdrawals according to a general principle of law. Instead, the Parliament was not involved at all. Furthermore, a doubt of constitutionality arises due to the divergent interpretations of art. 104, s. 17, which states that presidential decrees can concern issues connected to the executive power and excludes from their scope the discipline of fundamental rights, individual rights and political rights as well as matters whose discipline is reserved to a law. Hence, if we only consider the content of the IC, which is about fundamental rights, then the use of a presidential decree is against art. 104, s. 17. However, the withdrawal from a treaty may be considered as falling among the issues connected to the executive power. On a similar issue, on 25 June 2020, the Constitutional Court, appealed by the main opposition party (CHP), said that the ratification of treaties which shall not be published on the Official Gazette can be considered as pertaining to issues connected to the executive power and therefore presidential decrees can be used. It is however questionable whether this decision of the Court can be applied to the present case, mainly because the Convention had to be published on the Official Gazette due to its content.

[37] To provide all the relevant elements, it is worthy to remind that presidential decrees are a new source introduced after 2017 reform that shall not be converted into law – as a decree law for instance.

These points can form the main critical elements of the constitutional analysis that we expect to be performed by the Constitutional Court should the High Administrative Court – appealed by the opponents to withdrawal – decide to raise a constitutional appeal. The Constitutional Court will then have the chance to clarify not only the constitutionality of the presidential decree withdrawing from the Convention, but by and large the position of presidential decree in hierarchy of the sources of law.

The use of a source produced solely by the Executive is controversial also in the light of the principle of the separation of power because of the presidential form of government Turkey has introduced in 2017, which assigns to the President more competences than those traditionally provided in the archetypical presidential model. In this vein, the withdrawal without consulting the Parliament seems a way to silence the body having expressed its support to the Convention not only when ratifying it but also when approving the 2012 Law, establishing at article 1 that its content shall be implemented complying with the Convention.

5. Concluding remarks: what will happen to women's rights now?

Despite the fact that Turkey was the first country in ratifying the IC, the present contribution demonstrated that policies implemented since then failed to recognize the existing link between gender-based-violence against women and the existence of gender inequalities both at the legal and social level, thus failing also to provide transformative mechanisms for cultural changes and women's empowerment.

Besides, as said, domestic rules provide for a very narrow conception of violence against women, almost limited to physical violence and meant as a threat for the family and for the welfare of children, thus neglecting the existence of other forms of violence

(i.e. psychologic or economic) and recognizing a marginal role to the effects produced on women as victims. Furthermore, the legislation into force lack of preventive measures and deals with violence also by defining criminal law measures of punishment. A special attention shall be finally devoted to the violence connected to early marriage, which is absolutely conceived as a crime according to the IC, but has been treated as a phenomenon to be disciplined by Turkish law-makers, at the point of proposing the possibility of reintroducing reparatory marriage to compensate the violation deriving from sex with an underage girl.

In spite of these criticalities in the existing legislation, when debating on the possibility of the withdrawal, the representatives of the political majority constantly recalled that it was not meant to reduce the protection to women's rights. In this regard, they have often mentioned the Action Plan on Human Rights issued on 2 March 2021, which still focuses on contrasting gender-based violence following the approach based on family protection entrenched in the 2012 Law. The AKP leadership has also anticipated that the same approach will be adopted in the Ankara Convention it is drafting to substitute the Istanbul Convention.

Because this approach was already entrenched in the 2012 Law and because it was foreseeable that the withdrawal would have entailed an increased international blaming both for the reduced protection of women's rights and for the infringement of the principle of separation of powers the selected procedure entailed, it remains an open question why the AKP elite felt the need of withdrawing. Most probably, it was a political move, done in a moment of loss of the votes of the most conservative sectors of the Turkish society, already strongly frustrated during the COVID period by the measures limiting religious ceremonies and meetings. The withdrawal can be thus considered as an attempt of the AKP to show its position in the long-lasting debate on the importance of cultural

differences in the interpretation of fundamental rights, which has historically found on women's rights a battlefield between those supporting a universalistic vision and those supporting cultural accommodation.

As a final consideration, it is worthy to note that in a country historically characterized by populist tendencies – Kemalism in the past, Islamic populism nowadays – and preferences for charismatic leaderships, the protection of women's rights has been constantly interpreted as a reputational tool subservient to the leading elite. In current times, however, this entails a detachment from European values which is not directly connected with the religious inspiration of the AKP leadership, but moreover with the need of ensuring the control over the population to limit the potential opposition.

CHAPTER 2

CRIMINAL LAW AND CONTRAST TO VIOLENCE AGAINST WOMEN

The Istanbul Convention's values and its implementation in Italy

Valentina Bonini

1. The manifold nature of the Istanbul Convention

The Istanbul Convention is a document of great strength and value in preventing and combating violence against women and domestic violence, by being a useful tool and a gold standard at the same time[1]: it is a useful tool because of the multiple legal instruments specifically provided, which lead to a uniform development of the actions to counteract violence against women; besides, it is a gold standard in the light of its scope and aims, which inspire and guide a broad political action toward the ambitious goal of gender-based violence eradication. Therefore, it can be said that the Istanbul Convention is the most comprehensive international legal framework offered to the State parties in order to address violence against women by a series of coordinated actions,

[1] These are the words that the OSCE Chairperson-in-Office, Swedish Minister Ann Linde, pronounced on the occasion of the 10th Anniversary of the Istanbul Convention, 11 May 2021 (*www.osce.org/chairmanship/486104*). See the Conference Report, *Gender Equality and the Istanbul Convention: a decade of action*.

well summarized in the "4P" system: "prevention", "protection", "prosecution and punishment", and "integrated policies" are the four pillars of a refined architecture of interventions designed to contrast the complex and multifaceted phenomenon of violence against women. Though other international documents have dealt with violence against women, the Istanbul Convention stands out for its ability to look far ahead while offering legal tools that can already be used today, representing the most advanced system of protection of women from violence at the international level: it is a landmark treaty that gives us both a frame of principles and an array of powerful instruments.

Moreover, the Istanbul Convention has a varied and multiple nature, and it can be appreciated as a juridical, political and cultural document, both for its value and for the actions it requires to be implemented.

Firstly, the Convention is a very strong juridical document to combat gender-based violence, both for its binding nature and for its prescriptive contents: indeed, the Convention imposes a wide range of obligations on the State parties[2] and, from a more general point of view, it represents a normative reference for the European Court of Human Rights when dealing with domestic violence and violence against women[3]. Thus, the Istanbul Convention is binding for the States that have ratified it, and – though more generally

[2] See Grans L., *The Istanbul Convention and the Positive Obligation to Prevent Violence*, in *Human Rights Law Review*, 2018, 133.

[3] In this regard, see Erbaş R., *Effective criminal investigations for women victims of domestic violence: The approach of the ECtHR*, in *Women's Studies International Forum*, 2021; Jones J., *The European Convention on Human Rights and the Council of Europe Convention on Violence Against Women and Domestic Violence*, in *The Legal Protection of Women from Violence*, R. Manjoo, J. Jones (eds.), London, Routledge, 2018; Ristik J., *Protection from Gender-based Violence Before the European Court of Human Rights*, in *Journal of Liberty and International Affair*,

and indirectly – it functions as a legal framework also for the States that, being members of the Council of Europe, are subject to the jurisdiction of the Court of Strasbourg, despite the fact they have not adhered to or have withdrawn from the Istanbul Convention. Though the European Court of Human Rights does not make direct use of the Istanbul Convention when the case involves a State that has not ratified it[4], the positive obligations imposed to avoid any violation of art. 2, 3, 8 and 14 of the European Convention of Human Rights are identified and structured also in the light of what the Istanbul Convention establishes[5]. Hence, even if the criminalization obligations envisaged by the Istanbul Convention cannot be considered specifically binding for non-adhering States, the European Court of Human Rights requires the States to protect fundamental rights by punishing the behaviors that infringe them. Through the system of positive obligations, both substantive and procedural, the Strasbourg judges have established the right to live free from domestic and relational violence, the contents of which have been constructed in the light of the Istanbul Convention.

2020, 71; Tatu D.S., *Violence against Women. With an overview of the European Court of Human Rights's case law*, Milano, Key Ed, 2019.

[4] See, for instance, ECtHR, 3 September 2020, *Levchuk v. Ukraine*, n. 17496/19, that recalls the Istanbul Convention under the paragraphs dedicated to the relevant international material (§§ 55 ff.), highlighting that Ukraine has signed but not ratified it. In the same perspective see ECtHR, 9 July 2019, *Volodina v. Russia*, n. 41262/17.

[5] In this regard, see Nascimbene B., *Tutela dei diritti fondamentali e "violenza domestica". Gli obblighi dello Stato secondo la Corte edu*, in *www.lalegislazionepenale.it*, 2018. For a useful overlook on the ECtHR case-law, art.s 2, 3 and 14, see *Equal Access to Justice in the Case-Law of the European Court of Human Rights on violence against women*, 2015, in *https://www.echr.coe.int/Documents/Research_report_equal_access_justice_violence_women_ENG.PDF*; more recently see *Guide on art. 2 of the Convention, Right to life*, 2021, *https://www.echr.coe.int/Documents/Guide_Art_2_ENG.pdf*.

Moreover, the strong legal force of the Convention is linked to its detailed and cogent contents: in its structure, great relevance has been given to criminal law and criminal procedure in order to counteract gender-based violence, asking for the toughest legal response to the phenomenon. Thus, many provisions dedicated to protection, prosecution and punishment imply a reaction through criminal law, providing for new crimes (art. 33-42) and «effective, proportionate and dissuasive sanctions» (art. 45), as well as establishing rules that guarantee a timely and effective criminal investigation in ascertaining facts and responsibilities (art. 49-57).

It should be noted that particular attention is devoted to a strong legal response, in order to avoid any underestimation of the phenomenon that could create a climate of impunity: therefore, the choice to resort to criminal law has the goal to orientate society in order to underline how violence against women can no longer be tolerated.

In addition to its legal nature, the Istanbul Convention has political relevance as well, because it sets long-term goals, which must be considered as a guide for the State parties' policies: in this perspective, it points out a general principle by mentioning, among the purposes of the Convention (art. 1), the «elimination of all forms of discrimination against women» and the promotion of «substantive equality between women and men, including by empowering women». Equality and non-discrimination are appreciated as fundamental rights that must be embodied in the Parties' national Constitutions (art. 4) and as a cardinal principle that must guide the entire policy, prohibiting any political measure or choice that may contrast with equality between women and men.

Acting as a pivotal and general principle, equality is referred to women and men, as well as to many other conditions, prohibiting discrimination on any ground, such as sex, race, color, language, religion, political or other opinion, national or social origin, dis-

ability, including gender and gender identity. Though these qualities are mentioned in art. 4 § 3 of the Convention to introduce an intersectional point of view, it is made clear that the Istanbul Convention sets rules and affirms principles specifically dedicated to violence against women and does not deal with gender-related issues nor does it introduce new definitions of family. In this sense, the misleading narrative used against the Istanbul Convention, which describes it as a political document supporting gender ideology and contrasting with the traditional notion of family, must be rejected: the treaty does not mean to counteract or overcome a specific form of family, unless it prevails over fundamental human rights, legitimizing the use of violence[6].

The aim of the Istanbul Convention is to protect women from violence[7], and it pursues gender equality because it is a pivotal precondition for a society that, being free from inequalities, is free from violence.

Finally, the Istanbul Convention is a cultural document as it recognizes the roots of gender-based violence in the «unequal power relations between women and men, which have led to domination over, and discrimination against women» (Preamble). On the basis of this link between violence and inequality, the Istanbul Convention asks for a cultural change that is assumed to be the core

[6] For a critique of those visions of the traditional family as a place where tolerance and mutual understanding are referred also to violence, see Pejovic D., *The Need for a Gender Approach to Contrast Violence Against Women More Efficiently*, in *Gender Violence is Also a Cultural Issue*, L. Marchi (ed.), Trento, UN.I.RE, 2020, 178.

[7] This scope is clearly pointed out in art. 2, which reads that «t[]his Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately»; paragraph 2 sets a broader range of application that, however, is limited to domestic violence («[p]arties are encouraged to apply this Convention to all victims of domestic violence»).

action to prevent and to eradicate violence against women: in this perspective, art. 12 requires «measures to promote changes in the social and cultural patterns of behavior of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men». And this cultural evolution must be pursued both by massive awareness-raising campaigns aimed at society as a whole (art. 13) and by appropriate and specific training for those dealing with victims or perpetrators of gender-based violence (art. 14): it is only by following training focused on gender-based violence features that professionals and practitioners can break free from stereotyped patterns, making effective the provisions set down by the legislator. The cultural value of the Istanbul Convention is directly implied in the actions aimed at preventing violence against women, but, as we will see, guaranteeing protection and punishment must also be considered as a crucial feature.

The manifold nature (legal, political and cultural) and the broad outlook of the Convention demand a holistic response to the actions required: prevention, protection, prosecution and punishment can be effectively achieved only through an integrated approach. It requires State parties to make a commitment on several levels, which combines immediate and long-term interventions, so that both a cultural action that cannot ensure immediate protection and punishment that is not accompanied by constant awareness actions against gender-based violence should be considered inadequate.

2. An overview on the implementation of the Istanbul Convention in Italy

The broad perspective and the rich contents of the Istanbul Convention have obviously found responses of different intensity by the States: some of them have profoundly revised their systems, while others have opted for more limited restyling interventions, but the treaty can be said to have produced important effects in every country, helping to strengthen actions to combat violence against women.

In this broad panorama, the experiences of Turkey and Italy, despite their differences, make it clear that the path to overcome inequalities between women and men is a long, challenging road, which requires a joint effort by all stakeholders. Every step forward is constantly exposed to the risk of sudden interruptions, setbacks and treacherous swamps that can hinder even the seemingly most effective action.

Thus, even an experience like that of Italy, which seems to meet most of the obligations imposed by the Istanbul Convention, still produces unsatisfactory results, since the statistics give us a picture in which domestic violence, even in its most serious and aggressive forms, does not stop or decrease significantly.

It is worthwhile, then, to draw up a quick overview of the regulatory instruments that have been created, before and after the ratification of the Convention, in order to understand where the protection gaps are, leaving the victim exposed to the risk of revictimization and secondary victimization.

A brief analysis can underline the high number of measures adopted by the Italian legislator, whose attention was concentrated mainly on criminal justice. In fact, as observes Francesco Cingari[8],

[8] See Cingari F., *Criminal Law and Contrast to Violence Against Women*, in this Chapter.

several crimes have been introduced during the last decades with the specific purpose of punishing acts of violence in a domestic environment or in an intimate relationship. Hence, in addition to the more traditional crimes – such as injuries, ill treatment and sexual violence –, female genital mutilation, stalking, revenge porn, permanent facial scares, and forced marriage have recently been introduced. While formally constructing these crimes in a gender-neutral pattern, the legislator conceived them with the primary aim of counteracting violence against women and this is the reason for the severe penalties provided. The same gender-neutral structure characterizes the most traditional crimes as well (injuries, ill treatment, sex violence, homicide), which do not present any reference to the gender of the perpetrator and of the victim. Many of these crimes, however, are punished with a longer detention when they are committed in the family context or in an intimate relationship, because this represents an aggravating circumstance of the crime.

Therefore, even in absence of an express regulatory recognition of gender-based violence, the Italian criminal response has been structured in articulated and strong terms.

Furthermore, in compliance with the provisions of the Istanbul Convention and on the basis of the ECtHR's indications, several measures have been implemented in order to respond to the procedural obligations[9]. So, it is envisaged that 1) prompt and effective investigations must be carried out, in order to avoid that delays or underestimations can produce an effect of impunity and expose the victim to the risk of new attacks[10]; 2) the victim can be

[9] For an overview on the Italian procedural measures related to the obligations arised by art. 2 and 3 ECHR, see Montagna M., *Obblighi convenzionali, tutela della vittima e completezza delle indagini*, in *www.archiviopenale.it*, 2019.

[10] Most part of these interventions have been envisaged by Law no. 69/2019, which amended the following: art. 347, § 3 c.p.c. (Italian Criminal Procedure

protected from the danger of a recurrence of the crime through precautionary measures[11], which can also be adopted by following an emergency procedure[12], and preventive measures[13], as well as by protection orders issued by a civil judge[14]: the provision of several protection tools of varying intensity (from a police warning, to protection orders issued by the civil or the penal judge, to precautionary custody), adapted to the different levels of danger, entitles the

Code), requiring the police to immediately notify the public prosecutor of crime reports in cases of sexual violence, domestic and relational violence; art. 370, § 2 c.p.c., requiring the police to carry out without any delay the investigative acts requested by the public prosecutor in the proceedings for sexual violence, domestic and relational violence; art. 362, §1-*ter* c.p.c., requiring the public prosecutor to listen to the victim of sexual, domestic and relational violence within three days since the investigation started.

[11] In addition to the traditional precautionary measures (from the ban on leaving the country to pre-trial detention in prison), Law no. 154/2001 introduced art. 282-*bis* c.p.c., (order to remove the accused from the family home), and Law no. 38/2009 also included restraining orders (prohibition of approaching the victim, art. 282-*ter* c.p.c.), so that the Italian system now envisages protection orders and stay-away orders, the violation of which constitutes a crime (as provided for by Law no. 69/2019), that can be stopped and countered by arresting *in flagrante delicto* (as recently provided for by art. 2, § 14 of Law no. 134/2021).

[12] With Law no. 119/2013, art. 384-*bis* c.p.c., removal from the family home can also be ordered urgently by the police when the offender is caught in the act; in such cases, a judge needs to validate the order within 96 hours.

[13] Law no. 38/2009 provided that, until a lawsuit is brought, the victim of stalking and family violence can ask the chief of the police to formally warn the accused to stop harmful behaviors, and order the suspension of driving and firearms licenses; moreover, Law no. 161/2017 has provided in art. 4 lett. I-*ter* of d.lgs. no. 159/2011 (code of anti-mafia laws and preventive measures) that special surveillance can be applied by the judge to persons suspected of stalking and ill treatment in the family.

[14] The same Law no. 154/2001, which included the order of removal from the family home in the code of criminal procedure, established that the civil judge who ascertains an abuse within the family can apply the same measure to protect the victim, who will not be forced to leave the family home to escape violence and abusive behaviors.

victim to obtain protection for both the most dangerous and the milder cases, allowing her to find forms of safeguard even without having to initiate criminal proceedings (police warning or protection order issued by the civil judge); 3) the victim must be protected from secondary victimization through a series of provisions that operate, albeit in different ways, both in the investigation[15] and during trial[16], whenever the victim is called to make statements, so that overly aggressive ways to examine the witness are avoided.

In short, it seems clear that, on the procedural side, the regulatory instruments are numerous and adequate to offer a rapid response, which also considers the high vulnerability of the gender-based violence victim, who can be exposed to an intense risk of secondary victimization during criminal proceedings.

In the light of this quick overview, it is clear that the Italian lawmaker has created numerous tools which, through criminal law and criminal procedure, have the aim to respond with strength and decision to the phenomenon of gender-based violence. Certain provisions have been envisaged in order to fill gaps and overcome critical issues, which had been highlighted by the judgements of the ECtHR, including the direct condemnation of the Italian system[17].

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[15] Art. 351, 362 and 391-*bis* c.p.c. provide that the police, the prosecutor and the lawyers must be assisted by a psychologist when receiving statements from the victims of sexual crimes, ill treatment and stalking. Art. 392 and 398 c.p.c. allow the vulnerable victim to be heard during the preliminary investigations, following special rules to create a protected environment and pattern.

[16] Art. 498 c.p.c. provides that the vulnerable victim's testimony must be acquired during trial in a protected manner, by entrusting the judge, rather than the parties, with the task of proposing the questions and allowing to avoid any contact between the victim and the accused. Furthermore, art. 472 c.p.c. envisages that the victim of sexual crimes cannot be asked questions about private life or sexuality, unless they are necessary for the ascertainment of the facts.

[17] Special importance should be given to the ruling of the ECtHR in the Talpis case (ECtHR, 2 March 2017, *Talpis vs Italy*, no. 41237/14), which triggered the

Following these reforms, the recent GREVIO Report on Italy expressed an overall positive assessment regarding the implementation of the Istanbul Convention on the grounds of criminal response to violence against women. Although GREVIO has pointed out some critical issues[18], it can be said that the array of tools offered by the law is sufficiently effective to respond with strength to domestic violence and violence against women: the risk is avoided that a perception of impunity spreads the belief that such a form of violence is tolerated.

Of course, there are still provisions that need to be reviewed into a more gender-sensitive structure, but, overall, the criminal regulation related to protection, prosecution and punishment seems to be well settled. As observed by GREVIO in its Report on Italy, «several legislative reforms [...] have led to the development of a solid legislative framework in line with the requirements of the Convention on the civil and criminal law remedies»[19].

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reform process concluded with Law no. 69/2019. See Baldi G., *Re-thinking the (legal) limits of the state in the case of Talpis v Italy*, in *Reconsidering gender-based violence and other forms of violence against women: comparative analysis in the light of the Istanbul Convention*, G. Piccinelli, I. Kherkerlidze, A. Borroni, (eds.), Lecce, Libellula, 2018;

[18] With regard to criminal justice, GREVIO notes an insufficient implementation of the Convention related to art. 55, because offences such as simple bodily injury and sexual violence (§ 243 ff.) are only prosecutable *ex parte*; art. 36, because of the definition of sexual violence, which does not give relevance to the absence of consent (§ 190); art. 40, because of the lack of a specific incrimination of sexual harassment (§ 199 ff.); art. 29, because of the legislative gap caused by the absence of effective remedies against any state authority (police, prosecutors, judges) that has failed in its duty to take protective measures for the victim (§ 169 ff.); art. 51, because of the insufficient implementation of a risk assessment and management procedure (§ 226 ff.). Other suggestions or requests from GREVIO were at least partially addressed by the following legislation, in particular by Law no. 69/2019.

[19] GREVIO Baseline Evaluation Report on Italy, GREVIO/Inf (2019)18, 2020, 7.

Conversely, the actions taken up to now to prevent violence against women have been too weak and ineffective, while it is necessary to create an efficient network between national, regional and local authorities that need to engage in a continuous dialogue with the anti-violence centers: this is a precondition to offer a timely, concrete and uniform support to victims of violence throughout the national territory. But, above all, it is pivotal to intervene on the cultural and training sides of the issue, making women and men aware of the close link between violence and unequal power positions and gender stereotypes.

When observing the Italian system, a gap between the law in the book and the law in action can be noted and this is due to multiple factors: lack of coordination among the many institutions and agencies involved in dealing with violence against women; insufficient stability in funding programming and policing; deep-rooted presence of cultural stereotypes even among legal practitioners.

The deficient and incomplete Italian implementation – which has concentrated almost exclusively on the criminal response – is well highlighted by GREVIO, when it observes that (§ 29) «[p]olicy makers in Italy have to date largely privileged policies aimed at criminalizing acts of violence and tackling the inadequacies of criminal law provisions. This would reflect an approach which tends to consider violence against women restrictively as an issue of law and order rather than a violation of women's human rights, and in so doing fails to fully recognize the structural dimension of the phenomenon»[20].

[20] *Ibid.*, 17.

3. A cultural change is needed for effective protection

Of course, the punishment of violence against women is a pivotal action in the system built by the Convention, as it makes clear the unacceptability of behaviors that have been tolerated for too long in our societies.

Nevertheless, as GREVIO stresses, «policies which overemphasize the criminal aspects of violence against women can overshadow the need to concentrate on such other issues as remedying institutional shortcomings in the response to violence against women, countering prejudices and gender inequalities»[21].

Hence, the law enforcement action cannot be limited nor mainly concentrated on the use of penal sanctions, because this choice is insufficient in terms of prevention of the violence and can even become harmful for the victim. Criminal provisions alone are insufficient, as they do not allow to eradicate violence, which has its origins in the inequalities between women and men, and in a hierarchical conception of their relationship, as well as in prejudice and gender stereotypes. Moreover, the major role of criminal law in combating violence against women can even be dangerous for the victim herself, because of the high risk of secondary victimization during criminal proceedings.

The structure of the Istanbul Convention, with its four pillars, does not indicate four separate and independent intervention tracks, but rather asks for actions that must be carried out in a coordinated and combined way, because one is necessary for the other to function properly. Though protection and punishment need to be addressed by criminal law, they must also be accompanied by preventive initiatives that stimulate a cultural change: the con-

[21] *Ibid*.

nection between violence and inequality, the role of prejudices and stereotypes in feeding gender-based violence must be made clear.

In compliance with the provisions of the Istanbul Convention, cultural change must be pursued not only through massive awareness-raising campaigns to increase awareness and understanding among the general public of the special features of violence against women (art. 13), but also through the training of professionals and practitioners dealing with victims and perpetrators of gender-based violence: as prescribed by art. 15, operators must be specifically trained to recognize this form of violence, know its specificities, understand the value of equality between women and men, recognize the needs and rights of victims and avoid any behavior that heightens the risk of secondary victimization.

In fact, criminal proceedings always put the victim in an unfriendly context, but can also become a highly inhospitable place for those exposed to an intense risk of secondary victimization: although, as we have seen, the lawmaker has set provisions to protect the victim that needs to be heard by the authorities, the judiciary practice shows how even those protections can be ineffective, if the law is enforced by professionals not specifically trained to deal with cases of gender-based violence.

It can be observed that the more widespread is a culture (even among legal practitioners) made up of inequalities and imbued with gender stereotypes, the higher is the risk of secondary victimization: the patriarchal culture, indeed, leaks out in the process through the questions posed to the victim, through the arguments of the defense and the prosecution and even through the words used by the judges in their rulings, amplifying the victim-blaming that on many occasions affects the victim of sexual and domestic violence on a social level as well.

Awareness of the cultural roots and of the structural dimension that affect violence against women must be increased among crim-

inal justice professionals, otherwise any legal provision becomes a useless tool if it is applied without gender-sensitive lenses[22].

This is a lack of knowledge and consciousness that risks exposing victims to a further offence by participating in criminal proceedings, as has been recently stigmatized by the ECtHR in the case J.L. vs Italy[23], when the use of gender stereotypes by the judiciary authorities led to the condemnation of Italy.

Recalling the title of a well-known and eminent paper by Alessandro Pizzorusso, concerning a past ruling of the ECtHR revealing a lack of effectiveness, it can be said that today Italy is again «red, actually purple, with shame»[24]. Twenty-five years have passed since the Italian Criminal Procedure Code included the special regulation to protect victims of sexual violence from the secondary victimization that can occur when they are heard as witnesses: cross-examination has been limited and mitigated in order to preserve the victim from the most aggressive pattern of shaping evidence before the Court, due to the tendency to use sexist stereotypes to undermine the credibility of the victim of sexual violence. In this perspective, the victim's protection has been achieved through the sacrifice of the right to confrontation of the accused as a part of the right to a fair trial: an unnecessary sacrifice for a useless protection, when, in the reasoning of a judicial decision, the judge uses arguments that enhance the victim's red underwear, the

[22] In this regard, see De Vido S., *The Istanbul Convention as an Interpretative Tool at the European and National Levels*, in *International Law and Violence Against Women*, J. Niemi, L. Peroni, V. Stoyanova (eds.), London, Routledge, 2021.

[23] ECtHR, *J.L. vs Italy*, 27 May 2021, n. 5671/16. See Bouchard M., *La vittimizzazione secondaria all'esame della Corte europea dei diritti dell'uomo*, *https://dirittopenaleuomo.org/contributi_dpu/la-vittimizzazione-secondaria-allesame-della-corte-europea-dei-diritti-delluomo*.

[24] Pizzorusso A., *Rossi di vergogna, anzi paonazzi (remarks to ECtHR, Artico vs Italy, 13/05/1980, n. 6694/74)*, in *Foro italiano*, 1980, IV, 150.

victim's previous sexual experiences and sexual orientation, using them in the assessment of the credibility of the victim's statement[25].

The judiciary experience teaches that – for victims of sexual violence, domestic violence and gender-based violence – a fair and effective access to justice needs more than mere legal provisions: it needs a culture that can be said to be free from gender-related stereotypes, prejudices and bias.

[25] The European Court considers unjustified the references made by the Italian Court of Appeal to the red *lingerie* shown by the applicant during the evening, as well as the comments concerning her bisexuality, the romantic relations and the occasional sexual relations the victim had before the facts. Likewise, the Court deems inappropriate the considerations relating to the ambivalent attitude towards the sex of the applicant, just like the references to the non-linear life of the person concerned are also regrettable and irrelevant.

Criminal law and contrast to violence against women

Francesco Cingari

1. Introductory remarks

This contribution addresses the evolution and the features of the Italian repressive apparatus in combating violence against women, managing to highlight, on the one hand, the state of implementation of the Istanbul Convention, since its tenth anniversary and the occasion of this important Italian-Turkish Conference, and, on the other hand, the possibilities and shortcomings of criminal law on the topic.

2. Evolution of the repressive apparatus to combat violence against women

Over time, the Italian repressive apparatus in contrasting violence against women has undergone a process of progressive strengthening from both the point of view of the incriminating offenses and the sanctioning system. And in fact, on the one hand, the discriminatory penal rules against women provided for by the Rocco Code of 1930 have been eliminated and, on the other hand, several new incriminating cases have been introduced into the penal code aimed at repressing the main forms of manifestation of violence against women. Also, the sanctioning system was strengthe-

ned through the introduction of new aggravating circumstances[1]. More precisely, in the evolution of the Italian repressive apparatus in contrast to violence against women, it is possible to identify at least four major phases.

In the first place, it is given major consideration to the elimination of the penal provisions discriminatory against women from the criminal code by the Constitutional Court. In particular, the declaration of unconstitutionality of the crime of adultery (art. 559 of the Criminal Code) and of concubinage (art. 442/1981) of homicide and personal injury for reasons of honor (art. 587 of the Criminal Code) and of the special cause of extinction of the offense of shotgun marriage (art. 544 of the Criminal Code) as well as the reform of Law no. 194 of 1978 about the repressive system of procured abortion.

In a second phase of the evolutionary process of the Italian penal repressive apparatus the following provisions were enacted: Law no. 66 of 1996 which reformed sexual offenses, emancipating them from the protection of honor and public morals, thus focusing on the protection of the person; Law no. 7 of 2006, which introduced art. 583-*bis* of the Criminal Code, i.e. the crime of female genital mutilation; and finally, Law no. 38 of 2009, which introduced art. 612-*bis* on the crime of persecutory acts in contrast to stalking.

Hence, in a third phase we can place the legislative interventions to counter violence against women and domestic solicited, as well as by the growing social alarm caused by the phenomena of violence against women, precisely by the Istanbul Convention. In this perspective, the Law no. 119 of 2013 (conversion of Legislative

[1] On the evolution of the Italian repressive apparatus in contrast to violence against women, Basile F., *La tutela delle donne dalla violenza dell'uomo: dal Codice Rocco... al Codice Rosso*, in *Dir.pen. e uomo,* 2021, 1 ss.; Vitarelli T., *Violenza contro le donne e bulimia repressiva*, in *Diritto pen. cont., Riv. trim,* 3/2020, 462 ss.

Decree no. 93 of 14 August 2013) has affected the criminal system by introducing several provision, in order to speed up the criminal proceedings and ensure a greater protection for the victim of the crime itself. Among them, art. 61 n. 11-*quinquies* of the Criminal Code aggravating circumstance concerning non-culpable crimes against individual life and safety or against personal freedom, as well as the crime of ill-treatment committed to the detriment of a pregnant person or to the detriment of a child under the age of eighteen or in presence of the minor (so-called assisted violence) can be mentioned. Furthermore, penalties provided for the crimes of mistreatment in families and of stalking and sexual violence within a sentimental relationship between the perpetrator and the victim – in a broad sense, regardless of cohabitation or current or previous marriage bond between offender and victim – have been strengthened, a factor can turn out to be criminogenic even in the most serious forms of manifestation of violence against women[2].

Finally, the last phase is characterized by the most recent and impressive legislative intervention carried out with the Law no. 69 of 2019, the so-called "red code" which, in compliance with the Istanbul Convention has had an impact on the substantive criminal law, in addition to the procedural side in order to accelerate criminal proceedings on the issue and to guarantee the protection of the victim. The latter has been achieved not only by increasing the severity of the already existing penalties provided for crimes combating violence against women, as well as the introduction of new

[2] For some insights on the D.L. (Law Decree) no. 93 of 2013, see Pavich G., *Le novità del decreto legge sulla violenza di genere: cosa cambia per i reati con vittime vulnerabili,* in *Diritto penale contemporaneo,* 24 settembre 2013; Recchione S., *Il decreto sul contrasto alla violenza di genere*, in *Diritto penale contemporaneo,* 15 settembre 2013; Report on the law of 15 October 2013, edited by Ufficio del Massimario, in *Contemporary criminal law*.

aggravating circumstances, but also framing new incriminating cases[3]: crime of permanent facial disfigurement (art. 583-*quinquies* of the Criminal Code), of the coercion and induction to marriage (art. 558-*bis* of the Criminal Code), of the illegal dissemination of sexually explicit images or videos (the so-called revenge porn, art. 612-*ter* of the Criminal Code) and, at last, crime of violation of the victim's protection order had been introduced in art. 387-*bis* of the Criminal Code.

3. The repressive model in contrast to violence against women in force in Italy

Indeed, the abovementioned legislative framework is consistent with almost all the criminalization obligations of the Istanbul Convention referred to in arts. 33-41 and 45-46. In fact, only the charge for "Psychological violence" (art. 33 Conv.), prodromal in most cases *vis-à-vis* the physical one, has not yet been implemented. In this regard, however, it should be noted that the Italian legislator's inertia is not at all censurable but rather wholly acceptable given the elusive nature of the "psychic facts" and the consequent problematic nature of the intervention of criminal law to protect psychic integrity. From this point of view, the case of the crime of plagiarism (art. 603 of the Criminal Code) may provide a good example, since it was declared constitutionally illegitimate by the Constitutional Court in 1981 due to the impossibility of the empirical proof of the incriminated fact per se[4]. Nonetheless, the criminal legislator went beyond the international and the Istanbul Con-

[3] On the l. 96/2019, the so-called "Red Code", see Basile F., *La tutela delle donne dalla violenza dell'uomo*, cit.

[4] See Corte cost. (Italian Constitutional Court), sent. 9 April - 8 June 1981, n. 96, in *Riv. it. dir. proc. pen.*, 1981, 1147 ss.

vention expectations, since, for instance, the introduction of the crime of illicit dissemination of sexually explicit images or videos (the so-called "revenge porn") through art. 612-*ter* of the Criminal Code, notwithstanding the lack of conventional obligations regarding the topic.

As far as this robust repressive system features and the structure of the incriminating cases and aggravating circumstances are concerned, they are not conceived as "gender criminal norms". In my opinion, this point is of utmost importance. And in fact, on the one hand, in the criminal protection system to combat violence against women – with the exception of the crime of female genital mutilation provided for by art. 383-*bis* of the Criminal Code – there are no cases of restricted passive subjectivity in which the woman is an essential element of the crime, but rather crimes involving an indeterminate person, committed against any person, thus beyond the sphere of violence against women. On the other hand, in crimes concerning violence against women, the intent or the discriminatory orientation towards women, in which the phenomenon of gender violence finds its ideological cultural, social (and individual) matrix, is not relevant[5].

Similar considerations may apply to the aggravating circumstances against domestic violence, relating to the emotional relationship, which are formulated in general terms and therefore are applicable to violence (such as murder) committed by a woman against her partner or former partner as well. Essentially, the Italian legal system does not envisage any aggravating circumstances modelled on those enacted in Spain through the law on gender-ba-

[5] On the topic, Palazzo F., *La nuova frontiera della tutela penale dell'uguaglianza*, in *Sist. pen*., 2021, 3 ss.; Pecorella C., *Violenza di genere e sistema penale*, in *Dir. pen. proc*., 2019, 1181 ss.

sed violence in 2004, which provides with reference to some crimes – threat, injury, private violence and (non-habitual) mistreatment – an harsher punishment if made against a woman by the partner or a former partner[6].

To briefly conclude, in the Italian legal framework crimes to counter violence against women do not emerge at the level of the incriminating case, which is constructed, so to speak, in a neutral way and is therefore also applicable to acts committed to the detriment of persons other than women, even though offences are meant to detect the disvalue constituted by sexual discrimination, which accompanies the act of violence against women.

4. The current model of incrimination of violence against women and its shortcomings

The consequences of this legislative choice are at least two. However, it is worth mentioning its general compliance with the Istanbul Convention, which in art. 45 requires member states to ensure effective and dissuasive sanctions against the various forms of manifestation of violence against women without requiring the introduction of "gender" crimes or aggravating circumstances. Thus, in the first place, and from a political-criminal profile, the choice to punish the several forms of gender-based violence without resorting to "gender crimes" – in which the discriminatory negative feature clearly emerges – weakens the pedagogical-cultural and stigmatizing potential of criminal repression (the so-called "general positive prevention function"). The latter would be enhanced through the construction of crimes clearly centered on sexual di-

[6] On the Spanish penal system concerning gender-based violence, see Macrì F., *Femminicidio e tutela penale di genere*, Torino, Giappichelli, 2017, 86.

scrimination, in which the element of discriminatory orientation towards women emerges in the structure of the incriminating cases instead. Consequently, the current model of incrimination of violence against women is not the most adequate to achieve the criminal political objective of eradicating discriminatory socio-cultural orientations from the social environment, which represents the cultural and criminological matrix of violence against women.

Secondly, from the point of view of the principles of guarantee, the harsher punishment motivated by the need to provide women with enhanced protection against acts of sexual discrimination, also applies to facts that are not characterized by this negative pattern, thus no need for enhanced protection would have aroused. Consequently, notwithstanding these common incriminating cases, it will be up to the judge to establish whether the concrete fact is characterized by the specific discriminatory disvalue. Actually, though this embodies the rationale of these incriminating rules, it is not present in the structure of the incriminating case, and on the other hand, the latter may well conflict with the principles of equal treatment, offensiveness and proportion[7].

5. The Italian criminal system models of incrimination focused on discrimination and on the protection of women's equality and dignity

However, in the Italian criminal system there are recently framed models of gender incrimination aimed at protecting equality and combating discrimination, also capable to combat violence against women and to protect women's equality and dignity in a clearer and effective way. We are referring to the criminal regulatory sy-

[7] See Palazzo F., *La nuova frontiera dell'uguaglianza*, cit., 4.

stem, outlined by art. 604-*bis* and 604-*ter* of the Criminal Code, consisting of the crime of propaganda and incitement to crime for reasons of racial, ethnic and religious discrimination and in the aggravating circumstance applicable to crimes not punished with life imprisonment based on the ethnic hatred, national, racial or religious discrimination grounds.

Indeed, the abovementioned bill is currently under discussion at the Senate (A.S. 2005, already approved by the Chamber of Deputies on November 4, 2020) aimed at extending this protection system to discrimination based on sex, gender, sexual orientation, gender identity or disability as well[8]. More precisely, on the one hand, the bill A.S. 2005 extends application of art. 604-*bis* c.p. incriminating anyone who instigates to commit or commits acts of discrimination, who instigates to commit or commits acts of violence for racial, ethnic, national or religious reasons, including on the ground of sex, gender, sexual orientation, identity of gender or disability incitement as well as participation and assistance to organizations, associations, movements or groups that have among their purposes the incitement to discrimination or violence also reasons based on sex, gender, sexual orientation, gender identity or disability. On the other hand, it extends the scope of the aggravating circumstance provided for by art. 604-*ter* of the Criminal Code to crimes other than those punished with life imprisonment committed for reasons based on sex, gender or disability[9].

[8] The bill A.S. 2005 is currently under examination by the Senate and can be found on the website of the Senate of the Italian Republic, *www.senato.it*.

[9] On the bill n. 2005, see Dodaro G., *La problematica criminalizzazione degli "atti di discriminazione" non violenti nei delitti contro l'uguaglianza. Una riflessione a partire dal d.d.l. Zan e altri in materia di misure di prevenzione e contrasto delle discriminazioni omo-transfobiche*, in *L'omo-transfobia diventa reato: La Camera dà il via libera*, in *www.giustiziainsieme.it*, (accessed on 10.11.2020); Goisis L., *Sulla*

Consequently, in this model of incrimination, the particular discriminatory ideological component framing the negative connotation of the criminal facts resulting in violence against women assumes explicit criminal relevance, thus shaping the special content of negative value of the fact in itself.

Obviously, offences related to gender may well prove effective and consistent in contrasting the phenomena of gender violence and discrimination, as tool aimed at protecting women's equality and dignity. With a focus on the discriminatory nature of the violence, therefore, the structure of these crimes can meet the objective of counteracting gender-based violence, by contributing to the eradication of discriminatory orientations in the society.

Nevertheless, issues arise from the point of view of the fundamental principles of criminal law, since the risk of a problematic process of "dematerialization of the offense" and a strong anticipation of criminal threshold already at the early stage of the mere manifestation of thought[10].

6. Possibilities and limits of criminal law in combating violence against women and domestic violence: for an "integrated" model of combating violence against women

Undoubtedly, criminal law must and can constitute a useful instrument of contrast when combating violence against women comes into the picture. However, the focus on the function of general prevention through intimidation and on the punishment

riforma dei delitti contro l'uguaglianza, in *Riv. it. dir. proc. pen.*, 2020, 1543 ss.; D'Amico L., *Omofobia e legislazione antidiscriminatoria. Note a margine del d.d.l. Zan*, in *Leg. pen.*, 2021, 1 ss.

[10] Cf. Bartoli R., *Costituzionalmente illegittimo non* è *il d.d.l. Zan ma alcuni comportamenti incriminati dall'art. 604 bis c.p.*, in *Sistema pen*. 2021, 1 ss.

retribution should be avoided, for criminal law to constitute a truly and not merely symbolic tool to combat violence against women. Indeed, it seems the Italian legislation has chosen this path. Rather, it would be necessary to enhance the positive general prevention function through education and the special-preventive function through re-education and rehabilitation.

From the first point of view, concerning the exploitation of the pedagogical and cultural orientation patterns of the criminal punishment, it should be evaluated the option of the introduction of authentic gender-based criminal norms to counteract violence against women, taking into account the woman herself and/or the discriminatory intent against her as an essential or circumstantial element of the offence. However, the discriminatory intent against women must be anchored to genuinely offensive and sufficiently determined facts, in order not to contradict the guarantees principles enshrined in the criminal system. Thus, for instance, the legislative decree A.S. 2005 can prove to be a good model, extending the aggravating circumstance referred to in art. 604-*ter* of the Criminal Code to the ground of sexual discrimination. Following this path, crimes – other than those punished with life imprisonment – based on sexual discrimination would be aggravated[11].

Second, through the enhancement of the re-educational function of the criminal punishment, the Italian legislator seems to have chosen the introduction of new criminal offences and stronger penalties as the privileged focus on the topic, therefore relying on general prevention, through intimidation, rather than on special prevention through re-education. Despite these shortcomings, the aforementioned approach may appear particularly useful

[11] Cf. Goisis L., *Sulla riforma dei delitti contro l'uguaglianza*, in *Riv. it. dir. proc. pen.*, 2020, 1531.

and fruitful especially with reference to crimes involving violence against women whenever the offender is not aware of the profound disvalue of his actions, for instance if crimes are embedded in cultural context legitimizing them and fostering their perpetuation. Additionally, the offender often presents borderline personality disorders, which if not capable *per se* to undermine the offender's will and liability, however, can prevent the agent from a rational understanding, thus weakening the deterrent capacity of the criminal sanction in itself[12].

However, it must be said that the importance of the re-educational dimension is not entirely unknown to the Italian legislator. Indeed, the Law no. 69 of 2019 introduced through art. 165 paragraph 5 of the Criminal Code the possibility of conditional suspension to special rehabilitation-rehabilitation programs for offenders, in crimes involving violence against women (mistreatment, sexual violence, even in an aggravated form, sexual acts with minors, corruption of minors, group sexual violence, persecutory acts, and in cases of personal injury and deformation of the person's appearance through permanent injuries to the face, aggravated pursuant to art. 576 co. 1 nos. 2, 5, 5.1 and 577 co. 1 n. 1, and co. 2 of the Criminal Code). Moreover, the Law no. 69 of 2019 intervening on art. 13-*bis* of the Law no. 354 of 1975 (on penitentiary system), extended to those sentenced for the crimes referred to in art. 572, 583-*quinquies*, 609-*bis*, 609-*octies* and 612-*bis* of the Criminal Code, the option of undergoing psychological treatment for the purpose of recovery and support relevant to the assessment of the granting of penitentiary benefits pursuant to art. 4-*bis* co. 1 of the Law no. 354 of 1975.

[12] See Vitarelli T., *Violenza contro le donne e bulimia repressiva*, cit., 477.

However, it should be noted that the prospect of promoting re-education-rehabilitation programs must be pursued with a greater awareness about the need for financial resources and funding. From this point of view, art. 6 of the Law no. 69 of 2019 notwithstanding the chance to participate in recovery programs charges the offenders of the recovery costs.

But for an effective repressive action to combat violence against women, we cannot ignore the strengthening of the effectiveness of the overall criminal protection system by focusing on the effective – not merely formal – protection of women who are victims of violence. And in fact, an effective system of criminal protection against violence must be able to count not only on a substantive and procedural regulatory apparatus suitable to combat violence against women but also on men and means capable of making it actually work in practice.

From this point of view, it can be mentioned the European Court of Human Rights judgement *Talpis v. Italy*[13] censuring the Italian authorities' enduring negligence in the management of violence against women vis-à-vis the investigation phase. The European Court indeed did not criticize the formal regulatory framework in a broader sense, as shaped over time by the Italian legislator and currently in force[14]. Thus, for example, in order to raise the standards of effectiveness of the protection of women against violence, on the one hand it appears decisive that a greater attention is devoted to the phase of evaluation of penitentiary benefits (such as, *inter alia*, the measures of the bonus permits or semiliberty) for those convicted for this kind of offences, taking in due consideration the

[13] Corte EDU, Sez. I, sent. 2 March 2017, *Talpis c. Italia*, in *Dir. pen. cont., riv. trim*., 3/2017, 378 ss.

[14] See Basile F., *La tutela delle donne dalla violenza dell'uomo,* cit., 5.

protection of the person offended by the crime as well. Also, acquiring the necessary information and data to evaluate the coefficient of social danger of the perpetrator the crime, thus achieving at the same time higher standards of organizational efficiency in the management of proceedings for violence against women by the judicial offices and in the training of all the involved actors (magistrates, lawyers, technical consultants, police forces), in accordance with the provisions of art. 15 of the Istanbul Convention. From this point of view, it should be noted that the recent Law no. 69 of 2019 does not seem to fully engage in this challenge. Though it does stress (in art. 5) the importance of training courses – to be arranged within twelve months from the enacted provisions – and addressed to security force officers and judicial police personnel in the prevention and repression of gender-based violence, no financial resources have been provided to carry out these activities[15].

Taking into account the effective protection of women, anti-violence centers, listening centers and shelters, constituting concrete forms of assistance and support, represent necessary tools to deal with the phenomenon, especially for women suffering from psychological pressure and economic disadvantage, as well as other asymmetrical interpersonal dynamics[16]. In this regard, it should be noted that art. 5-*bis* of the Law no. 119 of 2013 provided for concrete resources and funding for anti-violence centers and shelters.

However, if there is no doubt that criminal law must and can play a significant role in facing violence against women and domestic violence, leaving the solution at the final stage of criminal repression can be risky and insufficient, at least for two basic rea-

[15] See Bertolino M., *La violenza di genere e sui minori tra vittimologia e vittimismo: notazioni brev*i, in *Riv. it. dir. proc. pen.*, 2021, 69; Basile F., *ibid*., 13.

[16] Bertolino M., *ibid*., 81.

sons. On the one hand, criminal law may become "overexposed" thus conflicting with the fundamental principles of criminal law as an *extrema ratio*, proportionality and the principle of strict legality; on the other hand, the victim (formal) protection may reveal symbolic rather than effective (and concrete). In fact, it should be noted, that both at the international law level and in the international Conventions – of course in the Istanbul Convention as well – reference is made to measures that are not necessarily repressive in order to face gender violence. In this regard, henceforth, in its latest report 2020 the monitoring body for the implementation of the Istanbul Convention (GREVIO) detected in the repressive pattern one of the main shortcomings of the Italian response against gender violence, thus treating the phenomenon mainly as a matter pertaining to public order[17].

Hence, above all it is necessary to intervene through an authentically preventive strategy based on comprehensive and complex social policies addressing the diverse (social and cultural) roots of the spread of gender-based violence[18]. In particular, on the one hand, according to the provisions of art. 6 of the Istanbul Convention, it is necessary to promote social policies aimed at eliminating the (still) existing inequalities between women and men and at promoting the empowerment of women[19]. Indeed, the different

[17] See the GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Italy, published on 13 January 2020, § 30, 18.

[18] See Bertolino M., *La violenza di genere e sui minori tra vittimologia e vittimismo: notazioni brev*i, cit.; Vitarelli T., *Violenza contro le donne e bulimia repressiva,* cit., 478; Basile F., *La tutela delle donne dalla violenza dell'uomo,* cit., 13.

[19] See the GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention

manifestations of violence against women reflect the unequal and asymmetric strength in social relations between women and men.

Furthermore, a strategy to combat gender-based violence against women cannot ignore the relevance and consistency of (and educational) programs aimed at eradicating the culture of sexual discrimination from the social tissue.

Indeed, violence against women is a culturally oriented crime, finding its roots in a discriminatory ideology that makes women particularly vulnerable[20].

Fighting against gender based violence through preventive strategies is the main goal to accomplish, though it constitutes a (more expensive) path whose long-term results can seem less appealing for political and mass-media narratives in the Italian scenario, especially in comparison with the repressive choice envisaged through the recent legislative provisions[21].

on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Italy, 18.

[20] See Vitarelli T., *Violenza contro le donne e bulimia repressiva,* cit., 478.

[21] See GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Italy, 22 ss.

Evidentiary challenges to an effective criminal investigation for domestic violence: an introduction

Rahime Erbaş

1. Introduction

«One of the most important ways to curb domestic violence is to ensure that abusers understand that society will not tolerate their behavior»[1].

I would like to begin with a case, Opuz v. Turkey (2009)[2], the landmark case of the ECtHR, as I consider this case as a written constitution of gender- based violence in Europe, which also paved the way towards the Council of Europe Convention on preventing and combating violence against women and domestic violence, abbreviated as the Istanbul Convention in 2011. When examining this case, it is the very picture of evidentiary issues in domestic violence that illustrates explicitly how the perpetrators may enjoy either impunity or lenient punishments on the grounds of a lack of evidence.

[1] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, in *Harvard Law Review*, 1996, 109, 8, 1890.

[2] ECtHR, *Opuz v. Turkey*, N. 33401/02, 9 September 2009.

In this case, the applicant and her mother struggled with a series of multiple assaults by both the applicant's partner and also applicant's partner's father, and which ended up with the murder of the applicant's mother by the applicant's partner. For example, in the first assault where they claimed to have been beaten and threatened to be killed by the applicant's partner[3]. He was acquitted of making death threats on the grounds of the lack of evidence[4]. In the second assault, during an argument, the applicant was beaten very badly by him. The medical report concluded that the applicant's injuries were sufficient to endanger her life[5]. He was taken in custody, but after that the applicant withdrew her complaint, the case was discontinued[6]. In the third assault, the applicant, her mother, her sister and her partner had a fight, where her partner drew a knife on the applicant. The applicant and her mother suffered injuries. Although the medical reports stated that injuries which rendered them unfit to work for seven, three and five days respectively, the public prosecutor decided not to prosecute by concluding that there was insufficient evidence to prosecute him and also considered that therefore, there was no public interest in pursuing the case[7]. In the sixth incident, the applicant was threatened by her partner, but 'the public prosecutor decided that there was no concrete evidence to prosecute the applicant's partner, apart from the statements of the victim[8]. In the ultimate assault, the applicant's mother wound up being killed by him[9]. He was convicted of mur-

3 *Ibid*., par. 9.
4 *Ibid*. par. 12.
5 *Ibid*. par. 13.
6 *Ibid*. par. 19.
7 *Ibid*. parr. 20, 21.
8 *Ibid*. parr. 45, 46.
9 *Ibid*. par. 54.

der and for illegal possession of a firearm to a sentence of life imprisonment. However, the court mitigated the original sentence, changing it to fifteen years and ten months' imprisonment and a fine of 180 Turkish liras (TRY) taking into account the fact that the accused had committed the offence as a result of a provocation by the deceased and his good conduct during the trial[10].

In the lack of evidence or weak evidence in a criminal investigation lies a fundamental obstacle that prevents judicial authorities from carrying effective criminal investigation in all criminal cases. Above all, the introduction of an indictment in court by a/the public prosecutor, necessitates the existence of certain degree - sufficient degree in Turkey's case - of suspicion, based on the respective evidence. As for DV cases, family home, or, more concretely, the concept of family or private life, is abused by violent spouses/partners and as such, it creates an unobstructed space for the perpetrators to enjoy impunity and lenient punishments in many ways[11]. The Istanbul Convention, art. 49/2, as the general obligation, to establish the jurisdiction to prescribe, in the following manner:

Within the scope of this article, the evidence issue appears as a primary component of effective criminal investigation, as highlighted in the Explanatory Report of the Convention. Accordingly, effective investigation and prosecution of all violence covered by this Convention, for example, requires:

[10] *Ibid*. par. 57.

[11] See Erbaş R., *Effective Criminal Investigations in Combating Domestic Violence and the ECtHR: Prima Ratio v. Ultima Ratio?*, in *Gender Based Approaches to The Law And Juris Dictio in Europe*, E. Stradella, G. Spanò (eds.), Pisa University Press, 2020, 222; Erbaş R., *Effective Criminal İnvestigations For Women Victims of Domestic Violence: The Approach of the ECtHR*, in *Women's Studied International Forum*, 2021, 1.

> [...] establishing the relevant facts, interviewing all available witnesses, and conducting forensic examinations, based on a multi-disciplinary approach and using state-of-the-art criminal investigative methodology to ensure a comprehensive analysis of the case[12].

Furthermore, art. 50/2 entitled Immediate response, prevention and protection states that «Parties shall take the necessary legislative or other measures to ensure that the responsible law enforcement agencies engage promptly and appropriately in the prevention and protection against all forms of violence covered by the scope of this Convention, including the employment of preventive operational measures and the collection of evidence». In this regard, the evidence issue is one of these ways that prevent an effective criminal investigation, as it becomes more challenging to obtain and even evaluate evidence within family sphere. Therefore, I consider/argue that the problem lies not only in obtaining evidence, but rather in obtaining valuable evidence for DV cases. In so doing, the question should be posed as: what types of evidence are valuable and how we can obtain and evaluate them by showing to society that violence at home is not a private matter of the victim and that the state does not tolerate criminal acts wherever they are committed[13].

This study, at this introductory level, aims to shed light on the evidence issue, which is a very important component of an effective criminal investigation. This study confines itself with indicating the reasons why evidence issue is more problematic in DV cases than in non-domestic cases, in addition to reflecting on the relevant provi-

[12] Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, § 256, 43, *https://rm.coe.int/16800d383a* (accessed: 08.11.2021).

[13] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, cit., 1890.

sions of the Istanbul Convention on the matter. Because showing reasons also means indicating the solution in many cases. As such, this study aims to analyze the main challenges and difficulties in obtaining evidence in domestic violence cases, with a particular focus on the vulnerability female victims face within the criminal procedure system. As such, this study will first consider why evidence issues in DV cases deserve the particular attention of judicial authorities (I). Second, it will indicate the reasons why obtaining evidence is more challenging when it comes to DV cases (II). Then it moves on to the role of police, prosecutor, and court (III), and, finally, the study will provide some concluding remarks (IV).

2. Collecting evidence in DV cases: an area for a particular Attention?

The ECtHR draws attention to the fact that domestic violence cases often occur within personal relationships or closed circuits (Opuz v. Turkey, App no. 33401/02, 9 June 2009, par. 132). In the case of Volodina v. Russia, the Court agreed that collection of evidence is not an easy task even for trained law-enforcement officials[14]. It is at this very point where the main obstacles in cases of domestic violence or violence against women arises: the human rights of women are violated under the roof of family homes and as such it is perceived as a private matter, for the victim to deal with. Consequently, in the respective case, no witnesses may appear in the court room. DV cases as relationship-based crimes[15], similar to

[14] ECtHR, *Volodina v. Russia*, N. 41261/17, 9 July 2019, par. 82.

[15] Tidmarsh P., Sharman S., Hamilton G., *The Effect of Specialist Training on Sexual Assault Investigators' Questioning and Use of Relationship Evidence*, in *Journal of Police and Criminal Psychology*, 2021, 1, *https://doi.org/10.1007/s11896-021-09446-x* (accessed: 08.11.2021).

sexual crimes, contain certain peculiarities in terms of both investigating and prosecuting. Indeed, it is highlighted that «DV cases are difficult to prosecute»[16]. This sentence by Peterson and Bialo-Padin, captures the reality in DV prosecution cases. Further, referring to the dynamics of the relationship between the victim and the perpetrator[17], they add that:

Unlike incident-based crimes such as gun possession or car theft, in DV cases there is usually an ongoing relationship between the parties: They share a history and, in all likelihood, a future[18].

Peterson and Bialo-Padin focus on the relationship dynamics between the victim and the perpetrator, which is very correct from a pragmatic perspective. However, to comprehend the exact algorithm in solving DV cases, I would rather describe the relationship with its peculiar dynamics jointly with societal influences, because the matter is more complex than a simple relationship with its peculiar dynamics. Indeed, the relationship has dynamics, because this relationship constitutes a unit of society, a family, private life circuit, however one chooses to conceptualize it; which makes it prone to the influence of society. This may be more than a hope for sharing a common future for the parties involved. Their behavior may be influenced also by cultural and societal norms or even pressures. Further, societal influences can be observed not only with respect to the parties of the relationship, but also the outside view of the family, even the view of criminal justice authorities. As such, the unit of the family, creates peculiarities and at the same time poses challenges for the prosecution of criminal acts committed at home.

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[16] Peterson R.R., Bialo-Padin D., *Domestic Violence Is Different: The Crucial Role of Evidence Collection in Domestic Violence Cases*, in *Journal of Police Crisis Negotiations*, 2012, 12, 2, 107.

[17] *Ibid*., 103.

[18] *Ibid*., 103-104.

The reasons as to why evidence issues are more challenging in DV Cases than in other non-domestic ones, can distinguish between two main categories: victim- and perpetrator-related reasons, and police, prosecutor, and the court-related reasons. The first reason is the necessity to draw a line between the aims of the victims and perpetrators and the aim of the criminal justice system. If we would have put all reasons in one basket, the aim of the criminal law may be undermined; and viceversa, victim-blaming tendencies may supersede. Second reason is that it is an additional necessity that differences regarding the roles of the victims and perpetrators and the criminal justice authorities in obtaining evidence should be indicated. For example, obtaining evidence is not among the obligations of the victim. A woman may not want to testify against her partners or husband. Therefore, I consider Victim- and Perpetrator- Related Reasons as out-of-criminal justice system reasons. Then, I will move to the main focus of the role of Police, Prosecutor, and Court. Here, I will not argue that there should be a "domestic violence exceptionalism"[19] in terms of the established evidentiary rules in criminal procedure or that we should deviate from the evidentiary standards and adopt an exception to the exclusion of illegally obtained evidence[20] when it comes to DV cases[21]. I entirely agree with the statement by Prof. Hanna as below:

[19] Collins E.R., *The Evidentiary Rules of Engagement in the War against Domestic Violence,* in *New York University Law Review*, 2015, 90, 2, 402, 23.

[20] Regarding exclusionary rule on illegally obtained evidence in Turkish law see Demiral-Bakirman B., *Unlawfully Obtained Evidences in Turkish Criminal Procedure Law,* in *Ceza Hukuku ve Kriminoloji Dergisi (Journal of Penal Law and Criminology)*, 2015, 3, 1, 239 ff.

[21] Collins E.R., *The Evidentiary Rules of Engagement in the War against Domestic Violence,* cit., 401.

> What is most important is not the verdict, but the fact that the state pursued a consistent policy of enforcing the law regardless of the social status of the defendant or the nature of the relationship between parties[22].

Indeed, the Istanbul Convention in art. 49 explicitly obliges state parties to ensure an effective criminal investigation for domestic violence cases, but not at all cost, rather it draws a line to this obligation through art. 6 ECtHR by stating the following in its Explanatory Report:

> [...] The drafters considered it important to spell out as part of this obligation the need to ensure that all investigations and procedures are carried out in conformity with fundamental principles of human rights and with regard to a gendered understanding of violence. This means, in particular, that any measures taken in implementation of this provision are not prejudicial to the rights of the defence and the requirements of a fair and impartial trial, in conformity with Article 6 ECHR[23].

I will thus discuss the roles of justice authorities with their focus to obtain and evaluate the evidence, respectively. For example, it is pointed out that police play role as "the gatekeepers to the criminal justice system"[24] by considering that a DV case is generally brought into the system through the police intervention[25].

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[22] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions,* cit., 1907.

[23] Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, § 256, 43, *https://rm.coe.int/16800d383a* (accessed: 08.11.2021).

[24] Danis F.S., *The Criminalization of Domestic Violence: What Social Workers Need to Know,* in *Social Work*, 2003, 48, 2, 240. See also Balenovich J., Grossi E., Hughes T., *Toward a Balanced Approach: Defining Police Roles in Responding to Domestic Violence*, in *American Journal of Criminal Justice*, 2008, 33, 19.

[25] Danis F.S., *The Criminalization of Domestic Violence: What Social Workers Need to Know,* cit., 239.

3. Victim – and perpetrator – related reasons

Victims generally do not act as creators or preservers of any evidence, even if the criminal justice system treat victims as a source of evidence. Here enters the victim's lack of knowledge of evidence and lack of support on evidence by authorities. Victims do not always know which types of evidence is strong or weak, or how to preserve any type of evidence. In the case of Volodina v. Russia, the Court highlighted that «this [collection of evidence] is not an easy task even for trained law-enforcement officials, but the challenge becomes insurmountable for a victim, who is expected to collect evidence on her own, while continuing to live under the same roof as the perpetrator, while being financially dependent on him, and fearing reprisals on his part»[26].

It is quite common that a woman, who has endured the ordeal of marital rape washes herself, and therefore, biological evidence is lost in the process. Further, due to the lack of an adequate system to collect the evidence in a timely manner, obtaining biological material could be challenging even for justice authorities. For example, if her partner inflicts bodily harm on a woman, she could reach hospital to have her status examined several days after sustaining the injury; so that the biological evidence appears less valuable. This is because of the fact that the standard evidence collection cutoff time is within the time span of up to 72 hours as is often noted[27]. The Explanatory Report of Istanbul Convention art. 18 under protection and support pinpoints the vulnerability of victim by stating that:

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[26] ECtHR, *Volodina v. Russia*, par. 82.

[27] Archambault J., *Time Limits for Conducting a Forensic Examination: Can Biological Evidence be Recovered 24, 36, 48, 72, 84 or 96 Hours Following a Sexual Assault?,* in *End Violence Against Women International*, 2007, 1, *https://evawintl.org/wpcontent/uploads/SAR1031TimeLimitsforConductingaForensicExamination.pdf* (accessed: 25. 11.2021).

> Law enforcement agencies who are often the first to be in contact with victims when called to a crime scene need to be able to refer a victim to specialist support services, for example a shelter or a rape crisis centre often run by NGOs. These support services will then support the victim by providing medical care, the collection of forensic evidence if required, psychological and legal counselling. They will also help the victim in taking the next step, which often requires dealing with the judiciary. It is important to note that this obligation is not limited to victims but extends to witnesses as well, bearing particularly in mind child witnesses[28].

Due to the lack of medical evidence, in many cases, victim statements may appear as sole evidence before the prosecution authorities. As such, there is an over-reliance on victim testimony in some DV cases[29]. In some cases, however, victim statements may not be available because women do not want to testify against their partners or husband. In some cases, they do not want them in jail either. In many cases, all they want is simply the violence to stop in their respective homes[30]. DV victims may seem uncooperative to the justice authorities in many instances[31]. Because there is an ongoing relationship between the victim and perpetrator. Further, the status of the victim at home, inter alia, being open to the constant influence or pressure of perpetrator, may prevent them from testifying. This is aptly put as "the batterer's control over the victim"[32]. Where the victim is uncooperative, or there in the absence

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[28] Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, § 114, 21, *https://rm.coe.int/16800d383a* (accessed: 08.11.2021).

[29] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, cit., 1899.

[30] Peterson R.R., Bialo-Padin D., *Domestic Violence Is Different: The Crucial Role of Evidence Collection in Domestic Violence Cases*, cit., 105.

[31] Furman E., *Addressing Evidentiary Problems in Prosecuting Domestic Violence Cases Post-Crawford*, in *Temple Political & Civil Rights Law Review*, 2016, 25, 1, 147.

[32] *Ibid*., 149.

of the victim's testimony, gathering evidence must be a more extensive activity[33].

4. The role of police, prosecutor, and court

As in the case of Durmaz v. Turkey (2015)[34], from the European Court of Human Rights (the ECtHR). Gülperi O. worked as a nurse in a university hospital, where her husband was also an employee in its pharmacy unit in İzmir, in Turkey. At 5.30 p.m. on 18 July 2005, a while after her returning home from work, she was taken to the hospital by her husband[35]. At that time, she was drowsy, but still conscious[36]. Her husband told the doctors and nurses that she had taken an overdose of two kinds of medicines, "Prent" and "Muscoril"[37]. After having received this information, they acted by pumping her stomach. When her pulse slowed down, they unsuccessfully tried to resuscitate her, but she died at 10.10 p.m[38]. He gave a statement to the police «that he and Gülperi O. had had a row earlier in the day; she had attacked him, and he had hit her. He had then left home and some time after his return at 3.00 p.m. Gülperi O. felt unwell. He then brought her to the hospital»[39]. The doctor and the prosecutor who subsequently examined her body, were unable to establish the cause of death. Because the deceased's husband, O.O., had told the police officers that he had hit her they decided that a *post-mortem*

[33] Danis F.S., *The Criminalization of Domestic Violence: What Social Workers Need to Know,* cit., 241.

[34] ECtHR, *Durmaz v. Turkey*, N. 3621/07, 13 February 2015.

[35] *Ibid*. parr. 7, 9.

[36] *Ibid*. par. 12.

[37] *Ibid*. parr. 7, 9.

[38] *Ibid*. par. 12.

[39] *Ibid*. par. 10.

examination was necessary[40]. In addition, Gülperi's parents alleged that he had been responsible for the death of their daughter, because he had beaten up Gülperi on a number of occasions and, as a result, she was thinking of divorcing him. Further, Gülperi had telephoned her sister during the afternoon of the day of her death, and she said that they had had a normal conversation; she had not been suicidal at all. Further, they alleged that he had forced Gülperi to take the medicines and had subsequently dumped her body at the hospital. The family had heard nothing from him since that date and he had not even attended the funeral. In addition, the parents stated that he had beaten up their daughter before and that as a result she was hospitalized twice with suspected head injuries. They also stated that the daughter had never been suicidal and that he had been responsible for her death[41]. Meanwhile, the Forensic Medicine Institute confirmed on 24 February 2006 that there had been no foreign substances or medicines - including "Prent" and "Muscoril" in Gülperi's body.[42]. Then, on 28 February 2006, the İzmir prosecutor decided to close the investigation[43]. Gülperi's parents lodged an objection before the domestic judicial authorities, by claiming that:

> ...[T]hat the prosecutor's conclusion that her daughter had committed suicide by taking an overdose ran contrary to the conclusions set out in the two reports issued by the Forensic Medicine Institute. She added that the prosecutor had not visited the flat where Gülperi O. used to live with O.O., even though they had informed the prosecutor that the flat had been a mess and that windows had been broken. She alleged in her petition that the prosecutor had accepted from the outset that Gülperi O. had committed suicide and that that had been the reason why she had not conducted an investigation into the allegations brought to her attention[44].

[40] *Ibid*. parr. 1-3.
[41] *Ibid*. parr. 16- 18.
[42] *Ibid*. parr. 24, 25.
[43] *Ibid*. par. 26.
[44] *Ibid*. par. 27.

Their objection, however, was dismissed by the Karşıyaka Assize Court on 11 July 2006, holding that the prosecutor's decision had been correct and in accordance with domestic law and procedure[45]. Consequently, the case ended up before the ECtHR. The Court held that there has been a violation of art. 2 of the Convention due to the national authorities' failure to carry out an effective investigation into the death of the applicant's daughter[46].
This case shows that it was allowed that one statement of a husband – that his wife had overdosed on two kinds of medicines[47] – overwhelmingly determined both health professionals' and justice authorities' decisions throughout the process. Consequences: (1) the life of a woman could not be saved, (2) the allegations against her husband regarding her death remain unanswered, (3) the allegations that she was previously beaten up multiple times by her husband and thus she had been hospitalized twice with suspected head injuries remain unanswered, (4) It is unclear whether the case is a domestic violence case or a suicide, (5) the criminal justice authorities did not address the case sufficiently, and the worst part is that (6) even the cause of death of a human being could not be established, which is an intolerable fact for a democratic state.

Here enters the significance of acting with special due diligence in terms of any suspicious case occurrs in homes. As a matter of fact, the Istanbul Convention obliges the State parties to act with due diligence[48]. As such, art. 5/2 states that:

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[45] *Ibid*. par. 29.

[46] *Ibid*.

[47] *Ibid*. parr. 7, 9.

[48] See Erbaş R., *Effective Criminal Investigations For Women Victims Of Domestic Violence: The Approach of the ECtHR*, cit., 7.

> Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.

In 2019, in the case of Volodina v. Russia, the ECtHR pointed out that as:

> The authorities must take all reasonable steps to secure evidence concerning the incident, including forensic evidence. Special diligence is required in dealing with domestic-violence cases, and the specific nature of the domestic violence must be taken into account in the course of the domestic proceedings[49].

It should be noted, in terms of evidence gathering, that what is generally and easily conducted for prosecution of a non-domestic criminal case may not be adequate for DV case prosecution. To illustrate, a victim statement may be a great asset in a criminal trial, however, when it comes to DV cases, it turns out as an overreliance on victim statements[50], as physical evidence is scarce; for example, obtaining biological material could be more difficult for justice authorities, or, no witness other than victim may actually appear in a court room. As *Prof. Hanna*, in 1996, warned that this overreliance on victim statements, implies that, as opposed to non-domestic case, a DV case is a private matter of the victim and its prosecution – based on personal utterances – implies «subjective narrative»[51].

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[49] ECtHR, *Volodina v. Russia*, par. 92.

[50] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, cit., 1899.

[51] *Ibid*., 1899. However, in this point I am making a distinction for the sake of evidence when measures are ordered for protecting DV victims. Indeed, GREVIO points out for Turkey case by saying «..[T]hat the victim's statement is evidence for the purpose of issuing protective measures, as well as the need for law enforcement agencies to take a proactive role in gathering evidence and reacting diligently to breaches of protection orders», (GREVIO's (Baseline) Evaluation Report on leg-

Indeed, criminal justice authorities convey a message to society that DV cases are handled as objective as the non-domestic cases[52]. Therefore, there should be an urgent need to shift criminal justice authorities' focal point from the victims to the physical evidence[53].

In terms of focusing on the physical evidence, inter alia, medical reports, the police play a pivotal role[54]. Regardless of whether the criminal justice system in a country is predominantly inquisitorial or adversarial, a DV case is generally brought to the system though the police intervention[55]. Therefore, it can be inferred that police play a role as "the gatekeepers to the criminal justice system"[56]. In the Opuz Case, the Court noted that «...[W]hen victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint»[57]. The GREVIO report for Turkey emphasized that «Initial law-enforcement enquiries to gather evidence are furthermore essential to raise the likelihood of prosecution services deciding to open criminal investigations»[58].

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islative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Turkey, Published on 15 October 2018, 9).

[52] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, cit., 1899.

[53] *Ibid*., 1899 ff.

[54] Danis F.S., *The Criminalization of Domestic Violence: What Social Workers Need to Know,* cit., 239.

[55] *Ibid*., 239.

[56] *Ibid*., 240. See also Balenovich J., Grossi E., Hughes T., *Toward a Balanced Approach: Defining Police Roles in Responding to Domestic Violence*, cit., 19.

[57] ECtHR, *Opuz v. Turkey*, par. 195. See also Erbas R., *Effective criminal investigations for women victims of domestic violence: the Approach of the ECtHR*, 4.

[58] GREVIO's (Baseline) Evaluation Report on legislative and other measures giving effect to the provisions of the Council of Europe Convention on Preventing

Today, the prevailing approach to overcoming the police attitude is establishing training programs to guide the police force[59]. As such, it aims at gathering accurate and valuable evidence type for DV cases. There is a need for medical reports. Or, the victim is to be interviewed and should testify in the early stages of the case[60]. Further, corroboration of evidence is to be applied by the public prosecutors.

5. Concluding remarks

In the lack of evidence or weak evidence in a criminal investigation lies a fundamental obstacle that necessarily prevents judicial authorities from carrying effective criminal investigation in all criminal cases. As for DV cases, family home, more concretely, the concept of family or private life, is abused by violent spouses/partners and as such, it maintains an unobstructed space for the perpetrators to enjoy impunity and lenient punishments in many ways[61]. In this regard, the issue of evidence is but one of these ways that prevent an effective criminal investigation, as it become more challenging to obtain and even evaluate evidence within the family sphere. This study based on the premise that DV cases require special due diligence in obtaining evidence. As *Prof. Hanna* argued, DV cases are

and Combating Violence against Women and Domestic Violence (Istanbul Convention) Turkey, § 280, 93.

[59] Peterson R.R., Bialo-Padin D., *Domestic Violence Is Different: The Crucial Role of Evidence Collection in Domestic Violence Cases*, cit., 116 ff.

[60] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, cit., 1851.

[61] See Erbaş R., *Effective Criminal Investigations in Combating Domestic Violence and the ECtHR: Prima Ratio v. Ultima Ratio?*, cit., 222; Erbaş R., *Effective Criminal İnvestigations For Women Victims of Domestic Violence: The Approach of the ECtHR*, cit., 1.

handled as objective as the non-domestic cases[62]. Then the question arises as to how we can create a system for evidence in terms of DV cases. This study considers justice authorities should focus at (1) seeking accurate types of evidence for DV cases, (2) seeking valuable types of evidence for DV cases, and (3) meeting the need for corroboration of evidence. In achieving the first and second proposal, it is necessary to provide the police – as an initial contact point of the victim – with a continuing trainingship.

[62] Hanna C., *No Right to Choose: Mandated Participation in Domestic Violence Prosecutions*, cit., 1899.

Istanbul Convention and the cyber violence

Emine Eylem Aksoy Rétornaz

1. Introduction

In the 21st century, the behaviour of individuals has been transformed by digital technologies. Digital technologies offer new opportunities and challenges, but it is also a source of danger for many people.

Violence has moved to the cyberspace. Physical strength is replaced by the ability to mobilize cyber-technologies. This power, called «cyberpower»[1], should be seen as the equivalent of physical power. It offers its users the opportunity to hide their identities and anonymity also facilitates cyberviolence. Besides, violence in the digital world also makes the victims more vulnerable in the "real" world.

The new form of violence generated by the widespread use of the internet and social media are shockingly frequent. Cyberspace is the scene of different actions directed against certain groups or communities in a wide range from privacy violation to psychological and sexual harassment. Different concepts such

[1] Jordan T., *Cyberpower. The Culture and Politics of Cyberspace and the Internet*, London, Routledge, 1999, 110-128.

as «cyberviolence», «online violence», «technology facilitated violence» are used for the forms of violence caused by new technologies[2].

This form of violence is a growing global problem. As a matter of fact, a study conducted in Turkey in 2017 showed that nearly 60% of 550 female social media users over the age of 18 were exposed to cyberviolence[3].. The 2015 UN Broadband Commission for Digital Development Report concluded that 73% of women present online have experienced abuse. Particularly women aged 18 to 24 are deemed at greater risk of being exposed to every kind of cyberviolence including online stalking and sexual harassment, as well as physical threats online[4].

There is no stable typology of behaviours considered as a form of cyberviolence. Many types of cyberviolence are interconnected, overlapping, or consist of many acts. Many forms of cyber violence are forms of behaviour that violate the privacy of victims[5].

A recent mapping study by the Council of Europe defines cyberviolence based on the definition of violence under art. 3 of the Istanbul Convention. According to this definition «cyberviolence is the use of computer systems to cause, facilitate, or threaten violence against individuals that results in, or is likely to result in,

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[2] Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, A/HRC/38/47, *https://undocs.org/en/A/HRC/38/47*, (accessed: 01/09/2021).

[3] Temur Şimşekcan N., *Toplumsal Cinsiyete Dayalı Şiddetin Başka Bir Biçimi: Siber Şiddet*, Unpublished Master Thesis, Adana, Çağ Üniversitesi, 2018, 40 ss.

[4] *https://www.broadbandcommission.org/publication/cyber-violence-against-women/* (accessed: 01/09/2021).

[5] Cyber Violence Against Women and Girls, *https://www.unwomen.org/~/media/headquarters/ attachments/sections/library/publications/2015/cyber_violence_gender%20report.pdf?v=1&d=20150924T154259*, 2. (accessed: 01/09/2021).

physical, sexual, psychological or economic harm or suffering and may include the exploitation of the individual's circumstances, characteristics or vulnerabilities»[6].

Cyberviolence is one of the aspects of gender-based violence and can be considered as an extension of the concept of «continuum of violence»[7], which expresses the continuity and change of form of gender-based violence identified by Kelly[8].

Cyberviolence against women and girls should therefore be seen as a means used to maintain women in an inferior position in the digital sphere and real life. Violence against women is thus the reflection of gender stereotypes in the digital world. Women are exposed to violent acts in the real world as well as in the cyberspace[9].

Gender-based cyberviolence, like all forms of violence, has a negative impact on women's physical and mental health, as well as on their social, educational and professional life[10].

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[6] Cybercrime Convention Committee, *Mapping study on cyberviolence*, Council of Europe, 5, *https://rm.coe.int/0900001680973bf9*, (accessed: 01/09/2021).

[7] Kelly L., *The Continuum of Sexual Violence*, in *Women, Violence and Social Control. Explorations in Sociology*, J. Hanmer, M. Maynard (eds.), London, Palgrave Macmillan, 1987, 46-60.

[8] Mcglynn C., Rackley E., Houghton R., *Beyond Revenge Porn: The Continuum Of Image-Based Sexual Abuse,* in *Feminist Legal Studies*, 2017, vol. 25 (1), 28-29; Van Doorn N., *Digital Spaces, Material Traces: How Matter Comes To Matter In Online Performances Of Gender, Sexuality And Embodiment*, in *Media Culture Society*, vol. 33, 4, 531-547; Soygüt B., *Kadına Yönelik Dijital Şiddet Biçimi Olarak Siber – Stalking*, in *Kadın Yazıları*, T. Yalçın (ed.), Ankara, Savaş Yayınları, 2020, 182; Aksoy Retornaz E.E., *Bir Siber Taciz Biçimi: Cinsel İçerikli Görüntüleri Rızaya Aykırı Olarak İfşa Etme, Yayma, Erişilebilir Kılma Veya Üretme Suçu, (Revenge Porn Ve Deep Fake*), İstanbul, On İki Levha Yayıncılık, 2021, 4.

[9] Soygüt B., cit. 182.

[10] *Ibid*., 183.

GREVIO underlines also the importance of viewing cyberviolence and offline forms of violence against women and girls as an expression of the same phenomenon of gender-based violence[11].

According to the ECtHR, the protection of the individual from cyberviolence falls also within the scope of the right to physical and mental integrity. Thus, in the judgment delivered in the case of Buturugă v. Romania, the Court has decided that not responding to complaints of cyber-harassment made to state authorities constitutes a violation of the positive obligations under art. 3 and 8 of the ECHR and may therefore fall within the scope of the definition of domestic violence[12]. In this case, for the first time, cyberviolence is recognised as an aspect of violence against women and is placed on the same footing as domestic violence.

In a recent case, Volodina v. Russia, the Court reiterates that States are required to put in place and effectively apply a system to punish all forms of domestic violence, whether they occur offline or online, and to offer sufficient guarantees to victims[13].

In this case, the applicant suffered acts of online harassment. In June 2016, she complained to police that her ex-boyfriend had used her name, personal details, and nude photos of herself to create fake social media profiles and had added classmates of their son and her schoolteacher as friends. She also reported to the police the presence of fake profiles on Instagram and on a Russian social network, the discovery of a GPS tracking device in the lining of her bag, as well as death threats sent to her via the social networks.

The authorities initially refused to act on the complaints, citing the absence of territorial jurisdiction or the absence of an offense. A

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11 *Cybercrime Convention Committee*, 26.

12 ECHR, *Buturugă v. Romanya* nº 56867/15, 11/02/2020.

13 ECHR, *Volodina v. Russia* (No. 2), nº 40419/19, 14/09/2021.

criminal investigation was finally opened in March 2018. In October 2020, police closed the case due to the statute of limitations, after it was established that the naked photos of the applicant which were on her phone had been posted without her consent.

No criminal investigation has been opened to inquire the GPS tracker or death threats. Police did not investigate the online death threats at all, concluding that no offense had been committed because the threats were not «real».

First, the Court ensured that Russian law contained both civil law mechanisms and criminal law provisions for the protection of an individual's privacy. The authorities were therefore provided with the necessary legal tools to investigate the cyberviolence of which the applicant was the victim.

However, Russian law does not guarantee victims of domestic violence any protective measures, such as a prohibition or protection order. A newly created ordinance prohibiting certain behaviour does not provide adequate protection for victims in the applicant's situation. Such orders are only available after sufficient evidence to indict the perpetrator has been gathered, but in the applicant's case, the investigation against the ex-boyfriend had not passed the stage of suspicion. The Court considers that the response of the Russian authorities to the known risk of recurrent violence was manifestly inadequate and that, through their inaction and inability to take deterrent measures, they enabled the ex-boyfriend to continue to threaten, harass and assault the applicant.

Finally, the way how the Russian authorities handled the investigation, in particular the initial delay of two years in the initiation of criminal proceedings and the slowness of the proceedings which hindered an effective prosecution, show that they have failed to ensure that the perpetrator of cyberviolence is brought to justice. The impunity cast further doubt on the capacity of state mechanisms to produce a sufficiently chilling effect to protect women from cyberviolence.

The Istanbul Convention contains several articles that can be applied to cyberviolence against women. Based on two forms of cyber violence against women, in this article we will try to explain that some provisions of the Istanbul Convention can be applied to this new form of violence. We will also try to explain that the Istanbul Convention can play a pivotal role in preventing this new form of violence as well.

2. Applicability of the Istanbul Convention to cyberviolence

2.1. Non-consensual diffusion of sexually explicit images

Art. 33 of the Istanbul Convention deals with psychological violence. According to it, the parties to the Convention, namely the States, shall take necessary legislative or other measures to ensure criminalising the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats. According to the explanatory report, art. 33 of the Convention refers to a course of conduct rather than a single event.

Cyber harassment is also a persistent and repeated form of behaviour targeting a specific person, violating the person's right to privacy, causing mental suffering. Cyber harassment can occur in different ways. In this respect, it is a type of psychological violence. The most powerful example of how cyber-harassment may embody a form of psychological violence against women and shall be considered as being within the scope of art. 33 of the Istanbul Convention, is the suicide of a young woman in Italy in September 2016, after a sexually explicit video taken by her ex-boyfriend had spread over the internet[14].

[14] Caletti G.M., *"Revenge porn" y tutela penal, Primeras consideraciones sobre la posibilidad de incorporar al ordenamiento italiano un delito de divulgación no consentida de imágenes pornográficas*, in *Diritto Penale Contemporaneo*, 3/2018, 65-66.

Sharing sexually explicit images in cyberspace against the consent of the person involved in the images causes the victims of this "virtual" form of violence to experience "real" problems. Many victims feel anxious and worried, lose their self-esteem, are isolated from society, and experience mental and physical health problems[15].

«Revenge porn» is a phenomenon resulting from sexually explicit messaging[16]. In this context, sexual messaging or sexually explicit images taken by one person and sent to another person with consent usually turn into a form of cyber harassment in which the partner - who oftentimes cannot accept the separation after a relationship - discloses the relevant messaging and/or images in order to take revenge[17]. The perpetrator is mostly a former spouse or lover who obtained a photo or video during a relationship. It may also happen that he never had a relationship with the victim.

Sexually explicit images can also be disclosed for sexual harassment purposes.

Sexual harassment is regulated in art. 40 of the Istanbul Convention. According to the explanatory report, the acts must aim at violating the dignity of the victim. This is obviously the case with revenge porn. It creates an intimating, degrading environment for the victim. As it is frequently the case with sexual

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[15] Kitchen A.N., *The Need to Criminalize Revenge Porn: How a Law Protecting Victims Can Avoid Running Afoul of the First Amendment*, in *Chicago-Kent Law Review*, 2015, 90, 1, 292.

[16] Humbach J.A., *The Constitution and Revenge Porn*, in *Pace Law Review*, 2014, 35, 1, 215-260.

[17] Julia D., Livingstone S., Jenkins S., Gekoski A., Choak C., Tarela I., *Adult Online Hate, Harassment and Abuse: A Rapid Evidence Assessment,* UK Council for Internet Safety, 2019, *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/811450/Adult_Online_Harms_Report_2019.pdf* (accessed: 01/09/2021).

harassment, the victim and the perpetrator of revenge porn also know each other. The perpetrator is almost always an ex-husband or boyfriend.

2.2 Stalking

Stalking is another type of cyberviolence. As Stark stresses «designed to convey the abuser's omnipotence and omnipresence, stalking falls on a continuum with a range of surveillance tactics that include timing partners' activities (calls, toileting, shopping trips, etc.); monitoring their communications; searching drawers, handbags, wallets, or bank records; cyberstalking with cameras or global positioning devices; or having partners followed»[18].

Stalking can involve the use of email, instant messaging, chat rooms, bulletin boards and/or other electronic communication devices to repeatedly harass or threaten another person[19].

With stalking, there is usually physical and geographical proximity between the perpetrator and the victim, and the victim knows the perpetrator. In cyberstalking, on the other hand, perpetrators usually choose the victims at random, and they can sometimes follow up the victims from another city or country. In this context, it is difficult to determine the identity of the perpetrator.

Although cyberstalking differs from stalking due to the nature of the cyberspace and its impact on the victim, the purpose of both

[18] Stark E., *Looking Beyond Domestic Violence: Policing Coercive Control*, in *Journal of Police Crisis Negotiations*, 12(2), 2012, 209.

[19] Bureau Fédéral de l'égalité entre femmes et hommes, *Mesures de lutte contre le stalking. Vue d'ensemble des pratiques appliquées en Suisse et à l'étranger Rapport de recherche,* 70, *https://www.newsd.admin.ch/newsd/message/attachments/49874.pdf*, (accessed: 01/09/2021).

actions and the legally protected interest they violate are basically the same[20].

In the explanatory report of the Istanbul Convention, cyberviolence is partially included in the broader concept of stalking as a form of violence. According to this definition stalking can also include following the victim in the virtual world «as well as» spreading untruthful information online[21].

3. Prevention of cyber violence

The Istanbul Convention can also play a role in preventing cyber violence.

In Chapter III on the Prevention, art. 17 of the Istanbul Convention specifically refers to the participation of the «information and communication technology sector».

The Council of Europe has issued a publication on the implementation of art. 17, thus identifying four possible actions that governments, the private sector and the media can take together to promote measures to prevent violence against women and domestic violence[22]. These measures can be summarized as follows:

- improve the training of media professionals on issues related to gender equality and violence against women;
- promote the self-regulation of the media and the regulation of discriminatory and violent contents;

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[20] Soygüt B., cit., 192.

[21] *Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence*, *https://rm.coe.int/16800d383a* (accessed: 01/09/2021).

[22] *Encouraging the participation of the private sector and the media in the prevention of violence against women and domestic violence*: art. 17 of the Istanbul Convention, *https://rm.coe.int/CoERM Public CommonSearchServices/DisplayDCTMContent?documentId=09000016805970bd* (accessed: 01/09/2021).

- create partnerships to increase media coverage of gender equality and violence against women;
- promote cooperation in media education.

Conversely, the Istanbul Convention does not contain specific provisions to secure electronic evidence in national and international investigations relating to online violence against women.

4. Final thoughts

We tried to explain that cyber violence perpetrated against women in the cyberspace is a type of violence that falls within the scope of the Istanbul Convention. An additional protocol to cover all types of cyberviolence, with a clear definition of cyberviolence, will allow a uniform application of the Convention by the states parties and will provide them with clear guidance to define behaviours which constitute cyberviolence and to criminalise such behaviours.

Domestic violence in light of the Istanbul Convention: some procedural issues

Lucia Parlato

1. Introduction

It is very significant and useful to examine the contents and the impact of the Istanbul Convention in a comparative perspective. Currently, all countries are becoming more aware of the gravity of gender-based and domestic violence. In particular, domestic violence is especially insidious, since it is a very widespread phenomenon and takes many forms. International scholarship has been addressing these issues, in order to generate a common reaction, more homogeneous and appropriate in the fight against these crimes. Under this perspective, the Istanbul Convention (Council of Europe Convention on preventing and combating violence against women and domestic violence, hereinafter referred to as IC), which is now eleven years old, is not simply a point of arrival, but it really represents a starting point for the protection of women.

This paper concerns domestic violence (hereinafter referred to as DV) and focuses on the connected criminal procedure topics. Following an attempt to define DV, the second part concerns the profile of the victim. The third part of the paper highlights two

procedural issues, namely the complaint and the evidence. After that, the duty of the States to grant legal aid will be analysed.

2. An attempt to define domestic violence

DV is a broad and challenging topic, difficult to frame. In the light of art. 3 of the Istanbul Convention, "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. It is evident that DV results in a partial overlapping with the phenomenon of violence against women, also defined by art. 3 IC.

Since the limits of domestic violence are elusive, it is hard to recognise and fight. The first image that comes to mind, when we talk about it, is beating and sexual abuse. But actually, DV consists in many other conducts. The definition of DV cannot be a clear-cut one. The main question is precisely what are the conducts that can be labelled as "domestic violence".

According to the World Health Organization (WHO), criminal conducts at home can be perpetrated in a wide range of "violent activities". Violence can be physical (beatings, torture, murder), but they can also be sexual (unwanted intercourse, harassment, sexual jokes), psychological (manipulation, threats, humiliations, intimidation), even economic (obsessive control of finances, money subtraction), or in the form of stalking (persecution, obsessive control of phone calls or messages)[1].

[1] Sacco M.A. *et al.*, *The impact of the Covid-19 pandemic on domestic violence: The dark side of home isolation during quarantine*, in *Medico-Legal Journal*, 2020, Vol. 88(2) 71–73; World Health Organization, *Violence and injury prevention*, in *www.who.int/violence_injury_prevention/violence/en*.

It is now clear that DV is made of several different layers. An ECtHR 2020 judgment is noteworthy in this regard[2]. In the "Buturuga case", it is highlighted that DV can be perpetrated even through the checking of social media accounts or messages without consent of the victim. In fact, in this case a man abusively accessed the social media accounts of his ex-wife, checked their contents and acquired images and data while the woman was not aware of it.

Consequently, the European Court recognised the violation of art. 3 ECHR (prohibition of inhuman and degrading treatment) and art. 8 ECHR (right to respect for private life). In this regard, it is significant to point out that GREVIO recently launched a public consultation to efficiently address the digital dimension of violence against women[3]. This consultation aimed at appropriately formulating the draft of a General Recommendation on the Digital Dimension of Violence against Women. In highlighting the variety of possible DV forms, it cannot be overlooked that it is a "transversal" issue, and can appear in all the strata of the society.

3. Who are the victims?

In identifying the profile of the victims in DV cases, various issues arise. On a general level, it can be observed how anyone who lives in the same house, where violent behavior is committed, could become a domestic violence victim. Moreover, domestic violence is often perpetrated against women cohabiting with their aggressor, however there are many other potential offended people too.

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[2] ECtHR, 11 November 2020, *Buturuga v. Romania*.

[3] *GREVIO launches public consultation on the draft General Recommendation on the Digital Dimension of Violence against Women*, 21 May 2021, in *https://www.coe.int/en*.

In this frame, a relevant issue concerns the involvement of minors as victims of the offence. According to the Italian system, even if minors are not the direct victims of an assault or a form of violence, the very fact of being present during the perpetration of a crime makes them victims. This solution was first introduced by the case-law[4] and later established by the law. The Italian legislator recently stated the same through the reform called "codice rosso", of 2019, with regard to abuse in the family[5].

Establishing that these minors are victims too has not only a theoretical impact, but also a practical one. In fact, if they are considered as victims, they are bound to give evidence if they are called as witnesses. In other words, they can not avoid testifying, notwithstanding their close family relationship to the accused (art. 199 criminal procedure code, hereinafter referred to as CPC).

Furthermore, considering different perspectives, it emerges that there are also other questions and borderline cases. For instance, even if two people do not live under the same roof, they may spend a lot of time together in the same house, in particular if the abuser has the key of the victim's house. Or it can happen that a woman is assaulted in a public place by someone she is (or was) in a close sentimental relationship with. All these cases share some features with the more "common" cases of domestic violence. Some judgments of the ECtHR are relevant to the above mentioned cases. The one concerning the *Tërshana v. Albania* case[6] will be examined further below.

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[4] It. Cass., III, 17 May 2016, no. 45403, in *Dir. Pen. Contemp.*, 7 October 2016.

[5] Art. 572 CC; art. 9, Law 19 July 2019, no. 69; Schirò D.M., *Modifiche agli articoli 61, 572 e 612*-bis *del codice penale, nonché al codice delle leggi antimafia e delle misure di prevenzione*, in *Codice rosso*, B. Romano, A. Marandola (ed. by), Pisa, 2020, 96, 101.

[6] ECtHR, 4 August 2020, *Tërshana v. Albania*.

Another relevant issue derives from the fact that DV is a crime that "generates" not only "victims" but "particularly vulnerable victims", taking into consideration the relationship between the victim and the abuser. It can be affirmed both in the light of the 2012/29/EU Directive on victims' protection ("Whereas" no. 17, art. 22) and of the Italian legislation (art. 90-*quater* CPC).

4. Two weak points: complaint and evidence

In the frame of the criminal proceedings, at least two elements often become critical. The complaint and the evidence.

A) In the light of art. 44 of the Istanbul Convention, proceedings about DV crimes must not, in principle, be subordinated to the victim's complaint or its withdrawal.

However, for some crimes the complaint is needed, in order to guarantee the privacy of the victim. In Italy, for DV and gender violence (hereinafter referred to as GV) cases, it is often required by the law, but it is not withdrawable, or is withdrawable only before the judicial authorities. This measure aims at protecting the victim from intimidation, conditioning or brainwashing on the part of the accused and their family or of the victim's social circle.

The actual problem is that these types of crimes do not often arise because they occur secretly inside homes or as part of a family or sentimental relationship.

A significant point is that DV crimes are not easily reported. We need new methods to increase/encourage reports, new places/institutions to host victims in extreme cases.

This situation was even clearer during the covid emergency time. During the lockdown there was an increase of domestic violence cases but at the same time a decrease of domestic violence reports. That should sound like a "potential wake-up call for public institutions". This state of things depended on many silence

factors. As stressed by some Authors the list includes: close contact between the victim-abuser in terms of shared space and time, the lack of opportunities for the victim to escape abuse and forced isolation[7]. It is noteworthy that the reasons of the reports decrease are the same as those leading to domestic violence itself during the pandemic. These reasons can be considered as double effect factors.

A possible line of action could be to reinforce the "social control net". Thus, this could be in contrast with people's privacy. However, greater focus should be directed towards families in which there have been previous episodes of violence and those who are already known by the authorities. In these cases, it would be appropriate to set up an online social assistance service that intervenes periodically and compulsorily. Among other possibilities, it could be useful to «promote the reporting of violence during the rare moments the abuser is absent», or through "encrypted" methods; maintain online contact among teachers/educational institutions and young people, even during periods of isolation; «allow faster reporting by victims by sending simple codes or symbols to dedicated toll-free numbers; encourage the reporting of cases by family members, acquaintances, neighbours who have news or suspicions; protect victims who report episodes of violence». Accordingly, information programmes and support initiatives through all mass media (TV, social networks, cell phones) should be increased[8].

B) Even if the complaint is not withdrawable, the problem of possible intimidation or pressure may emerge again at the time of giving evidence. The victim may try to describe the facts in a different light and minimize the cruelty of the conducts.

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[7] Sacco M.A. *et al.*, *The impact of the Covid-19 pandemic*, cit., 71.

[8] *Ibid.*, 71-73.

In this context, a victims' hearing is affected by the same issues we have already seen for the complaint. Considering together complaint and evidence, two problems often occur. Firstly, a delay in reporting the crime facts. Secondly, an unclear "declarative progression", which is intermittent and discontinuous. In this regard, the Italian Supreme Court clarified that these issues cannot by themselves undermine the "reliability" of the victim as witness[9].

The investigation of these crimes usually focuses mainly on a victim's hearing. However, considering the weaknesses of this type of evidence in DV matters, a central role is recognised to scientific evidence and in particular in DNA analyses. The ECtHR case-law is noteworthy in this regard, especially where it clearly underlines the importance of following these investigative paths[10].

5. The States' duty to grant legal aid

The last part of my paper is dedicated to art. 57 of the Istanbul Convention.

Art. 57 concerns the so called "legal aid". In the case of gender violence and domestic violence, the States «shall provide for the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law».

In the light of this norm, at least two important questions arise. They can be briefly analysed as follows.

A) The first issue to be addressed is why does legal aid play a very significant role in the frame of DV.

The norm under consideration, art. 57 IC, relates to the sphere of victims' procedural protection. But it involves also other per-

[9] It. Cass., III, 31 July 2020, no. 23419, in *http/penaledp.it*.

[10] ECtHR, 20 February 2020, *Y v. Bulgaria*.

spectives, in the context of the so-called four Pillars, the "4P" of the Istanbul Convention (namely, prevention, protection, prosecution, co-ordinated policy). In fact, technical defense often represents a precondition of each of the four indicated fields.

In the period immediately following violence, many victims of gender and domestic violence are forced to leave all their belongings or their jobs without prior warning. This results in victims being devoid of financial resources.

Victims often need legal aid in order to successfully claim their rights, as judicial and administrative procedures can be very complex and expensive. In fact, not all offended persons are able to bear the high costs involved in the use of justice. In many States (including Italy) it is not mandatory for victims to have a defense lawyer however actually they can not effectively exercise their rights by themselves.

For these reasons the European Council has deemed appropriate to impose on the States Parties the duty to provide the rights to legal assistance and free legal aid to victims in compliance with domestic law. art. 57 is inspired by art. 15, par. 2, of the Council of Europe Convention on Action against Trafficking in Human Beings (16 May 2005). Moreover, the topic of legal aid in favour of victims has received special attention on the part of the European Council, also under the so-called Lanzarote Convention (Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, 25 October 2007, art. 31, par. 3). In the context of EU sources, the Directive 2012/29/EU follows a similar trend.

The Istanbul Convention and the Lanzarote Convention aim at protecting the victims and to shield them from the "violence" inherent to the trial itself. In this frame, the victims' protection has to be twofold. Victims might have both a passive and weak role or an active and strong one. On one side the offended party may need

assistance, information and support. On the other side they may want to take an active part in the proceedings. Both perspectives fall under art. 57 IC and involve the topic of legal aid. However, art. 57 IC does not automatically grant victims the right to free legal aid. The States are entitled to establish the criteria to obtain the above-mentioned assistance.

B) The second issue to be addressed concerns the relationship between art. 57 IC, on the one hand, and the case-law of the ECtHR and of Italian judges, on the other one.

In the context of the European Council, art. 57 IC fits in the well-established ECtHR case-law. In fact, it is possible to notice an evolution in favour of the victims' rights to legal aid also in the frame of the ECHR. The Court of Strasbourg has gradually recognised the importance of the victim's role in criminal proceedings. The involved conventional norms, in this context, are art. 2, 3, 4 and 8 ECHR[11]. In particular, it is significant that the Court of Strasbourg invoked art. 8 ECHR to stress the need of an effective protection of domestic life. It also invoked art. 2, 3, 4 and 8 ECHR, to point out the duty of the States to carry out effective criminal proceedings in cases of sexual abuse[12].

Incidentally, it could be appropriate to remember that also the Committee of Ministers of the Council of Europe – within Recommendation (2002) 5 of 30 April 2002 on the protection of women against violence – stressed that member States should "have an obligation to exercise due diligence to prevent, investigate and punish acts of violence, whether those acts are perpetrated by the State or private persons, and provide protection to victims".

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[11] Marandola A., *Reati violenti e Corte europea dei diritti dell'uomo: sancito il diritto alla vita e il "diritto alle indagini"*, in *www.sistemapenale.it*, 22 September 2020.

[12] Among others, see again ECtHR, 20 February 2020, *Y v. Bulgaria*.

Besides the self-evident "negative obligation" to abstain from behaviour that violates the fundamental rights under art. 2, 3 and 4 ECHR, the ECtHR recognises that the States have several "positive obligations" both in the substantial sphere and the procedural one. As far as the latter is concerned, it is mandatory for the States to ensure the actual identification and punishment of the perpetrators. State authorities are obliged to conduct complete and effective investigations.

In this frame, the States shall also guarantee to the victim and their close relatives the right to participate to the criminal proceedings, to be heard and to introduce evidence. At the same time victims need to be protected from the risk of "secondary victimization", which could result also from the participation of the charged in the trial, or from the dynamics of the proceedings.

It is this case-law trend that stresses the necessity of protecting the victim through the justice system, but also from it. Many ECtHR judgments are noteworthy in this regard, but only some of them will be taken under consideration for lack of space.

In the recent case *Tërshana v. Albania*[13], the victim suffered grievous injuries in an acid attack by an unidentified assailant (the former husband was the main suspect). The European Court recognised the State authorities' failure to conduct a prompt and effective investigation into the identification, prosecution and punishment of the assailant. According to the Court, they failed to protect the woman's life and her right to a private life under art. 2 and 8 ECHR.

This judgment is important since it clearly confirms a "positive obligation" for the States, namely an "obligation to do", which was already stated in previous cases[14].

[13] ECtHR, 4 August 2020, *Tërshana v. Albania*.

[14] ECtHR, 9 June 2009, *Opuz v. Turkey*; 27 May 2014, *Rumor v. Italy*; 2 March 2017, *Talpis v. Italy*; 1 June 2017, *Volodina v. Russia* (see now 14September 2021, *Volodina v. Russia*).

In particular, the Court formerly underlined that the passage of time can compromise the investigation, because of the loss of evidence[15]. Following this warning, the Italian legislator introduced a reform (Law 19 July 2019, no. 69 on domestic and gender violence), the so-called "codice rosso" ("red code"). The latter has introduced new crimes (*inter alia* art. 583-*quinquies* of the criminal code – hereinafter referred to as CC – "Permanent disfigurement of the face"), new prevention tools and specific measures to contrast violence against women.

The above mentioned interpretative current of the European Court is the very "cornerstone for the protection of victims". In this context, the ECtHR has affirmed the importance of granting free legal aid to victims, as the latter plays a central role in enabling victims and their close relatives to participate in the investigations and the trial. In this frame, the ECtHR has recognised several violations of art. 2 or art. 3 ECHR, in the procedural sphere. In some cases, the Court of Strasbourg stressed that the victim could not participate in the proceedings in a suitable and effective way, since he/she was not granted free legal aid[16].

The *Savitzkyy v. Ucraina* judgment concerns a case of alleged abuse by the police[17]. This judgment summarises the various ways in which legal aid was taken into consideration within the ECtHR case-law. The applicant claimed that he was not able to effectively participate in the investigation, because free legal aid was not granted. The ECtHR highlighted the core of its "finalistic perspective", that is to assure that human rights are "practical" and "effective". On this basis, the Court affirmed that the State's positive obligations,

[15] ECtHR, 2 May 2017, *Talpis v. Italy*.

[16] ECtHR, 26 July 2012, *Savitskyy v. Ukraine*; 7 January 2010, *Rantsev v. Cyprus and Russia*.

[17] ECtHR, 26 July 2012, *Savitskyy v. Ukraine*.

deriving from art. 3 ECHR, include the duty to grant access to legal aid too. The latter has to be guaranteed to victims in a concrete way. Consequently, the ECtHR condemned Ucraina for failing to meet its positive obligations and to provide the applicant with free legal assistance in order to ensure an effective participation in the proceedings. The judgment is emblematic of the Court's trend aimed at fully protecting the victims' rights.

A similar line of reasoning emerges from the *Rantsev v. Cyprus* and Russia judgment, where the Court acknowledged the violation of art. 2 ECHR and condemned the State of Cyprus for not conducting a satisfactory investigation[18]. In this case, the State authorities did not provide legal aid to the father of a murder victim. It is true that the applicant did not carry out the right procedure to obtain legal aid. Nevertheless, the Court stressed the duty of the State to inform the people involved in a trial about the correct protocol, through the judicial authority. This conclusion reflects the trend of ECtHR case-law under art. 6 ECHR and art. 3 and 8 ECHR.

In the same context, the *E.B. v. Romania* case is about the alleged rape of a person considered particularly vulnerable because of her mental disability. The lack of legal aid was strongly stigmatized by the ECtHR[19]. The Court stressed the risk of further traumas for the victim during the proceedings. Moreover, it clearly promoted legal aid as a tool for victims' protection and to avoid "secondary victimization". The latter – as the Court pointed out – is the sufferance that the proceedings can cause to the victim.

In conclusion, it is evident that the ongoing evolution of the ECtHR case-law aims at including victims' legal aid in the list of

[18] ECtHR, 7 January 2010, *Rantsev v. Cyprus and Russia*.

[19] ECtHR, 19 March 2019, *E.B. v. Romania*.

the States' procedural duties in criminal matters. This attention for the needs of the victim has been strengthened even beyond the consideration of their civil rights. This has been also confirmed also by a recent European Court judgment, which involved Italy. The judgment recognised for the first time a violation of the right to a fair trial (art. 6 ECHR), in favour of a victim who had not yet appeared as a civil party in the criminal trial (since it was not yet possible according to the deadlines set by the Italian law)[20].

In order to ensure that adequate care is given to the victims of these crimes, the ECtHR stated that whenever there are any doubts about the occurrence of domestic violence or violence against women, special diligence of the State authorities is required, to deal with the specific nature of the violence in the course of the proceedings[21].

6. Final remarks

In conclusion, it may be appropriate to add some considerations on the Italian situation. Following the entry into force of the Convention, the Italian legislator approved Law no. 77 of 27 July 2013, introducing in the CPC dispositions on vulnerable witnesses' protection and on victims' rights in the frame of non-lieu procedure. Among other innovations, what is relevant for us is that the legislator also modified the "legal aid law": they provided the victim of some gender/sexual/domestic crimes with technical defense paid by the State.

As was already mentioned, Law no. 69 of 2019 (the so-called "codice rosso") introduced new norms in the CC and in the CPC, regarding gender and domestic violence. Among these innovations,

[20] ECtHR, 18 March 2021, *Petrella v. Italy*.

[21] ECtHR, 9 July 2019, *Volodina v. Russia*.

the law affirmed that the victim of these crimes shall be heard within three days after the beginning of the investigation.

In conclusion, the Italian legislator provided a set of measures to protect the victim, however some judgments still question the reasonableness of legal aid in favour of victims. The following lawsuit is emblematic of this trend.

An Italian judge has recently challenged the norm which provides legal aid (art. 76, par. 4-*ter* "Consolidated Act on Justice Costs", d.P.R. 30 May 2002, no. 115) in favour of GV and DV victims, irrespective of their economic situation and without any judicial assessment (the norm does not allow any judges to deny legal aid under any circumstances). The alleged defect concerned the incompatibility of the law with the principle of equality and with the right of defense. Consequently, the Constitutional Court was called to decide on this matter[22]. It clearly reaffirmed the constitutionality of this form of legal aid. The latter – according to this decision – is the result of the legislator's unquestionable choice, aimed at supporting particularly vulnerable victims and encouraging them at report crimes. For this reason, legal aid has to be granted to all victims of the above-mentioned crimes regardless of their financial means.

There should be no need for such a clarification, which should have been taken for granted. It appears that a lot has been done, but there is still a lot to do, especially on a general and cultural sphere, to assure that the victim can have an active and effective role in criminal proceedings. This is also demonstrated by a recent judgment in which the European Court condemned Italy. The case was about the alleged rape of a young woman. The second instance judge – the Court of Appeal of Florence – acquitted the accused, expressing

[22] It. Const. Court, 11. January 2021, no. 1.

very hard considerations against the victim. Aspects of her private life were mentioned by the judge: among those, her sexual orientation and her clothing at the time of the violence. A violation of the art. 8 ECHR was recognised because of the words levied by the Court of Appel. According to the ECtHR, it used "language and arguments that vehicle the prejudices on women's roles that exist in the Italian society"[23]. Words are important and what victims seek in the trial is often an "acknowledgment"[24].

[23] ECtHR, 27 May 2021, *J. L. v. Italy*.

[24] Parlato L., *Il contributo della vittima tra azione e prova*, Palermo, 2012, 89 ff.

CHAPTER 3

THE YOUNG SCHOLARS' CONSIDERATIONS

Stalking by partner in the context of violence normalised myths

Neslihan Can

1. Introduction

In the incident occurring from Malatya, Turkey to Kilis, Turkey, B who has unrequited love for his highschool classmate, A who currently works as general practitioner while both used to study in a highschool course. When A moved to another city following matriculating to university, B also gets the medical school, closes at his feet by waiting at the door of the unit where A is intern, he texts or calls to find out who she is talking to when she is online on Whatsapp. No matter how A moves to another city or changes her dwelling for seven years to get rid of being stalked by B, everytime B finds out where she is, on the quiet takes pictures of her, sends to her and tries to get in touch with her[1].

In another incident occurs in Antalya, Turkey, C gets text messages to get back together from her ex-husband who got divorced with five years ago but she turns him down. Then ex-husband D

[1] *https://www.medimagazin.com.tr/guncel/genel/tr-kadin-doktor-7-yildir-zindan-hayati-yasiyor-genc-doktora-yakin-olmak-icin-tip-fakultesini-kazanan-sapik-hacer-dyi-olumle-tehdit-ediyor-11-681-90896.html* (accessed: 15.01.2021).

starts to stalk C. When C meets her friends, D comes across and insults her in front of her friends. After a month D shoots a bullet in her foot[2].

In both the incidents which also reflect the media, there are stalking by the perpetrators with the motive of reuniting. Whereas the victim and perpatrator used to be in the same class in the first one, the second has a marital relationship that ended. Although stalking is considered as a phenomenon carried out by strangers, it is a form of violence against women and domestic violence. According to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) stalking is being described as "the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety"[3] and the parties are obliged to criminalise this conduct. Turkey as (was) being party to the Convention does not prescribe stalking as a particular crime, but in the Code of Protection of the Family and Prevention of the Violence against Women numbered 6284 stalking is enumerated as a form of violence. The Code numbered 6284 provides the victims to apply for protective and preventive measures. In practice, suspension measures are frequently applied to the stalker. In spite of applying to suspension measure against the stalkers in above mentioned incidents, they do not stop stalking.

In this paper stalking is discussed with a couple of well-known myths as well as the validity of these myths. The myths based on the relationship between the perpetrator and the victim, such as the consideration that only famous people are exposed to stalking,

[2] *https://www.haberler.com/eski-kocasinin-silahla-yaraladigi-kadin-dehset-13083136-haberi/* (accessed: 15.01.2021).

[3] Art. 34 of Istanbul Convention.

that stalking does not pose a danger to the victim, the perpetrator uses stalking because he/she loves the victim, are addressed through criminological studies and incidents reflected in the media. Following this, stalking is taken into consideration with the role of the current/former relationship between the perpetrator and the victim and the gender role and the solutions for combatting stalking are presented.

2. The concept of stalking

Even though stalking dates back to humankind history, it has caught attention of public with the media bringing the paparazzi which followed Son of Sam and Jack Kennedy in the form of stalking and harassment in the 1980s. In a short time stalking is identified with serial murder, rape and the perpetrators who murder the celebrities. In press releases between 1980-1988 stalking was used as obsessive conducts, psychological violence and rape against female former or current partner by the male. Stalking which is considered as a form of violence against women, did not receive enough media attention despite women's movements during this period. Between 1989-1991, following that famous actress Rebecca Shaeffer being murdered by her obsessed fan stalking was perceived as conduct against celebrities by obsessive fans[4]. Owing to the efforts of lobby on domestic violence, stalking has been taken as a phenomenon that occurs when the woman is abused by her former or current partner, and thus, it has been identified with one of its old meanings[5].

[4] van der Aa S., *Stalking as a Form of (domestic) Violence Against Women: Two of a Kind?*, in *3° Rassegna Italiana di Criminologia*, 2012, 175.

[5] van der Aa S., *Stalking as a Form of (domestic) Violence Against Women: Two of a Kind?,* cit., 175-176.

Stalking is a phenomenon that needs to be addressed not only from legal perspective but also psychological perspective. Being result of an asymmetric relationship, as the attempts to communicate with the victim fails, the stalker becomes obsessed with the victim[6]. Stalking may occur in a large scale. For instance, unwanted phone calls, sending unsolicited e-mails or notes to the victim, following the victim, spying on the victim, waiting for the victim without a reasonable reason, leaving flowers, gifts and other materials for the victim, spreading rumors or various information about the victim on the internet or verbally are described as stalking[7].

Stalking is not carried out by only the stalker in person, but also proxy stalker such as a friend or relative of the stalker[8]. In a meta-analysis study conducted on stalking conducts, seven different behavioral patterns are identified. Among these excessive sincerity, sending flowers or notes are aimed to communicate to the victim. By following, approach and observation the stalker aims to get closer to the victim and almost keeps a tight rein on the victim. Conducts that violate to private sphere of the victim varies from violation of the immunity of residence to violation of confidentiality of communication. Commination and harass-

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[6] Bağ B., *Bir Şiddet Türü Olarak Saplantılı Takip Etme Hâli*, in *Zeitschrift für die Welt der Türken*, 2012, 4 (1), 166.

[7] The acts are numerated according to *the Supplementary Victimization Survey/ SVS)*. See also Baum K., Catalano S., Rand M., Rose K., *Stalking Victimization in the United States*, *https://www.justice.gov/sites/default/files/ovw/legacy/2012/08/15/bjs-stalking-rpt.pdf* (accessed: 15.01.2021), 1.

[8] The relationship between the stalker and proxy stalker may be explained from the perspective of criminal law as accomplice or indirect perpetrator. For instance in the first incident according to the statement of A, who is claimt being victim of stalking B stalks her via Syrian kids who are placed into corners to follow her. In this case B may be indirect perpetrator of stalking if the kids are not legally competent.

ment is the perpetrator telling the victim that he will commit suicide, threaten and force him/her to be with him/her. On one hand duress and force is stated as conducts that cause the perpetrator to limit the mobility of the victim. Aggression is the act of directly damaging the victim's personality or property, including their pet[9].

Even if the conducts are not considered per se illegal, when they are seperately analyzied persistency of the conducts leads threat to the victim and/or his/her family about their safety[10]. In order to prescribe a conduct as stalking, this conduct must be repeated many times and continuously, it must be unwanted by the victim and violate the victim's living space and cause fear and anxiety[11]. The motivation of the perpetrator may vary from controlling over the victim, jealousy to revenge. According to the study carried out by USA Ministry of Justice, when the victims are asked about the motivation of the perpetrator, 21 percent of victims answered as controlling, 20 percent upholding the relationship and 16 percent of victims answered that the perpetrator wants to scare them[12].

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[9] Bağ B., *Bir Şiddet Türü Olarak Saplantılı Takip Etme Hâli*, cit., 169.

[10] Baum K., Catalano S., Rand M., Rose K., *Stalking Victimization in the United States*, cit., 1.

[11] Bağ B., *Bir Şiddet Türü Olarak Saplantılı Takip Etme Hâli*, cit., 170.

[12] Melton H.C., *Stalking in the Context of Intimate Partner Abuse In the Victims' Words,* in *Feminist Criminology*, 2007, 2 (4), 348. In the criminologic research conducted by *Melton* which was conducted with 21 women who were stalked by their (former) partners, stated why the stalker applies this; 28.6 percent of the participants say that their partner used stalking to control themselves, 23.8 percent say that because of the stalkers' anger, 14.3 percent because of jealousy of the perpetrator, 14.3 percent to get into together with their partner, 14.3 percent to intimidate, 14.3 percent because of their love or concern for themselves and 9.5 percent because of their mental or physical illnesses. See *ibid*. 351-352.

Stalking differentiates from some similar concepts. One of the most frequently confusing conduct is cyberbullying which is aimed to humiliate the victim by insulting, blackmailing or threating him/her by means of information technologies[13]. However to take an act as cyberbullying, both the victim and perpetrator must be children. If the perpetrator is an adult, the act can be taken as cyberharassment or cyberstalking[14]. Particularly as in case of this study's topic when there is partnership between the perpatrator that is mostly an adult, and victim it must be defined as cyberstalking not cyberbullying. Whereas the intent of aggrieve the victim is in the frame in cyberbullying, in cyberstalking the intent appears as controlling and harassing the victim by constantly following[15]. Creating fake accounts by name of the victim, logging into these accounts, tagging him/her on insulting posts, putting his/her car GPS receiver are few of cyberstalking acts[16]. According to one survey of Bureau of Justice Statistics in USA one in four stalking victims is exposed to cyberstalking and 83 percent of these are stalked via mail and 35 percent of these via instant messaging apps in 2009[17].

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[13] Yetim S., *Siber Zorbalık, Türkiye ve ABD Karşılaştırması (ABD V. Drew Dosyası)*, in *TBB Dergisi*, 2015, 28 (120), 329.

[14] *Ibid*., 329.

[15] *Ibid*., 331.

[16] Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu*, in Çankaya Üniversitesi Hukuk Fakültesi Dergisi, 2020, 5 (1-3), 2787. In an incident reflected in the media in Turkey, the perpetrator living in Germany offered to reconcile with his ex-wife in Turkey, and when his wife did not accept this offer, he shared his ex-wife's photo and address information and stated that he was a prostitute. See *https://kirsehirhaberturk.com/haber-eski-esini-sosyal-medyada-hayat-kadini-olarak-tanitti-3676.html* (accessed: 25.01.2021).

[17] Baum K., Catalano S., Rand M., Rose K., *Stalking Victimization in the United States*, cit., 1.

3. Common myths on stalking

According to one report published within National Stalking Awareness Week in 2018 in the UK, although stalking is defined as crime in the Protection from Harassment Act (1997) in England and Wales, the Criminal Justice and Licensing Act (2010) in Scotland, the Protection from Harassment Order (2010) in North Ireland, there are couple of myths claiming that stalking is not a crime[18]. This part of the study, the standing of these myths is discussed by using this report as base.

3.1. "Only the artists, celebrities and public figures are exposed to stalking"

Early on in Germany the examples have shown that celebrities are victims of the stalking mostly, later on the studies have approved that non-celebrities are too[19]. The studies have shown that the percentage of victims stalked by ex-partners are higher than the ones stalked by an acquaintance or strangers. However the percentage of conviction of ex-partner is remarkably lower than stranger perpetrators[20]. It tries to explain with The Just World Hypothesis of Lernen. According to this hypothesis, unfair situations are re-interpreted to maintain the belief of controllable and fair world. In a fair world, people take what they deserve. The incidents are interpreted in a way that the victim deserves what he/she lives through

[18] *https://www.mysistersplace.org.uk/wp-content/uploads/2019/07/Stalking_Fact_Sheet.pdf* (accessed: 15.01.2021), 1.

[19] Ünver Y., *Ceza Hukuku Açısından Mobbing, Stalking ve Cinsel Taciz Eylemleri*, in *Ceza Hukuku Dergisi*, 2009, 4 (11), 113.

[20] Sheridan L., Raphael Gillett R., Davies G.M., Blaauw E., Patel D., *'There's no smoke without Fire': Are male ex-partners perceived as more 'entitled' to stalk than acquaintance or stranger stalkers?*, in *British Journal of Psychology*, 2003, 94, 88.

including the victim's characteristics. The judicial authorities may consider the stalkers who has common history with the victim is more competent to harass than strangers[21].

In a criminologic research conducted by Sheridan and others, the sample are presented six different relationship scenario between the victim and perpetrator such as ex-partnership, acquaintance, strangers, being man and/or woman. The sample has defined the incident as stalking more when the perpetrator and victim are stranger to each other or acquaintance comparing to being ex-partner. Being old acquaintance especially ex-partner results in putting the blame more on the stalking victim for the sample. Moreover being acquaintance is taken as situation that required less police intervention[22]. Ultimately the research approved the just world hypothesis, yet the sample is of the opinion that "no smoke without fire" and a person would not be irrational without any reason to stalk another. In the light of the hypothesis, the police intervention must be less in "domestic disputes" since both sides are responsible for the incident[23].

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[21] *Ibid.,* 88. This situation may be explained with bystander effect. It is used to explain the situation of people who are eyewitnesses but do not intervene during the commission of a crime. For example, in the murder of Kitty Genovese in New York in 1964, although 38 neighbors witnessed the act, none of them even reported the situation to the police. Their justification is that they describe the situation as a "lover's fight". See, *ibid*., 89.

[22] *Ibid*., 94-96.

[23] *Ibid*., 96. Although domestic violence is considered a family issue in the society, judicial authorities need to be free from these myths and misconceptions. For example, in *Opuz v. Turkey* case, the ECtHR stated that when victims of violence apply to law enforcement, the law enforcement authorities assume the role of mediator and recommend that the victim withdraw their complaint or return to their home (para. 195). See Erbaş R., *Effective Criminal Investigations in Combating Domestic Violence and the ECtHR: Prima Ratio v. Ultima Ratio?*, in *Gender Based*

The existence of a partnership between the victim and the perpetrator normalizes stalking in the eyes of the people. Another study conducted by *Summers and Feldman* has discussed in which situations the victims are blamed. A violent image between male perpetrator and female victim is showed to the sample and they are given additional information about the relationship between the perpetrator and victim such as marriage, living together and acquaitance. It resulted in that as the degree of closeness between the perpetrator and the victim increased, the rate of finding the victim at fault increased[24].

Coming to Turkey, even if there are very limited jurisprudence on stalking by ex-partner, in cases analyzied it is not found any victim-blaming myths. In the case of the spouse who sent many written messages to his seperated wife, who was in the divorce phase, despite not getting a response, Court of Cassation decided that he should be sentenced the crime of disturbing an individuals' peace and harmony (Turkish Criminal Code/TCC art. 123) because of his "insistent and just the motive of disturbing"[25]. In the same vein Court of Cassation evaluated within TCC art. 123 the perpetrator's act that after breaking up with the victim he lived with, refused the offer of reconciliation, followed the victim persistently, wandering around his house and proposing to marry[26].

Approaches to The Law And Juris Dictio In Europe, E. Stradella, G. Spanò (eds.), Pisa University Press, 2020, 233.

[24] *Ibid*., 89.

[25] Court of Cassation Penal Chamber numbered 18, Merits no. 2019/7634, 2020/9597.

[26] Court of Cassation Penal Chamber numbered 14, Merits no. 2014/2506, 2015/9030.

3.2. "Stalkers are with limited social skills and lonely people"

Even though it put forward that stalking conducts increase owing to loneliness and isolation of modern person and reduced social control on him/her[27], criminologic data confutes this argument. A study conducted by Kamphuis and others shows that 80 percent of stalkers who stalked their ex-partners have no psychiatric disorder related to their social skills[28].

According to the Los Angeles Threat Management Unit's stalker classification, there are three main type of stalkers as simple obsessional, love obsessional and erotomaniac stalker[29]. Simple obsessional type knows the victim beforehand and there are social interaction between the victim and stalker such as romantic or sexual relationship, neighbourhood or friendship. This type of stalkers' sociocultural and economic background in the society does not matter. His/her self confidence is hurt after being rejected by the victim and he/she aims to control over the victim. Even if it does not require that the stalker has psychriatric disorder, he/she may have personality disorder[30]. This type of stalking cases, since there is history between the stalker and victim, judicial authorities may

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[27] Bağ B., *Bir Şiddet Türü Olarak Saplantılı Takip Etme Hâli*, cit., 167.

[28] Kamphuis J.H., Emmelkamp P.M.G., de Vries V., *Informant Personality Descriptions of Postintimate Stalkers Using the Five Factor Profile*, in *Journal of Personality Assessment*, 2004, 82 (2), 174. According to the research, 83 percent of stalkers are people with normal functions and extra sensitivities about rejection, abandonment and loss. While 10 percent of stalkers have a criminal history and do not feel guilt or anxiety, 3 percent are highly disturbed/psychotic.

[29] Bağ B., *Bir Şiddet Türü Olarak Saplantılı Takip Etme Hâli*, cit., 170; Akduman İ., Ünsalver B., Cavlak M., Oral G., Cansunar N., *Takipçi Tacizcilik*, in *Adli Psikiyatri Dergisi*, 2006, 3 (3-4), 28.

[30] Akduman İ., Ünsalver B., Cavlak M., Oral G., Cansunar N., *Takipçi Tacizcilik*, cit., 28.

not pay enough due diligence, moreover the victim also may not be aware of the seriousness of the issue[31].

Love obsessional stalker has neither former or current relationship with the victim nor interaction. He/she with psychiatric abnormalities has no social skills and disturbs the victim[32]. This type of stalker may be from the victim's workplace, may make shopping in same store or anyone on the street[33]. Coming to erotomaniac type of stalker, due to his/her psychiatric disorder he/she has the delusion that the victim is in love with him/her. The presence of this delusion at a certain intensity is known as Clerambault Syndrome in psychiatry. A person with this syndrome may have incidental and insignificant contact with the subject of their obsession[34]. Although one category of stalkers is the erotomatic group, it has also been stated that reducing stalking to the level of obsessions or other psychiatric disorder may prevent the fact that it is a type of gender-based violence[35].

3.3. "Stalking and sexual harassment are the same"

It is a myth that stalking and harassment are the same, because in stalking, although the stalker's behavior disturbs the victim, his/her motive is different from that in harassment. If there is insistence and obsession in the behavioral pattern of the stalker and this

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[31] *Ibid*.

[32] Bağ B., *Bir Şiddet Türü Olarak Saplantılı Takip Etme Hâli*, cit., 170.

[33] Akduman İ., Ünsalver B., Cavlak M., Oral G., Cansunar N., *Takipçi Tacizcilik*, cit., 29.

[34] Okumuş B., Kocaoğlu Ç., *Karşılıksız Aşk 'de Clerambault Sendromu': Bir Olgu Sunumu*, in *Klinik Tıp Bilimleri Dergisi*, 2018, 6 (1), 37.

[35] Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu*, cit., 2785.

causes stress and alertness in the victim, there is stalking[36]. Stalking may occur with any conduct but sexual harassment does only occur with sexual acts. In sexual harassment, the perpetrator's motive is to sexually disturb the victim and it is under the category of crimes against sexual immunity. However the stalker's motive is not necessarily to disturb the victim sexually. Moreover the protected legal value in stalking is to peace of the victim[37].

3.4. "If the stalker does not threaten the victim, the victim is not in danger"

Stalking and threat is similar regarding to consist of fear in itself, there is consistent fear in stalking. However, it is not always the stalker's conduct that he/she will commit an evil act to the victim or their relatives, which causes fear in stalking. Becaıse even if the stalker does not threaten victim explicitly, knowing that the victim is constantly being watched by the stalker, constantly followed is frightening in itself[38]. In particular, following the victim's life habits and behavioral patterns by his/her ex-partner may lead to a more traumatic situation. In addition, the victim's feeling of having to make changes such as leaving his/her school or job, taking extraordinary security measures, moving, is both material and moral burden on him/her[39]. Therefore, the victim is in danger in terms

[36] *https://www.mysistersplace.org.uk/wp-content/uploads/2019/07/Stalking_Fact_Sheet.pdf.*

[37] Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu*, cit., 2799.

[38] Türkoğlu S., *Ceza Hukuku Açısından Israrlı Takip*, Istanbul, On Iki Levha Press, 2020, 62-63.

[39] For example, according to the National Victimization Survey conducted in the USA, approximately three in ten perpetrator victims have had to spend extra on things like attorneys' fees, damage to property, childcare costs, relocation costs, or

of his/her own safety. In addition, the stalker may also threaten the child, spouse, parents or one of the relatives of the victim in order to control over and intimidate the victim and these people may possibly be secondary victim of stalking and threat too[40].

After stalking, the stalker may kill the victim too. After one of the partners ends the relationship, the other threatens the victim in order to get together again and can kill when they do not get together. In an incident that was reflected in the media in Turkey, the woman who left her husband moved to another city and started to work. According to the information reflected in the indictment, the perpetrator, who repeatedly called his wife to reconcile, threatened that he would kill his wife and family when he did not receive a positive response from his wife, and upon the threat, the perpetrator was dismissed upon the request of the victim. Thereupon, the perpetrator killed his wife, who did not want to talk to him after he left the apartment, following his wife to work[41].

3.5. "Deleting social media accounts keeps potential victims safe"

As the technological developments and communication opportunities innovate, the risk of stalking people and penetrating their privacy increases too[42]. In fact, as a new crime trend, virtual stalking, which is carried out by using the internet and social media tools, is also on the agenda. It is argued in the doctrine that this form of

changing phone numbers. See Baum K., Catalano S., Rand M., Rose K., *Stalking Victimization in the United States,* cit., 7.

[40] Akduman İ., Ünsalver B., Cavlak M., Oral G., Cansunar N., *Takipçi Tacizcilik*, cit., 30.

[41] *https://www.haber7.com/guncel/haber/2878041-evi-terk-eden-esini-katleden-koca-50-lira-istedim* (accessed: 25.01.2021).

[42] Türkoğlu S., *Ceza Hukuku Açısından Israrlı Takip*, cit., 15.

stalking is as dangerous as stalking and causes harm to the victim, therefore it should be regulated as a aggravated circumtance[43].

However, deleting social media accounts will not be enough to end stalking, as it is possible for instance the stalker to install an application on the victim's phone to follow him/her too. In this way, the stalker will be able to know the photos, messages, files and phone calls of the victim even if he/she is not physically close[44].

3.6. "Stalker loves the victim"

The stalkers are motivated not by their love for the victim, but by exposing the victim to fear and stress. In addition, some motives such as honor may come to the fore in stalking. In another case reflected in the media in Turkey, stalker who thought that his ex-wife, who rejected the offer of reconciliation and started to work in a holiday resort, "will take a bad turn", came to the city where the victim worked, found her workplace and declared that he killed the victim "because he made a matter of honor"[45].

Although the Court of Cassation does not take into account these myths, it can be said that the media romanticize stalking incidents by the partner and do not pay attention. In another case in Turkey, which is the subject of an internet news, the woman who divorced her husband due to violence decided to suspend her because she was uncomfortable with her ex-husband's frequent visits to her home and workplace after the divorce. Thereupon, the spouse, who was given a restraining order, printed 2500 posters in various parts of the city with the words "One Last Chance" writ-

[43] *Ibid*., 92.

[44] *Ibid*., 86.

[45] *https://www.sozcu.com.tr/2016/gundem/eski-esini-bodrumda-bulup-oldurdu-1250925/* (accessed: 25.01. 2021).

ten on them. This was also included in the news content, and the photograph of the wife whose flower was not accepted, sent to her workplace on Valentine's Day, was used. In addition, the name of the ex-wife, who did not allow journalists to take pictures, was included in the news, and the photo of the woman was also used by including the poster in the news. The use of the ex-spouse as the subject in the headline and the emphasis on rejecting the flower show that the media has a victim-blaming attitude and romanticizes the act of stalking[46].

4. The role of gender and prior relationship in stalking

Although stalking has been thought of as a type of domestic violence, an act committed from a male perpetrator to a female victim, today it is seen that there is a heterogeneous understanding in perpetrator and victim profiles, both in terms of gender and whether there is a former relationship between the perpetrator and the victim[47].

Although there is no normative regulation regarding the crime of stalking in TCC there is "Code of the Protection of the Family and the Prevention of Violence Against Women" No. 6284, which aims to protect the victims of "unilateral stalking" through preventive interventions. When we look at the purpose and scope of the law, the fact that it includes stalking shows that stalking is also a type of domestic violence and violence against women[48].

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[46] *https://www.sondakika.com/haber/haber-5-yil-once-bosandigi-esi-barisma-teklifini-geri-6967292/* (accessed: 25.01.2021).

[47] van der Aa S., *Stalking as a Form of (domestic) Violence Against Women: Two of a Kind?,* cit., 175.

[48] See that stalking is a problem of violence against women Türkoğlu S., *Ceza Hukuku Açısından Israrlı Takip*, cit., 53. However according to the Implementation

The fact that stalking is a form of domestic violence can be explained by the fact that most men resort to stalking to control their former or current female partners, to force them to continue or restart the relationship[49]. According to the results of a criminological study involving 16,000 Americans, 60 percent of female participants and 30 percent of male participants were subjected to stalking by their former or current partners[50]. Victims who are stalked by their spouse, ex-spouse and boyfriend are more likely to be exposed to physical and sexual violence and threats than other victims[51]. Although it is widely believed that stalking is carried out to control the victim, whom the perpetrator can not reach physically, due to the termination of the relationship between the perpetrator and the victim, the act of stalking can also occur while the relationship continues. In the research conducted by Melton, 80.9 percent of the participants who were victims of stalking stated that they

Regulation on the Code numbered 6284 on the Protection of the Family and the Prevention of Violence Against Women art 3/1-ş, unilateral stalking is prescribed regardless of the existence of family relationship as «Regardless of whether there is a family ties or relationship between them, the perpetrator uses any means of actual, verbal, written or other communication, regardless of the content, against the victim of violence, in a way that causes fear and helplessness, physically or psychologically, in a way that causes concern for his/her safety. all kinds of attitudes and behaviors that will keep them under pressure».

[49] van der Aa S., *Stalking as a Form of (domestic) Violence Against Women: Two of a Kind?*, cit., 177.

[50] Tjaden P., Thoennes N., *Prevalence and Consequences of Male-to-female and Female-to-male Intimate Partner Violence as Measured by the National Violence Against Women Survey*, in *Violence Against Women*, 2000, 6 (142), 147.

[51] Akduman İ., Ünsalver B., Cavlak M., Oral G., Cansunar N., *Takipçi Tacizcilik*, cit., 29; Türkoğlu S., *Ceza Hukuku Açısından Israrlı Takip*, cit., 54; Statistics show that eight out of ten victims of stalking in Canada are women, and nine out of ten perpetrators are men. See Department of Justice Canada, *Stalking is A Crime Called Criminal Harassment*, *https://www.justice.gc.ca/eng/rp-pr/cj-jp/fv-vf/stalk-harc/pdf/har_e-har_a.pdf* (accessed: 15.01.2021), 3.

were exposed to stalking by their partners while in a relationship. At this stage, it was stated that the perpetrators resorted to stalking such as constantly calling, visiting the victim at workplace without giving notice, or popping into them on the their street. However, some of the victims described the perpetrator's regular visit to the workplace during relationship as a courteous act[52].

Although classifications are made at the point of the profile of the perpetrator of stalking, there is no specific victim profile. However, more women are victims[53], and the rate of homosexuals is higher among victimized men[54]. As a matter of fact, it is seen that more punishment is foreseen for crimes committed with hate motive, including disadvantaged groups in the USA, and stalking and cyber stalking are also counted among crimes committed with hate motive[55].

It should be evaluated whether stalking is a form of violence against women. When the definition in the Istanbul Convention is taken into consideration, violence against women is the fact that women are purely women, that is, the phenomenon of violence occurs with a gender motive. In many criminological studies carried out, there is a dramatic difference between women and men who are victims of stalking. Based on these rates, it can be concluded that stalking is a type of violence against women[56]. The reason why

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[52] Melton H.C., *Stalking in the Context of Intimate Partner Abuse In the Victims' Words*, cit., 355-356.

[53] Baum K., Catalano S., Rand M., Rose K., *Stalking Victimization in the United States*, cit., 3.

[54] Akduman İ., Ünsalver B., Cavlak M., Oral G., Cansunar N., *Takipçi Tacizcilik*, cit., 29.

[55] Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu*, cit., 2807.

[56] van der Aa S., *Stalking as a Form of (domestic) Violence Against Women: Two of a Kind?,* cit., 176.

men are less victimized is that men experience less fear than women in the face of acts constituting stalking[57]. Although stalking is a phenomenon as old as human history, the increase in the rate of perpetration of male perpetrators against their former partners is related to the change in the social position of women[58].

5. The situation in Turkish law

In Turkish law, as a means of combating stalking, protective measures that can be given by the local authority (art. 3) and protective (art. 4) and preventive measures (art. 5) that can be given by the judge are stipulated in the Law no. 6284. Although one of the obligations of the state is to prevent stalking, when these prevention tools are not sufficient, criminal law sanctions should also be introduced[59]. Because, when the prima ratio character of the criminal law does not come into play at the point where civil law or administrative measures are not sufficient, many rights of the person will be faced with the danger of being violated due to stalking, especially the material and moral integrity of the person, and the

[57] *Ibid*., 178.

[58] Türkoğlu S., *Ceza Hukuku Açısından Israrlı Takip*, cit., 15.

[59] Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu*, cit., 2794. For example in the informational booklet of the Ministry of Justice in Canada a "peace bond" which includes issues such as visiting the victim, communicating with the victim, children or family and being detained without carrying a weapon for up to twelve months, for those exposed to stalking by the former partner. In addition, a restraining order or a protection order can be obtained by applying to the family court. However, even in the booklet, it is suggested that such court decisions do not guarantee the safety of the person and that these decisions should be given to the local police, institutions and schools that take care of the children.

See Department of Justice Canada, *Stalking is A Crime Called Criminal Harassment*, cit., 7-8.

state will not fulfill its positive obligations in terms of protecting these rights[60].

Stalking acts are punishable due to the prima ratio character of the criminal law. Although not under the name of stalking in the TCC, these acts can be punished. The closest regulation in the TCC art 123 regarding stalking is "Disturbing an Individuals' Peace and Harmony"[61]. However, this article does not attach special importance to the partnership between the perpetrator and the victim, and the ability to combat stalking, which is an appearance of domestic violence, does not have an adequate level of protection through criminal law. However, with art 46 of the Istanbul Convention, it has obligated the parties to regulate some cases as qualified cases of crime that require aggravating circumtances. The first of these is "the offence was committed against a former or current spouse or partner as recognised by internal law, by a member of the family, a person cohabiting with the victim or a person having abused her or his authority"[62]. As it can be understood from the wording of the article, qualified status is not only limited to the civil status accepted under the name of marriage, but also situ-

[60] On the *prima ratio* character of criminal law in combating domestic violence and gender-based violence, see Erbaş R., *Effective Criminal Investigations in Combating Domestic Violence and the ECtHR: Prima Ratio v. Ultima Ratio?*, cit., 222.

[61] Art. 123 of TCC "Where a person persistently makes phone calls, creates noise, or otherwise acts in an unlawful manner, with the aim of disturbing a person's peace and harmony the offender shall be sentenced to a penalty of imprisonment for a term of three months to one year, upon the complaint of the victim". *https://www.legislationline.org/download/id/6453/file/Turkey_CC_2004_am2016_en.pdf* (accessed: 24.07.2021); Çinar A.R., *Kadına Yönelik Şiddetin Önlenmesine İlişkin İstanbul Sözleşmesinin Ceza Hukuku Alanında Öngördüğü Yükümlülükler*, in *Terazi Hukuk Dergisi*, 2015, 10 (106), 64.

[62] Art. 46/1-a of Istanbul Convention.

ations such as religious partnership, partnership or living together are within this scope.

Besides, TCC art. 123 is formulated as an abstract danger crime and does not seek the realization of the disturbance of the victim's peace of mind[63]. However, the victim of stalking often has the burdens of changing his life habits and suffering psychological damage. Another aggravating circumtance Istanbul Convention provides "the offence resulted in severe physical or psychological harm for the victim"[64]. For this reason, the protection envisaged by the abstract danger crime is insufficient. In addition, after most stalking incidents, the perpetrator may commit intentionally killing or injuring the victim if his/her ex-spouse refuses the victim's offers of reconciliation or reunion. However, in matters of domestic violence, the preventive character of the criminal law, which came to the fore after the act of killing, is functional rather than repressive. In particular, due to the deterrent effect of penalties, an effective criminal investigation against women victims of domestic violence may serve this prevention purpose in a broader sense[65]. Regulating stalking as a separate crime and sanctioning it with a deterrent penalty may also serve to protect the victim before intentional killing or injury acts.

Stalking acts can be committed together with threats, insults, violation of privacy, and dissemination and seizure of personal data. It is necessary to evaluate each of these. The peace and harmony of people can be disturbed by insulting and threatening in a successive way. In this case, it is required that the insult and threat

[63] İtışgen R., *Kişilerin Huzur ve Sükununu Bozma Suçu*, in *Bahçeşehir Üniversitesi Hukuk Fakültesi Dergisi*, 2014, 9 (113-114), 117.

[64] Art. 46/1-h of Istanbul Convention.

[65] Erbaş R., *Effective Criminal Investigations in Combating Domestic Violence and the ECtHR: Prima Ratio v. Ultima Ratio?*, cit., 226.

be persistent, and the perpetrator's persistent threats or insults both these crimes and the TCC art. 123[66]. It should be noted that with the crime of stalking, the freedom of movement of individuals, free decision-making and freedom of movement in this direction, body immunity, property, privacy and the right to be left alone are also protected. Therefore, it is necessary to fight against the establishment of a crime type that protects these legal values as a whole and stalking in the context of criminal law[67]. As a matter of fact, according to the report published by the Group of Experts on Combating Violence Against Women and Domestic Violence (GREVIO), which was created regarding the implementation of the Istanbul Convention, since there is no perpetual stalking crime in Turkish law, these acts are evaluated under the name of persecution, sexual harassment, threats, blackmail, and TCC art. 123, violation of privacy and violation of privacy. However, pursuant to the Istanbul Convention, stalking has two components: the intent of the perpetrator to instill fear in the victim's safety and the effect of instilling fear in this manner through repeated threatening behavior. These crimes, which are applied in the practice of Turkey for stalking acts, do not reflect the seriousness of stalking and do not carry the aforementioned components[68]. The tendency of the states to combat stalking is to regulate punishment and stalking as a separate crime type within the scope of the crime types currently in the legislation, but today the second method is more dominant. Because, when stalking acts are considered within the scope of harassment, the characteristics of stalking are avoided and short-term,

[66] İtişgen R.*, Kişilerin Huzur ve Sükununu Bozma Suçu*, cit., 126.

[67] Ünver Y., *Ceza Hukuku Açısından Mobbing, Stalking ve Cinsel Taciz Eylemleri*, cit., 114.

[68] *https://rm.coe.int/eng-grevio-report-turquie/16808e5283* (accessed: 15.01.2021) 76.

non-deterrent punishments are given[69]. In a possible arrangement to be made, stalking should be arranged among crimes against personal freedom. Because personal freedom requires not only the freedom of the individual to go somewhere or stay where he/she is, but also the protection of peace and harmony where he/she is[70].

In none of the European countries where stalking is regulated as a crime, a definition based on gender or taking into account the existence of a close relationship between the parties has been preferred[71]. However, in some countries, the existence of a relationship between the victim and the perpetrator can have an impact on criminal law or criminal procedure law. For example, in Germany, this situation manifested in the form of a judgment clause, that is, the pursuit of the crime of stalking is subject to a complaint, while the stalking from the former partner is a crime that can be investigated ex officio[72]. In Italy and Hungary, the fact that the perpetrator is a former or current partner is a situation that requires more punishment and concerns material criminal law. In France, a heavier penalty is imposed if the perpetrator is a spouse, life partner or cohabitant, even if the relationship has ended. According to Istanbul Convention, the investigation of acts as pshysical violence (art. 35), sexual violence, including rape (art. 36), forced marriage (art. 37) and female genital mutilation (art. 38) should not be subject to the complaint of the victim, but should be followed ex officio. Although the Convention does not count the acts of stalking in this context, there is no obstacle in front of the domestic law of

[69] Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu*, cit., 2794.

[70] İtişgen R., *Kişilerin Huzur ve Sükununu Bozma Suçu*, cit., 110.

[71] van der Aa S., *Stalking as a Form of (domestic) Violence Against Women: Two of a Kind?*, cit., 178.

[72] *Ibid*.

the states parties to provide a more qualified protection than the Convention provides. For this reason, the perpetration of the act of stalking by the partner should be investigated *ex officio*. Because stalking is a manifestation of domestic violence, dark figure of crimes phenomenon is higher, and if the victim does not apply to the judicial authorities within the period of complaint, it is possible to be unprotected. In addition, the evaluation of stalking within the framework of the TCC art. 123 results in that this crime is subject to mediation in accordance with the Turkish Criminal Procedure Code art 253/1-a. However, the Istanbul Convention art. 48, states parties should take the necessary measures to "prohibition of mandatory alternative dispute resolution processes or sentencing" in acts of domestic violence and gender-based violence. Because in the case of acts of violence, the perpetrator and the victim are not equal in alternative solution methods[73], and waiting for the victim to meet with the perpetrator again will lead to double traumatization of the victim. Therefore, the current regulation or the fact that the stalking is subject to a complaint in the event that stalking is a crime is incompatible with the obligations of the Convention. In Ireland, according to The Non Fatal Offences Against the Person Act art. 10/3 in addition to the punishment given to the person convicted due to stalking or as an alternative sanction, it may be ruled to be prohibited from communicating with the victim or going to the victim's home or workplace. The duration of this sanction is at the discretion of the court. Even if a conviction is not given for the person who is tried in accordance with the art 10/5, the court may order the measures in question, provided that it is

[73] Çınar A.R., *Kadına Yönelik Şiddetin Önlenmesine İlişkin İstanbul Sözleşmesinin Ceza Hukuku Alanında Öngördüğü Yükümlülükler*, 69; Soygüt M.B., *Kadına Yönelik Erkek Şiddetinin Önlenmesi Bağlamında Stalking (Israrlı Takip) ve Cezasızlık Sorunu,* cit., 2798.

in accordance with justice, and failure to fulfill these measures will constitute the crime of stalking[74]. If the perpetrator is sentenced to imprisonment due to stalking, the condition of conditional release should be to be prohibited from living and working in the region where the victim is located, and to be prohibited from approaching the victim's place.

6. Conclusion

Although it is a common myth that people who apply to stalking act because of their erotomanic disorders, it has been understood that former spouses/partners resort to stalking in order to reunite with the victim and control over the victim. When the perpetrator and victim profiles are examined, the perpetrator is mostly the male partner/spouse, while the victim is the female partner/spouse. As the degree of intimacy between the perpetrator and the victim increases, the tendency of the society to blame the victim increases. In most cases reflected in the media, it is seen that after stalking, the perpetrator also commits the crimes of injury or deliberately killing the victim, who is his ex-spouse/partner. These myths about stalking have not been found in judicial decisions. However, it has been seen that the acts of stalking without death or injury are romanticized in the media, which may hinder the public's attention to the struggle with stalking.

Stalking acts, especially the right of the victim to protect and develop his/her material and spiritual existence, interfere with many legal values of the victim. The preventive and protective measures available in Turkish law within the framework of Code No. 6284 are insufficient to combat gender-based violence and

[74] Türkoğlu S., *Ceza Hukuku Açısından Israrlı Takip*, cit., 33.

persistent stalking, which is also a manifestation of domestic violence. If the fight against civil or administrative law sanctions is insufficient, the criminal law should show the character of prima ratio, otherwise it is against the obligations of the state under the Istanbul Convention.

Although stalking is not regulated as a type of crime in Turkish law, it is punished by resorting to other types of crimes such as disturbing one's peace and harmony, sexual harassment, threats, and violation of privacy. However, this situation is not compatible with the characteristics and components of stalking and does not provide deterrence. In addition, since the crime of disturbing the peace and harmony who is resorted to is the type of crime that is most similar to stalking, it is a crime subject to complaint, making it difficult to fight against domestic violence and gender-based violence, where the dark figure of crime phenomenon is very high. Moreover, even if the victim is a complainant, since it is a crime subject to mediation, traumatizing the victim a second time can lead to bargaining situations between unequals that are incompatible with the nature of mediation.

Even though it is not obligatory to have a relationship between the victim and the perpetrator in stalking acts, criminological studies show that this act is committed more between former partners than the stalking of stranger perpetrator against a victim he/she does not know. Stalker who knows the life habits and behavioral patterns of the victim, will undoubtedly be more frightening on the victim. In this case, the perpetrators resort to stalking in order to maintain their relationship with the victim or to reunite, and if they cannot control the victim, they may harm the victim or their relatives in the form of killing and injury. For this reason, the past or present relationship between the perpetrator and the victim should be regulated as a situation that requires more punishment.

Stalking acts that take place in the virtual environment by using information technologies have the effect of facilitating the commission of the crime by taking advantage of the anonymity of the perpetrator. Therefore, stalking acts that take place in the virtual environment should be regulated as a qualified situation that requires more punishment in order to ensure deterrence.

Gaslighting (You drive me crazy)

Valentina Fredianelli

1. Introduction: an old, actual type of abuse

The purpose of this paper is to address a topic that the Istanbul Convention does not mention on a formal, literal level, but that is fundamentally included in its *ratio*, as it is a type of abuse that is – more often than not – carried out on women.

In particular, the reference is to gaslighting, a psychological technique executed in power-laden relationships[1] and aimed at making victims seem or feel "crazy", eroding their realities and creating a surreal interpersonal environment of fear and confusion through the use of gendered stereotypes and structural vulnerabilities related to race, nationality, and sexuality[2].

Although it is likely that the majority of people may not be acquainted with the term, or even aware of this form of abuse, nearly

[1] While it is a kind of abuse that usually happens in intimate relationships, it is not limited to them and can actually occur in multiple different scenarios; however, the roles of power, trust, and coercive interpersonal strategies in the relationship represent a key factor to the success of the abuse.

[2] Sweet P.L., *The Sociology of Gaslighting*, in *American Sociological Review*, 2019, vol. 84(5), 851-875.

every person experiences some form of it as a victim, at least once in their lifetime.

The working mechanism is quite simple, and at the same time insidious: the gaslighter makes the victim question what they said, what they did, plays with their insecurities and changes the narrative of events, in order to make them believe the narrative they are writing was the true one all along. This leads victims to feel crazy, to isolate themselves, to stop seeing friends and going places (in other words, from a constitutional rights point of view, their freedom of movement and self-determination becomes extremely limited and is practically transferred to the partners), and makes them unlikely to ask for help – from friends or from the authorities – because they are led to believe they are the ones in the wrong, so nobody will actually help them. Often, in the alternate version of events portrayed by the gaslighter, the offenders themselves actually end up being the true victim in the relationship.

In some cases, gaslighted victims actually come to prefer physical to psychological violence, as the manipulative technique can be so insidious and hard to pinpoint[3], while physical aggression would validate their experiences as genuinely abusive, being perceived as more compatible with reality.

[3] From the outside, «the battered woman transforms into a 'willing slave'». Mukhatar M., *Standing at the edge of the crevice: Turkey's withdrawal from the Istanbul Convention*, in *Culturico*, May 15th 2021.

1.2. The role of gender, race, and structural fallacies

In order to maliciously intervene on the partner's mind, some factors play an important role. In particular, stereotypes and institutional settings often function as background contexts for the success of gaslighting tactics in manipulating women's reality and mind[4].

As previously mentioned, these techniques used to gaslight someone can be defined as gendered, because they rely on the general cultural association of femininity with irrationality – and that makes it easier to understand why the majority of victims are women; even when they are used against men, the victim in that case is treated as the weak, irrational, crazy woman of the situation. The idea of the woman as overly emotional, irrational, and not in control of her emotions is not new: in medical history, for example, women have long been represented as lacking reason and rationality. And although, through the centuries, women as a group have gained more power and mobility[5], gendered inequality in intimate relationships seems to persist[6].

On an institutional level, gaslighting can be executed on multiple levels, for example convincing the victim that they are going to be deported because of their craziness, forcing them to enter a mental health institute[7], or even making them appear as unre-

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[4] Sweet P.L., *The Sociology of Gaslighting*, cit., 858.

[5] Cf. England P., *The Gender Revolution: Uneven and Stalled*, in *Gender & Society*, 2010, 24(2), 149-166.

[6] Cf. Ridgeway C.L., Correll S.J., *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, in *Gender & Society*, 2004, 18(4), 510-31; Scarborough W.J., Sin R., Risman B.J., *Attitudes and the Stalled Gender Revolution: Egalitarianism, Traditionalism, and Ambivalence from 1977 through 2016*, in *Gender & Society*, 2019, 33(2), 173-200.

[7] Cf. McCloskey L.A. *et al.*, *Abused women disclose partner interference with health care: an unrecognized form of battering*, in *Journal of General Internal Medicine*, 2007, 22(8), 1067-1072.

liable witnesses whether they manage to call the police for help. Moreover, female victims of violence are used to being portrayed as senseless and unreasonable in court and other legal settings, especially in divorce and child custody proceedings, and the traditional medical construction of women as "hysterical" continues to allow experts and common people to discredit them, treating their pain and their requests as illegitimate[8]. Additionally, it is worth mentioning that gaslighting carried out on socially marginalized women (for instance, immigrants) can have more dramatic effects, since these women can experience increased institutional surveillance and lack of credibility[9]. As a result, institutions that are allegedly supporting victims, often end fostering themselves, because the abuser exploits such settings to overexpose the victim's fear and lack of credibility.

2. Gaslighting and the law

From this summary explanation, it would appear that the phenomenon touches several aspects addressed by the Convention, and in particular: art. 12[10] and 18[11], on general obligations in prevention, protection and support against any form of violence against

[8] Kempner J., *Not Tonight: Migraine and the Politics of Gender and Health*, Chicago, University of Chicago Press, 2014.

[9] *Ex multis*, Menjívar C., Salcido O., *Immigrant Women and Domestic Violence: Common Experiences in Different Countries*, in *Gender & Society*, 2002, 16(6), 898-920.

[10] Art. 12, par. 1: «Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men».

[11] Art. 18, par. 1: «*Parties shall take the necessary legislative or other measures to protect all victims from any further acts of violence*».

women, and especially gendered stereotypes and behaviours based on the idea of the inferiority of women; art. 15, on the training of professionals[12]; art. 33, on psychological violence[13]; and art. 40, on sexual harassment[14].

These references show how the Istanbul Convention recognizes the importance of protecting people – and especially women – from all types of violence, especially those occurring in their own homes; nonetheless, from a legal point of view the particular kind of violence represented by gaslighting has been largely neglected – at least, until now –, and the little we know about it comes from psychological studies and, more recently, from sociological ones.

Currently, most States include psychological violence as a component of domestic or intimate partner violence[15], and in Europe

[12] «Parties shall provide or strengthen appropriate training for the relevant professionals [...], on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation».

[13] «Parties shall take the necessary legislative or other measures to ensure that the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats is criminalised».

[14] «Parties shall take the necessary legislative or other measures to ensure that any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment, is subject to criminal or other legal sanction».

[15] Jeney P. *et al.*, *Violence against Women: Psychological violence and coercive control*, study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, March 16th 2020.

only a few (England[16], Ireland[17], Scotland[18], and France[19]) have specifically focused on the type of behaviour that stops short of serious physical violence, but amounts to extreme psychological and emotional abuse.

In Italy[20], gaslighting is seen as a type of civilian non-pecuniary loss[21], meaning the victim can ask for compensation for the damage

[16] Serious Crime Act 2015, s. 76 («Controlling or coercive behaviour in an intimate or family relationship»): «A person commits an offence if (a)A repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive, (b)at the time of the behaviour, A and B are personally connected, (c)the behaviour has a serious effect on B, and (d)A knows or ought to know that the behaviour will have a serious effect on B».

[17] Domestic Violence Act 2018, s. 39.

[18] Domestic Abuse (Scotland) Act 2018, S. 2: «[abusive behaviour is one that] would be considered by a reasonable person to be likely to have one or more of the relevant effects [...]:making B [the victim] dependent on, or subordinate to A [the abuser]; isolating B from friends, relatives or other sources of support; controlling, regulating or monitoring B's day-to-day activities; depriving B of, or restricting B's, freedom of action; frightening, humiliating, degrading or punishing B».

[19] Loi n. 2010-769, art. 31: «Le fait de harceler son conjoint, son partenaire lié par un pacte civil de solidarité ou son concubin par des agissements répétés ayant pour objet ou pour effet une dégradation de ses conditions de vie se traduisant par une altération de sa santé physique ou mentale est puni [...] [Harassing one's spouse, partner, or co-habitant by repeated acts that "degrade one's quality of life and cause a change in one's physical or mental state of health" is punishable [...]».

[20] Cf. Mendicino R., *Gaslighting: I profili giuridici di una forma di abuso psicologico*, in *Sul Filo del Diritto*, n. 2, giugno 2016.

[21] Art. 2059 c.c., as interpreted by the Italian Supreme Court of Cassation, i.e. as, «modifica peggiorativa della personalità da cui consegue una sconvolgimento dell'esistenza [...]obiettivamente accertabile in ragione dell'alterazione del modo di rapportarsi con gli altri nell'ambito della vita comune di relazione, sia all'interno che all'esterno del nucleo familiare, che, pur senza degenerare in patologie medicalmente accertabili (danno biologico), si rifletta in un'alterazione della sua personalità tale da comportare o indurlo a scelte di vita diverse [a pejorative modification of the personality which results in an upheaval of existence [...] objectively ascertainable due to the alteration of the way of relating with others in the context of the common

suffered on their personal intimate sphere of life. On a criminal level, gaslighting is not regulated as an independent offence itself, but it falls under the elements that are to be considered regarding the crime of stalking[22] or domestic violence[23].

In Turkish law, psychological violence is only mentioned in the "Law to protect family and prevent violence against women" as a form of domestic violence[24], but multiple reports and interviews show that the protection given to women is far from effective[25].

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life of relationship, both inside and outside the family, which, although without degenerating into medically ascertainable pathologies (biological damage), is reflected in an alteration of the personality such as to involve or lead them to different life choices]». Cass. 14402/2011.

[22] Art. 612-*bis*, co. 1, c.p.: «Salvo che il fatto costituisca più grave reato, è punito[...] chiunque, con condotte reiterate, minaccia o molesta taluno in modo da cagionare un perdurante e grave stato di ansia o di paura ovvero da ingenerare un fondato timore per l'incolumità propria o di un prossimo congiunto o di persona al medesimo legata da relazione affettiva ovvero da costringere lo stesso ad alterare le proprie abitudini di vita [Unless the fact constitutes a more serious crime, the law punishes anyone who, with a repeated conduct, threatens or harasses someone in such a way as to cause a persistent and serious state of anxiety or fear or to generate a persistent and serious state of anxiety or fear or to generate a well-founded fear for their own safety or that of a close relative or of a person linked to him by an emotional relationship or to force him to alter his life habits]».

[23] Art. 572, co. 1, c.p.: «Chiunque [...] maltratta una persona della famiglia o comunque convivente, o una persona sottoposta alla sua autorità o a lui affidata per ragioni di educazione, istruzione, cura, vigilanza o custodia, o per l'esercizio di una professione o di un'arte, è punito [The law punishes anyone who mistreats a person in the family or in any case cohabiting with them, or a person under his authority or entrusted to him for reasons of education, instruction, care, supervision or custody, or for the exercise of a profession or an art]».

[24] Defined as «Any physical, sexual, psychological and economical violence between the victim of violence and the perpetrator of violence and between the family members and the people who are considered as a family member whether they live or do not live in the same house». Law 6284/2012, art. 2.

[25] *Ex multis*, Karakas B., *Turkey: Laws against domestic abuse fail to protect women*, in *DW*, November 25th 2020.

3. Final thoughts for further thinking

This brief overview of the phenomenon should give food for thought, especially since the Convention states that "Parties shall take the necessary legislative or other measures to ensure that the offences established in accordance with this Convention are punishable by effective, proportionate and dissuasive sanctions, taking into account their seriousness" (art. 45), and that "basic" gaslighting includes several of the aggravating circumstances established by the Convention for the determination of the sentence (art. 46)[26]. Furthermore, the fact that psychological «coercive control involves surveilling, micromanaging and gaslighting the victim» allows the prospect that it is «this obsession with control that invites other gender-based crimes into play»[27].

Though what has been said about gaslighting particularly stems from psychological contexts and studies, only recently coming to the attention of legal framework, the briefly mentioned overview wishes to give us hope in raising awareness on the topic among legal institutions as well. As has been noted, «popular conceptualizations of intimate abuse should go well beyond physical, verbal, and financial abuse», especially considering that, when talking about gaslighting, «the invisibility of this form of abuse makes it especially damaging, cutting victims off from institutional protections»[28].

Still, while the Convention states that «parties shall take the necessary measures to promote changes [...]to eradicating prejudices, customs, traditions and all other practices which are based

[26] In particular: the fact that the offence is committed by a partner (a), that is committed repeatedly (b) and against a person made vulnerable by particular circumstances (c), and that the offence resulted in severe physical or psychological harm for the victim (h).

[27] Mukhatar M., *Standing at the edge of the crevice*, cit.

[28] Sweet P.L., *The Sociology of Gaslighting*, cit., 870.

on the idea of the inferiority of women or on stereotyped roles for women and men», in practice this goal appears quite complex to achieve, especially with a modern criminal law demanding for accurately defined boundaries of punishable conducts: on the one side, sometimes it can be difficult to recognize the prejudice behind a specific behaviour; on the other side, complications may arise on the actual outlining of specific acts that could amount to an offence for the general public[29], and the inquiry on the gaslighter's *mens rea* could lead to problems in discerning between intention and negligence of the perpetrator, since the abuse is not always intentional or recognized even by the author. Lastly, some thoughts are so pervasively rooted in our society that only recently some kind of awareness has been reached, leading to the inevitable consideration that any intent to instantly eradicate them may well be unsuccessful. The only way to achieve this goal is to envisage a gradual strategy, starting from the words used to describe the phenomenon[30] up to an actual, legally defined, approach to deal with this abusive behaviour.

[29] As it has been noted, the gaslighter often relies on the single victim's liabilities, not allowing much space for generalization apart from the already mentioned prejudices on gender and race.

[30] Cf. Katz J., *Violence against women – it's a men issue*, TED talk, November 2012, available at *https:/0/www.ted.com/talks/jackson_katz_violence_against_women_it_s_a_men_s_issue?language=la*.

Effectiveness of legal protection against secondary victimization

Stefania Giammillaro

1. A brief historical overview of gender discrimination: the roots of gender violence

The first decade of the 21st century has seen the development of two key legal interventions in the field of fighting violence against women, both at the national level (Law 4 April 2001 n. 154 "Measures against violence in family relationships") and at the international level (Council of Europe Convention on preventing and fighting violence against women, the so-called Istanbul Convention); although this latter *soft-law* instrument aims to have a wider range of action and to operate on different levels with respect to the more limited intervention, typical of the national protection orders.

Both regulatory approaches have become the first response to the most heartfelt requests for protection, which had remained, until then, almost completely disregarded[1].

[1] At the national level, before the law n. 154 of 2001, intra-family crimes were not adequately contained; despite the significant jurisprudential arrests registered in the field of compensation protection, with regard to the new notion of non-pecu-

Even though the most aberrant and violent forms of sexual discrimination have atavistic, historical and juridical roots, only recently the need to fight them has become more widespread.

Through an in-depth historical-juridical examination, it emerged that the gradual privatization of family law and the constitutional recognition (art. 29 of the Italian Constitution) of its original character as a "natural society" with respect to the legal

niary damage, in the light of a more extensive and constitutionally oriented interpretation of art. 2059 cc. On the other hand, family law did not provide effective remedies to counter the negative consequences of such offenses: "it must in fact be excluded that the separation and divorce allowance performs a compensatory function, for the damages caused by a spouse towards the other" (thus Cass. 10 May 2005 n. 9801). Furthermore, this gap could not be effectively filled even by criminal protection, due to the application limits of art. 570 of the criminal code, (concerning only the violation of the obligations of economic or moral assistance, with the exclusion of the duty of loyalty), as well as the strict conditions required for the purposes of the operation of art. 572 of the criminal code, (in the matter of family mistreatment), such as: the constraint of habituality and the unitary and programmatic psychological element inherent in generic maltreatment. Cf. Facci G., Voice *Famiglia*, (VIII Illeciti all'interno della famiglia, in *Enc. Giur. Treccani*, 2005, Vol. XV, Roma, § 2; and cf. Roppo E., Voice *Coniugi I) Rapporti personali e patrimoniali tra coniugi*, in *Enc. giur. Treccani*, 1988, Vol. IX, Roma, 1 ss. Instead, the Istanbul Convention represents, on a supranational level, the final destination of a troubled and complex juridical path, which draws its roots in the Versailles Treaty of 1919, which established the League of Nations. That is, at a time when the trafficking of white women and the exploitation of human beings were the subject of international agreements, preceding the birth of the Society itself, including: The international convention for the suppression of trafficking in women and children, concluded in Geneva in September 1921; as well as the Convention for the Suppression of Trafficking in Adult Women, concluded in Geneva in October 1933. Cf. Saulle M.R. (ed.), *L'opera delle Nazioni Unite, degli Istituti Specializzati e delle Organizzazioni Regionali Europee in favore della donna, dal 1945 a Nairobi*, in *Il Decennio delle Nazioni Unite per la donna*, *raccolta di atti della Conferenza Mondiale di Nairobi: uguaglianza, sviluppo e pace, patrocinata dal Ministero affari esteri e dalla Presidenza del consiglio dei ministri*, *Direzione generale delle informazioni, della editoria e della proprietà letteraria, artistica e scientifica*, 14 ss.

system[2], have had twofold consequences: firstly the progressive erosion of the juridical sanctioning of personal marital duties, and secondly, the huge proliferation of forms of domestic violence perpetrated against the so called "weak gender", i.e. the women.

At a social level, we are reacting to such aberrant forms of abuse, as a result of the conquered marriage equality. This is almost like a "revolt", which claims a return to that type of so-called "organic", "relative" or "functional"equality. As a result the differences in treatment connected with the "natural" division of roles between husband and wife would not be incompatible with the principle of equality of spouses: with the consequence, for example, that the former would be responsible for non-domestic activities and the latter for housework[3].

Therefore, there would be a return to the so-called "*infirmitas sexus*" of Gaian derivation or to the "*imbecillitas sexus*" of the Renaissance period, which would justify the current depreciation of women, as a subject unable to autonomously manage their own legal-patrimonial sphere, although, from a formal perspective, the ability to own the related rights is not contested[4].

In other words, it is believed that the evolution of values and legislation, which took place respectively with the Constitution and the reform of family law (law no. 151 of 1975), would have meant that the breach of the *affectio maritalis*, followed by separation or divorce, does not derive from the violation of marital duties,

[2] This constitutes the foundation of the principle of autonomy of family reality understood as «the community least susceptible to aggression and regulation by the State», as underlined by Rescigno P., *Matrimonio e Famiglia*, in *Proprietà e Famiglia*, Bologna, il Mulino, 1971, 139 ss.

[3] This is an idea supported by Passarelli F., in *Comm. rif. Dir. fam. Carraro-Oppo-Trabucchi*, I, 1, Padova, 1977, reported by Roppo E., Voice *Coniugi*, cit.

[4] Cf. Torrente A., *Donna*, in *Enc. del diritto*, XIII, Milano, Giuffrè, 1005 ss.

but from a balance underlying a tacit subordination agreement (to which the wife would have adhered to), the breach of which would result in the violent reaction – necessary to "rebalance" their roles – from the husband[5]. This would imply that the consent to marry, or more broadly to enter into a romantic relationship, results in the acceptance on the part of the woman to become subordinate to her spouse.

2. A comparative analysis about remedies

Therefore, in order to counter this social plague and subsequent form of violence against women, the Istanbul Convention and, before that in Italy, the Law 4th April 2001 n. 154 have been adopted as instruments of protection.

In particular, the Istanbul Convention of May 11th 2011, signed by Italy in 2012 and ratified in 2013 with the Law no. 77, is grounded in the framework of national and international sources, also conventionally established in the Italian legislative framework, in order to retrieve the the "victim"'s reasons, especially if deemed as "supervictims" or "vulnerable victims".

In fact, the Convention, in addition to equating physical to psychological violence, for the first time qualified violence against women as a violation of human rights and as a form of discrimination against women[6].

Taking into consideration the victim's perspective, in its very first article, the Instabul Convention proposes, as a primary scope, the protection of women – considered as vulnerable victims – as

[5] Cf. Puleo S., *Famiglia II) Disciplina privatistica: in generale*, in *Enc. giur. Treccani*, Vol. XV, Roma, 1989, 6 ss.

[6] Cf. Dalia G., *La risposta del sistema processuale penale per la tutela delle vittime di violenza di genere*, in *Archivio Penale 2020*, 1, 8.

well as the prevention, prosecution and eradication of domestic violence and violence against women. Thus, we have already defined the 4 "P" that enlightens the Convention: prevention, protection, punishment and integrated politics, which refer to the so-called "5 Ps obligations", outlined in the 1995 Pechino Conference, where it was emphasized that gender-based violence must be understood as a violation of fundamental rights[7].

To this end, art. 53 of the Convention entitled "Restraining or protection orders" disposes that the acceding countries must take the necessary legislative measures to ensure that the victims of any kind of violence receive appropriate and effective protection, even if certain timings and other interests must also be taken into account.

In fact the Convention was a source of inspiration for the Italian legislators in 2013, since with the Legislative Decree. n. 93 numerous both substantive and procedural innovations in the criminal field have been introduced, in order to guarantee: more information available for the victim, in order to contrast the so-called secondary victimization (i.e. further damage for those who have already suffered from this crime and who must recall it during the hearing); the strengthening of precautionary measures, through the introduction of precautions such as art. 384-*bis*[8] of the crimi-

[7] See Muscella A., *Forme di tutela cautelari e preventive delle vittime di violenza di genere: riflessioni a margine delle novità introdotte dal "Codice rosso"*, in *Archivio Penale 2020*, 1 ss.

[8] It is a measure of urgent removal from the family home which is added to the precautionary measure of the prohibition of approaching the places frequented by the victim pursuant to art. 282-*ter* of criminal procedure code. See Dalia G., *La risposta del sistema processuale penale per la tutela delle vittime di violenza di genere*, cit., 12.

nal procedure code as well as intervening on the methods of gathering the victim's declarations[9].

As already mentioned, Nevertheless in Italy, even before the ratification of the Convention, the following provisions were introduced by the law n. 154 of April 4th 2001: the art. 282-*bis*[10] of the criminal procedural code; a new Title IX-*bis* of the civil code and a new section V-*bis* in the civil procedure code. In particular, the criminal coercive measures are characterized by their adaptability to the criminal context and to their preventive effect, able to stopthe escalation of criminal conduct that culminates in violent behaviours; however, the determination of their content is left to a wider discretion for the judge, which seems to conflict with the "high level of legality" required in the matter of personal freedom pursuant to art. 13 Cost.[11].

These new normative layouts, in addition to the Police commissioner's warnings and the special surveillance applied by the judge as a preventive measure, aim to trigger an escalation of the levels of protection, such as the imposition of restraining order not to reach homes or the usual places the victims may go.

While these intervention measures are suitable for achieving coordination between the three branches of Italian jurisdiction (administrative, civil and criminal), they do not prove to be suitable

[9] Cf. Dalia G., *La risposta del sistema processuale penale per la tutela delle vittime di violenza di genere*, cit., 9 ss.

[10] The coercive measure of removal from the family home was introduced by law no. 154 de 2001 precisely with the aim of stemming repeated victimization in order to protect the weakest members of the family, such as women and minors. On the topic, Zacchè F., *Le cautele fra prerogative dell'imputato e tutela della vittima di reati violenti*, in *Riv. it. di dir. e proc. pen*., 2015, 2, 646 ss.

[11] See Zacchè F., cit., and also Casella G., *Violenza di genere: la tutela della vittima nella dimensione procedimentale e processuale (Gender crimes: Procedural and Trial protections of the victim)*, in *Cass. Pen.*, April 2019, 4, 1388 ss.

for guaranteeing the desired effectiveness of protection. The warning, in fact, takes the form of a dissuasive message addressed to the perpetrator of the violence by the Police commissioner. It has favorable effects in terms of admissibility conditions and aggravating circumstances in the application of art. 612-*bis* of the criminal code (stalking), but it can, at the same time, trigger an increasingly aggressive reaction, especially in cases where the person's fundamental rights are exposed to higher risk. The dissuasive force of protection orders in civil matters should derive from the fact that they are adopted, in this case, by a judicial authority; however, there is a lack of protection for the victim in their execution: one should resort either to art. 388 of the criminal code, which, implies activating a further *ad hoc* procedural path and in the criminal court, or to art. 614-*bis* of the civil procedure code, which postulates the application of a mere financial penalty "for any subsequent violation or non-compliance or for any delay in the measure's execution". In addition, the intervention of the civil judge could also result in a reconciliation between the perpetrator of the violence and the victim, just by referring them to family mediation centers, in contrast with the provisions of art. 48 of the Istanbul Convention, which excludes recourse to restorative justice, if imposed on a mandatory basis. Therefore, only the measure referred to in art. 282-*bis* of the criminal procedure code, as a precautionary measure auxiliary to a criminal proceeding, would seem to guarantee that dissuasive and effective protection required by the victim, contributing to stop the violence, rather than to resolve a conflict as in civil court[12]. Moreover, we must also add the use of the custody in prison. The application of this pretrial detention, in the context of mistreatment in

[12] Cf. Bonini V., *Il sistema di protezione della vittima e i suoi riflessi sulla libertà personale*, Padova, Cedam, 2018, 93 ss.

the family, stalking, etc., has been facilitated by various regulatory interventions. However, restricting the effectiveness of the protection to criminal intervention alone is far from satisfactory: on the one hand, this implies that the nature of *extrema ratio* of the said measures is undermined; on the other hand, it does not guarantee a degree of protection at all the different levels, like an effective preventive protection would have guaranteed.

3. The lack of effectiveness and the hope in the future remedies. Conclusions

The described lack of effectiveness is identified in several important statements of the GREVIO Report[13] (acronym for "Group of Experts on Action against violence against women and domestic violence"). Ten years after the Istanbul Convention, the Group of experts still reports «serious concerns about the idea of classifying violence as domestic violence according to the victim's ability to "tolerate" violence». The report also underlines that "if the evidence supporting the complaint by the victim of domestic violence is not sufficient, it cannot request restraining orders or protective measures". This circumstance is the most serious if we consider the possibility of activating a link between civil and criminal courts. For istance, there are behaviours that the civil judge considers as an offence that can be prosecuted *ex officio*, or the cases in which the Police commissioner, before the warning is issued, decides to initiate a non-summary investigation, which can be used as documentary evidence in the criminal proceedings[14].

[13] Available on *http://www.pariopportunita.gov.it*.

[14] Cf. Bonini V., *Il sistema di protezione della vittima e i suoi riflessi sulla libertà personale*, cit., 93 ss.

There is still a long way ahead to eradicate this social plague that has precise historical roots, which just recently starts gaining legal attention. As such, there is a desire to develop more targeted preventive actions at a social level. Furthermore, there is also a desire to see the most recent regulatory interventions in the field of protection from violence against women as more suitable to counter the aforementioned secondary victimization, just like the case of Law no. 69 of 2019, the so-called Red Code, that had gained more effective and efficient feedbacks *vis-à-vis* its application[15].

[15] The reference is, for example, to art. 4 of law n. 69 of 2019 which introduced art. 387-*bis* of the criminal code, entitled "Violation of the measures for removal from the family home and the prohibition of approaching the places frequented by the injured person" with which it was intended to give force to apply the aforementioned art. 53 of the Istanbul Convention. See Muscella A., *Forme di tutela cautelari e preventive delle vittime di violenza di genere: riflessioni a margine delle novità introdotte dal "Codice rosso"*, cit.

Evaluation of so-called "honour" crimes under the scope of GREVIO's Report of Turkey, Turkish Criminal Code and Istanbul Convention

Ege Kavadarli

1. Introduction

Art. 42 of the Istanbul Convention covers every unacceptable justification for crimes. The main source of these justifications could be culture, custom and religion as well as it could be the so-called "honor"[1]. Since Turkey has a problematic history regarding so-called "honor" crimes, specifically before the important changes of the Turkish Criminal Code that have been made in 2005, it was deemed necessary to focus on this aspect of the phenomenon. Nevertheless, it is immensely important to acknowledge cultural or custom based crimes just as dangerous as so-called honor crimes.

Wrong teachings of honor, tradition and certain rudimentary religious beliefs or acts can be considered the source of the honor

[1] Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011.

based violence and crimes. Additionally, there are many reasons to believe that honor based violence is one of the forms of domestic violence that is being practiced against women all over the world.

As it is known, some of the main factors that cause domestic violence to occur are the patriarchal mentality and wrong family teachings[2]. Some women's right activists claim that the problem is in the laws in general. Crimes like honour killings are rooted in patriarchal law[3]. As an example to this, art. 630 of the Iranian Penal Code allows a man who witnesses his wife in the act of having sexual intercourse with another man to kill both of them if he is certain that his wife is a willing participant[4].

Not surprisingly, so-called honor killings and cases of violence against women are similar in terms of the type of victim, the way the crime was committed, and the social or psychological factors that caused the crime. So-called honor based violence includes a wide range of crimes, the severest of which is honor killing.

There are many different definitions for the so-called honor killing which are focusing on different aspects of this phenomenon. One of the definitions presented by a rapporteur of the Council of Europe Committee declares «Honour crimes, [as a] crime that is, or has been, justified or explained (or mitigated) by the perpetrator of that crime on the grounds that it was committed

[2] Gülseren Ü., *Aile İçi Şiddet*, in *Aile ve Toplum*, 2005, 2 (9), avaliable at *https://dergipark.org.tr/tr/download/article-file/198147*.

[3] Dayan H., *Female honor killing: the role of low socio-economic status and rapid modernizatio*, in *J. Interpers Violence*, 2019.

[4] Pirnia B., Pirnia F., Pirnia K., *Honor Killings and violence against women in Iran during Covid-19 pandemic*. Correspondence, October 01 2020, Volume 7, Issue 10, E60, Available at: *https://www.thelancet.com/journals/lanpsy/article/PIIS2215-03662030359-X/fulltext*.

as a consequence of the need to defend or protect the honour of the family»[5].

Some other definitions include the circumstance that these crimes are almost always commited against women. Therefore, it is important to acknowledge this as a part of an act of violence against women in general. A definition that also mentions women are specifically subjected to violence was presented in the Council of Europe Parliamentary Assembly:

So-called honour-based violence defined as any form of violence exercised in the name of traditional codes of honour. Where the "honour" of the family is at stake, according to the family, and the woman suffers the consequences, it is proper to speak of a so-called "honour crime. "Honour" crimes may be described as acts of violence against women where the publicly articulated 'justification' is attributed to a social order claimed to require the preservation of a concept of 'honour' vested in male (family and/or conjugal) control over women[6].

The UN estimates that 5,000 women and girls are murdered each year in honor killings, which are widely reported in the Middle East and South Asia, but they also occur in other countries[7]. There are many other studies that present statistical data regarding violence against women in general and honor crimes. In order to understand how important it is to combatting against the latter

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[5] 2003 report, *So-called "honour crimes"*, in *Rapporteur of the Council of Europe Committee on Equal Opportunities for Women and Men*, 2003.

[6] Mr. Austin, Rapporteur, *Mr. Austin, Rapporteur, The Urgent Need to Combat So-called "Honour Crimes,* Council of Europe Parliamentary Assembly, 2009, C.1.1-2. Available at: *https://www.endvawnow.org/en/articles/731-defining-honourcrimes-and-honour-killings.html*.

[7] Almaleki N., *The Horror of "Honor Killings", Even in US*, 10 April 2012. Available at: *https://www.amnestyusa.org/the-horror-of-honor-killings-even-in-us/*.

these studies must be examined. Additionally, it is of great importance to evaluate the regulations of the Istanbul Convention on honor crimes, as well as in other cases related to violence against women, and to take into account the recommendations of the GREVIO's report on this matter.

2. Evaluation of honor crimes within the scope of Turkish Criminal Code and Istanbul Convention

2.1. Istanbul Convention on so-called "honor" crimes (art. 42)

As stated before, the art. 42 of the Istanbul Convention covers unacceptable justifications for crimes including so-called honor crimes. This exercise showed that crimes committed in the name of so-called "honour" are usually crimes that have been part of the criminal law landscape of Council of Europe member states for a very long time: *murder, manslaughter, bodily injury, etc.* What makes them different is the intent behind them[8]. Most of the time, this intent is to prevent the actions made by the victim, punish them in the name of religion, custom, tradition or honor. By doing so, perpetrator and his/her supporters believed that they have restored order and satisfy the code that they revered.

It is important to understand that this type of thinking is different from normal criminal thinking. This logic is widely accepted in certain communities. The morality that is behind the crimes usually has been going on since ancient times, transferred by teaching in this way. Ordained by the Gods, supported by the priests or *hodjas*, implemented by the law, women came to accept and to psychologically internalise compliance as necessary. Violence towards

[8] Council of Europe, *Crimes committed in the name of so-called "honour"*. Available at: *https://rm.coe.int/honor-crimes-web-a5/1680925835*.

women in all its forms has been thriving in such an environment[9]. This causes many people in this environment *actually* believe that the violence is *actually* needed in certain situations. Therefore it can be stated that usually perpetrators of honor crimes have many supporters.

The Istanbul Convention recognizes this problem; and the relevant article has been regulated accordingly. Istanbul Convention brings an obligation to the state parties to take necessary legislative measures to ensure no custom, no religious demands, nor traditions will ever justify honor killings or any of the acts of violence[10]. Considering that the laws of some countries (mostly Middle Eastern and some Asian countries) have similarities with the mentality that constitutes this crimes, it can be said that this obligation is excessively important. There are reported cases that even state officials are making comments that justify crimes or victim-blaming comments , although Istanbul Convention is clear on this matter. States parties shall ensure that national laws do not permit such interpretations. The obligation extends to the prevention of any official statements, reports or proclamations that condone violence on the basis of culture, custom, religion, tradition or so-called "honour"[11].

Second paragraph of the art. 42[12] remarks the importance of taking measures to prevent incitement of a child to commit

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[9] Husseini R., *Murdered women: A history of 'honour' crime.* Available here: *https://www.aljazeera.com/features/2021/8/1/murdered-women-a-history-of-honour-crimes*.

[10] Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, art. 42:1, 11 May 2011.

[11] Council of Europe, *The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence,* November 2014, ISBN 978-92-871-7990-6. Available at: *https://www.refworld.org/docid/548165c94.html*.

[12] Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, art. 42:2, 11 May 2011.

crimes in the name of tradition or so-called "honor". Its a well known fact that great number of honor killings have been committed by children or juveniles, possibly being manipulated by the elders of the families. Convention brings an obligation to the State parties to establish an effective investigation and make sure of those parties to face criminal liabilities due to these actions.

2.2. Turkish criminal code on so-called "honor" crimes

Turkey has an extensive history of "honor" killings and unfortunately there have been many cases in which the perpetrators received reduced sentences due to unjust "provocation" art. 29 of Turkish Criminal Code establishes mitigating circumstances wheter the offence was committed "in a state of anger or severe distress caused by an unjust act". Using this provision to reduce sentences in the so-called honor killing cases has been greatly criticized in the Turkish media over the years.

Yargıtay's (Supreme Court of Turkey) - first penal chamber, overturned many sentences by stating that unjust provocation cannot be used to mitigate the punishments since the reason for committing the crime is solely the so-called "honor"[13]. Although there are other cases that even the Supreme court upheld the decisions of using unjust provocation as a mitigating circumstance in killings, among them many took place in smaller families and there is no family court or incitement. An example of a man who killed his mother by stabbing her twenty-five times because his mother was sleeping with people for money can be given here. In this case,

[13] *Yargıtay* 1. Penal Chamber Date: 14.03.2008 Case no:2007/6700 Sentence No:2008/1986.

Court did not consider this case as an "honor" killing and actually sentence the man 15 years in prison instead of 20 years[14].

The contrast between the amount of the sanctions and prosecutions regarding the so-called "honor" crimes and the unjust provocation reductions has been the subject of discussion for a long time. In our opinion, art. 42 of the Istanbul Convention should be interpreted broadly and unjust provocation should not constitute a reason for reduction in such crimes.

Art. 82 of the Turkish Criminal Code regulates qualified cases of intentional killing. Paragraph k) provides that: «[...] If the act of intentional killing is committed k) with the motive of tradition, the offender shall be sentenced to aggravated life imprisonment». As it can be seen, killing someone in the name of customs or honor or to satisfying some sort of code, will be considered as a specific and qualified form of murder which is a reason to increase the severity of the sentence. Accepting the existence of unjust provocation in such cases simply contrasts the art. 42 of the Istanbul Convention.

It is also important to mention the regulation of 'incitement' in the Turkish Criminal Code. As it is stated before, Istanbul Convention brings an obligation to the State parties to establish an effective investigation and take other neccessary legislative measures to identify the instigator and punish them accordingly.

In the description of the art. 38 of Turkish Criminal Code there is a definition of incitement. According to this incitement can be defined as: «a person who does not yet have an idea about committing a certain crime and having someone else or a group decide for him to commit this crime»[15].

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[14] Adana Ağır Ceza Mahkemesi Case no: 2006/129E.

[15] *Türk Ceza Kanunu Madde Gerekçeleri* (*The Explanatory Memorandum of the Turkish Criminal Code*), art. 38. Available here: *https://docplayer.biz.tr/1257504-Turk-ceza-kanunu-madde-gerekceleri.html*.

According to Turkish Crminal Law, the instigator is punished with the same punishment as the one who committed the crime. Additionally, if the instigator is a close relative who is in a position able to force the perpetrator using the influence from being a family member, they are both sentenced with increased punishments[16].

In some cases, courts of first instance did not consider some cases of crimes as 'honor' crimes due to the lack of incitement or of decision made by family courts. Similarly, in some other cases, courts of first instance did not consider crime at hand as "honor" crimes because there is no custom or tradition that justifies crimes in that specific crime zone[17].

The *Yargıtay*, (Supreme Court in Turkey) overturned these sentences. According to the *Yargıtay,* so-called honor crimes can be committed by a single perpetrator without needing a family court decision; therefore there is no need to see the incitement to take effect in honor crimes.

Additionally, the *Yargıtay* also overturned the sentence of the court of first instance about rejecting the existance of "honor" crime because they were not able to see a tradition justifying the crime itself. According to the *Yargıtay* that sentence accepted honor based crimes as a very specific crime type. So to say, specific to a certain region, which seeking a family council decision or common acceptance of violence is contrary to the principle of equality which provided for in the Turkish Constitution[18].

The *Yargıtay* remarks that the perspective of first instance court will result in the conclusion that this crime can only be committed

[16] Turkish Criminal Code, art. 38/1 Law No: 5237 of 26.09.2004.

[17] Doğan R., *Understandıng The Concept Of Customary Killing In The Light Of Rulings Of The Appeal Court*, TBB Dergisi, 2016, 29.

[18] Constitution Of The Republic Of Turkey, Intro and art. 10, Law no. 2709 of 7.11.1982.

in a certain region or by people with a certain cultural structure and this acceptance is not compliant with the principles of the state, nor have a legal basis.

2.3. GREVIO's evaluation Report of Turkey on so-called honor crimes

Changes that have been made in Turkish Criminal Code in 2005 were welcomed by the GREVIO team as positive steps. Even though positive changes that the reform of the code brougth had been recognized in the GREVIO report, experts still reported some concerns regarding investigation and prosecutions of the abovementioned crimes. As stated before, even though unjust provocation cannot be used for "custom" crimes, this prohibition may not always cover killings in the name of "honour" and this causes concerns for GREVIO team as mentioned in the report.

GREVIO emphasises that extensive preventive actions should be undertaken, specifically designed to help potential victims who are being forced to kill themselves. This part from the report should be underlined and must be acknowledged by authorities and should be acted upon meticulously. Even though the Turkish Criminal Code is well designed on the topic, it is also among the primary duties of the authorities to prevent crimes before it happens or at least to take the necessary actions to make prevention possible.

Hence, GREVIO urges Turkish authorities to effectively investigate and prosecute the crimes related to the so-called "honor" and provide protection to women who are under extreme pressure from their families. In 2019, with the circular order of the Minis-

try Of Justice, prosecution offices specialized in cases of domestic violence against women were established[19].

These offices are handling the cases of domestic violence cases as well as the cases of so-called honor crimes. This is a positive change because these officials will have extensive education and experience about violence against women in general and in dealing with these cases. In the scope of this and regulations brought by Turkish Criminal Code it can be said that some of the recommendations of GREVIO have been fulfilled.

GREVIO's Evaluation Report also mentions art. 62 of the Turkish Criminal Code which covers grounds for discretionary mitigation as a main reason causing great concerns. According to GREVIO report, this article regulates the grounds on which judges may mitigate penalties at their discretion. A discreation that may be based of judge's own – not professional but – personal opinions. Considering how this article has an open ended nature that gives judges the chance to mitigate sentences at their discretion, Grevio declares its concerns by pointing out the prevalence of discretionary mitigation in cases of violence against women; this indeed might mirror sexist prejudice and victim-blaming attitudes of courts.

Last but not least, GREVIO strongly recommends authorities to ensure that no sentence reductions shall be granted based on justifications which mirror victim-blaming attitudes and a lack of gendered understanding of violence against women[20]. Considering honor and custom based crimes as a form of violence against

[19] Turkey Ministry of Justice, *Circular on Protection of the Family and Against Women Law on the Prevention of Violence*. Available at: *https://magdur.adalet.gov.tr/Resimler/Dokuman/19102020111414154-1-NOLU-GENELGE.pdf*.

[20] GREVIO Baseline Evaluation Report Turkey, art. 42, 15 October 2018 Available at: *https://rm.coe.int/eng-GREVIO-report-turquie/16808e5283*.

women and (in most cases) as domestic violence it is important to adress the issues that cause the violence against women, in general, to effectively combat against honor crimes, in particular.

GREVIO's last encouragement actually remarks the importance of recognizing the victim blaming attitudes and gender-based violence by the authorities. In order to make it possible, the main reasons that are causing violence against women must be adressed, such as patriarchial beliefs and frame of mind, which justify male control over women and has been prevalent for a long time. Especially, considering how the concept of patriarchy refers to a set of ideas and beliefs that justify male control over women[21]. It is clear that the reasons that cause violence against women and domestic violence show strong similarities with the "honor" crimes.

3. Conclusion

According to many researches and available criminologic data, the complete elimination of crime is almost unattainable. Criminologist Ian O'Donnel states that «the crime is a normal feature of social life and it can never be eliminated. The best we can hope to achieve is a fuller understanding of its causes and consequences, a reduction in criminal opportunities, and a proportionate response to lawbreakers»[22].

However, identifying and addressing a common problem or a specific form of crime properly needs to be considered as a priority

[21] Tonsing J.C., Tonsing K.N., *Understanding the role of patriarchal ideology in intimate partner violence among South Asian women in Hong Kong*, in *International Social Work*, 2019; 62(1).

[22] O'Donnell I., *The Irish Times*, 8 August 2003. Available at: *https://www.irishtimes.com/opinion/crime-can-be-reduced-and-controlled-but-not-eliminated-1.368957*.

by the authorities. There are some measures that can be put into action by the latter. These include: (1) running an effective investigation regarding honor crimes, as it has been stated in GREVIO's Report of Turkey, (2) defining and identifying honor killings well enough to make it possible to understand if it is a factor in a murder case, even wheter there is no mentioning of honor, (3) reviewing the possibility of incitement in these cases, especially in cases in which the preptrator is a child or a juvenile, (4) work to remove any harmful patriarchal beliefs and myths that justify any type of violence against women (or men in some cases) from people's minds.

Specifically for Turkey, one more important suggestion can be made. It is clear that changes in Turkish Criminal Code and some sentences are great improvements in combating this type of crimes. But it is clearly a mistake of the courts to assume there is a difference between "custom" killing and "honor" killing. Courts and state officials should not accept any justification for ending someone's life, whatever the case. Therefore, mitigating circumstances such as unjust provocation and discretionary mitigation should be abolished from these cases alltogether.

In theory, one can safely state that Turkish Criminal Code covers almost every necessary part to prevent these crimes or punish perpetrators that committed crime in the name of honor. Establishing and sustaining an effective execution of the mentioned provisions should be considered as a priority in order to put an end to so-called honor killings.

The due diligence standard and Combating vıolence agaınst women

Şeyma Kuş*

1. Introduction

The European Court of Human Rights (ECtHR) made a landmark decision on violence against women in the *Opuz v. Turkey*[1] case. The applicant and her mother were continuously abused and threatened by the applicant's spouse from 1995 to 2008. The applicant, Ms. Opuz, could not obtain the results of her complaints to the authorities regarding the abuse she had suffered. As a result, Ms. Opuz's mother was murdered by the applicant's husband. In examining the application, the ECtHR particularly pointed out that the police authorities had not intervened in Ms. Opuz's complaints because it was a family matter for the police officers. The Court pointed out that the local authorities did not exercise due diligence in preventing violence against women and decided that the right to life had been violated. Aside from the fact that this judgment marks a milestone, it is not the first time due diligence has been considered when dealing with violence against women.

* The author would like to thank Dr. Rahime Erbaş for the guidance and encouragement.

[1] ECtHR *Opuz v. Turkey*, N. 33401/02, 9 June 2009.

So, what is the due diligence standard, and how does it relate to violence against women?

Violence against women has been a subject of debate both regionally and internationally for many years. The fact that violence against women is typically committed by third parties and usually occurs in the private sphere has become a problematic issue regarding the States' responsibility. The view that States cannot intervene based on the distinction between public and private spheres has created a significant problem of criminalization, investigation, and prosecution of acts of violence against women. States' fulfillment of their negative obligations not to violate human rights has led them to remain silent or passive on violence against women.

Presently, it is acknowledged that States have positive obligations to protect, and respect human rights. Since the acceptance of positive obligations on human rights, the response to violence against women has evolved significantly. In other words, in the context of violence against women, it is recognized that States have an obligation not to violate human rights themselves but also a positive obligation to prevent third parties from violating the rights of others. Meanwhile, the due diligence standard is for a State to meet its positive obligations by exercising due diligence in its obligations to respect, protect and fulfill human rights. In this regard, the due diligence standard is used as a criterion to determine whether States have met their positive obligations to address violence against women[2].

States have an obligation to prevent human rights violations, protect victims and survivors, prosecute violations, punish perpe-

[2] Radacic I., *Human Rights of Women and The Public/Private Divide in International Human Rights La,* in *Croatian Yearbook of European Law and Policy*, 2007, 3, 443, 457.

trators, and provide reparation for victims[3]. The increasing reliance on due diligence as a tool to address gender-based violence calls for consideration of this standard[4]. Therefore, the study begins with a brief history of the due diligence standard and how it was addressed for the first time on violence against women. Secondly, the provisions of the due diligence obligation in the international areas are contained. Additionally, the study contains GREVIO's observations on due diligence obligation in country reports and United Nations Special Rapporteur on Violence Against Women reports. This study aims to demonstrate that the due diligence standard is more practical rather than theoretical. As a result, the study concludes with determinations and suggestions regarding the current position and implementation of the standard.

2. Historical background

The due diligence standard has a long history before being addressed in violence against women[5]. Seventeenth-century jurists considered the due diligence standard in the context of the responsibilities of monarchs to punish acts of violence against foreign nationals and compensate for the damage caused by these acts[6]. In

[3] Campbell E., Dominic E., Stadnik S., Wu Y., *Due Diligence Obligations of International Organizations Under International Law,* in *International Law and Politics*, 2018, 50, 541, 570.

[4] Goldcheid J., Liebowitz D.J., *Due Diligence and Gender Violence: Pasing its Power and its Perils,* in *Cornell International Law Journal*, 2015, 48, 301, 301 ff.

[5] For a study in which the due diligence standard is examined in a historical context, see, Hessbruegge J.A., *The Historical Development of the Doctrines of Attribution and Dule Diligence in International Law,* in *New York University Journal of International Law & Politics*, 2004, 36, 4, 1.

[6] Bourke-Martignoni J., *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against*

the case of Velasquez Rodriguez v. Honduras, the Inter-American Court of Human Rights made the first decision on the liability of the State with respect to third-party actions. The Court stated that:

> An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to the international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention[7].

Given that judgment, it has been recognized in the international arena that States have a duty of due diligence to prevent and punish acts of violence committed by third parties. Due to the fact that violence against women is usually committed by third parties – especially by intimate partners – the concept of due diligence drew a great deal of interest in the doctrine and practice of women's human rights. The application of the due diligence standard to women's human rights and violence against women corresponds to the 1990s.

The United Nations Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee) is the first international body where the due diligence standard addresses violence against women. In its General Recommendation No. 19, the Committee emphasized that:

> Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation[8].

Violence, in *Due Diligence and Its Application to Protect Women from Violence*, C. Benninger-Budel (ed.), Leiden, Boston, Martinus Nijhoff Publishers, 2008, 47.

[7] IACHR Velasquez Rodriguez v Honduras, Series C No 4, 29 July 1988, par. 172.

[8] UN CEDAW, General Recommendation No. 19, 1992, par. 9.

In this recommendation, it is also stated that there are four obligations derived from the application of Velasques Rodrigez: prevention, investigation, punishment, and provide compensation. The United Nations General Assembly has similarly accepted that States should exercise due diligence in preventing, investigating, and in accordance with their national legislation punishing acts of violence against women, whether the State or individuals perpetrate these acts[9].

The CEDAW Committee also referenced the due diligence standard in its General Recommendation No 35, updated in 2017. The Committee stated that art. 2 of the CEDAW is actually often referred to as the obligation of due diligence and that this standard is the foundation of the Convention. As stated in paragraph 24:

> Article 2 (e) of the Convention explicitly provides that States parties are to take all appropriate measures to eliminate discrimination against women by any person, organization, or enterprise. That obligation, frequently referred to as an obligation of due diligence, underpins the Convention as a whole, and accordingly, States Parties will be held responsible should they fail to take all appropriate measures to prevent, as well as to investigate, prosecute, punish and provide reparations for, acts or omissions by non State actors that result in gender-based violence against women, including actions taken by corporations operating extraterritorially[10].

When comparing the Committee's General Recommendations 19 and 35, it can be seen that there is a significant alteration of the due diligence standard. While the Committee stated in General Recommendation No. 19 that if the States fail to exercise due

[9] UN General Assembly, *Declaration on the Elimination of Violence against Women*, 20 December 1993, A/RES/48/104.

[10] UN CEDAW, General recommendation No. 35 on gender based violence against women, updating general recommendation No. 19, 26 July 2017, CEDAW/C/GC35, par. 24.

diligence to punish, prosecute, investigate, and prevent violations, States' responsibilities *may arise*. In contrast, in Recommendation No. 35, it was emphasized that the States would be clearly *responsible* if due diligence is not exercised. The difference between the two recommendations demonstrates that the due diligence standard has strengthened its place in combating violence against women in the last 30 years.

The first Convention in which the obligation to exercise due diligence is addressed at the regional level is the "Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women" also known as the Belém do Pará Convention. Art. 7(b) reads as follows:

> The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:
> [...]
> b) apply due diligence to prevent, investigate and impose penalties for violence against women[11].

Finally, the Istanbul Convention regulates a duty of due diligence of the States. As it is known, the Istanbul Convention, which is a regional convention of the Council of Europe, regulates comprehensive provisions to address violence against women. As well as providing comprehensive regulations on violence against women, the Convention also included States' obligations on this issue in detail and was constructed on four components: prevention of violence, protection against violence, prosecution of perpetrators, and integrated

[11] Organization of American States, Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women ("Convention of Belem do Para"), 9 June 1994, art. 7.b.

policies. Art. 5 of the Convention regulates the general obligations of States and the due diligence standard as follows:

> State obligations and due diligence
> 1- Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions, and other actors acting on behalf of the State act in conformity with this obligation.
> 2- Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors[12].

According to the article, States are obligated to refrain from violence against women and exercise due diligence in acts of violence committed by non-state actors. These issues, namely, the avoidance of violence and due diligence, are also addressed in the Explanatory Report to the Convention. As mentioned in paragraph 57, if the States fail one of these obligations, State's responsibility will occur[13]. However, there is a crucial point about due diligence obligation. Due diligence obligation is not an obligation of result; it is an obligation of means. In other words, even if States exercise due diligence, they cannot guarantee the expected outcome in an absolute manner. Likewise, the ECtHR is of the opinion that the scope of positive obligations should not impose an impossible or disproportionate burden on States due to the difficulties of controlling modern societies and the unpredictability of human behavior. Therefore, there is no harm in making the due diligence obligation a tool obligation, which does not reduce the importance of the standard.

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[12] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 5.

[13] Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, par. 57.

3. Implementatıon of due dılıgence standard

Unlike acceptance of the due diligence standard in the international and regional areas, such issues as implementation of the standard, scope of the standard have become controversial. Some scholars have pointed out that the scope of the standard is uncertain, which weakens the positive obligation of the States[14]. Claiming that it cannot be predetermined whether States have met their due diligence obligations, these views argue that the due diligence standard only allows for an adequate examination if the harm has occurred. Furthermore, these arguments are based on the assertion that the due diligence standard provides governments with a wide margin of appreciation and that the standard has wide application[15].

On the other hand, other scholars – as an opposing view – have claimed that this standard does not undermine the States' positive obligations. According to the counter-argument, this standard is an oversight tool in the compliance of the State with its positive obligations[16]. The due diligence standard, which addresses how States meet their obligations, is therefore considered a concept that cannot be inferred from the State's positive obligations. It is necessary to understand these different perspectives better and respond to criticisms of the due diligence standard. Therefore, the determinations and definitions of the United Nations Special Rapporteurs regarding the due diligence standard will be included under the ti-

[14] Stoyanova V., *Due Diligence versus Positive Oblaigations,* in *International Law and Violence Against Women: Europe and the Istanbul Convention*, J. Niemi, L. Peroni, V. Stoyanova (eds.) London, Routledge, 2020, 3.

[15] *Ibid*., 9.

[16] Sarkin J., *A Methodology to Ensure that States Adequately Apply Due Diligence Standards and Processes to Significantly Impact Level of Violence against Women around the World*, in *Human Rights Quarterly*, 2018, 40, 1, 16.

tle below. Then the observations in the GREVIO's country reports regarding the implementation of the standard will be reviewed.

3.1. Reports of UN special rapporteurs on violence against women

As stated above, UN Special Rapporteurs have examined due diligence standard and interpreted its implementation of violence against women. In doing so, various approaches, definitions, and methodologies for implementing the due diligence standard emerged. One of the most significant reports is "The Due Diligence Standard As a Tool for Elimination of Violence Against Women," written in 2002 by Special Rapporteur Yakin Ertürk. According to her, the due diligence standard provides a test to determine whether a State has met its obligations to address violence against women. However, she acknowledged that this standard remains a lack of clarity. In her report, Ertürk stated that:

> The application of the due diligence standard, to date, has tended to be limited to responding to violence against women when it occurs and in this context, it has concentrated on legislative reform, access to justice and the provision of services[17].

As a solution to this problem, she stated that the due diligence standard should be examined at four different levels: the level of individual women, at the community/family level, at the State level, and at the transnational level. Each level points to different issues that may help address violence against women. For instance, at the level of individual women, she suggested that women's individual empowerment should be seen as the goal to understand subordina-

[17] Economic and Social Council, Report by Special Rapporteur Yakın Ertürk: *The Due Diligence Standard As a Tool for Elimination of Violence Against Women*, 20 January 2006, E/CN.4/2006/61, par. 15.

tion and violence are not fate. She stated that in order to address the causes of violence, the community and family order must be addressed at the second level.

The third step that guides the fulfillment of the due diligence obligation is the State level. At this level, there are many steps, such as the acceptance of human rights without reservation, the States' making the necessary legal arrangements in the domestic legal order, and the implementation of these regulations. At the last level, States have an obligation to fulfill their obligations arising from international law and conventions at the international level. Considering the due diligence standard of this level, it is accepted that non-state organizations also have obligations to show due diligence.

Rashida Manjoo elaborated another approach to the due diligence standard. Unlike Ertürk, Manjoo argued that the due diligence standard should be addressed in two ways[18]. Manjoo who expresses that States do not see violence against women as a violation of human rights thus creating a significant obstacle to combating this violence, believes that the due diligence standard should be examined in two categories: individual and systematic due diligence. Manjoo argues that the obligation to exercise individual due diligence refers to States' obligations to protect individuals, prevent and punish violence, and provide effective solutions. Therefore, individual due diligence requires flexibility and the needs and preferences of individuals who have been harmed in acts of violence. States can fulfill their due diligence obligations by providing services in many forms, such as emergency hotlines, health services, counseling centers, legal aid, shelters. Individual due diligence also

[18] United Nation General Assembly, *Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences*, 14 May 2013, A/HRC/23/49.

requires States to punish the perpetrators and those who fail to fulfill their duty to respond to violations.

On the other hand, systematic due diligence refers to the obligations of States to provide a holistic and sustainable model of prevention, protection, punishment, and reparation for acts of violence against women. In this context, States need to effectively regulate their legislation on combating violence against women, develop policies and action plans to prevent violence, and hold accountable those who violate human rights, as well as those who fail to protect these rights or prevent violations. While the State needs to have legislation that can reasonably deter violence, it also requires that legal remedies that express due diligence are formally available and effective.

These reports, prepared by the United Nations Special Rapporteurs, guide States, and non-state actors to apply the due diligence standard and understand its scope. In this context, it emerges as a result of an effective struggle against violence against women in order for States to fulfill their due diligence obligations. Although States' responses after the occurrence of violence are essential in fulfilling the obligation of due diligence, the necessity of States to be active participants in the individual, social and international arena in the context of ending and preventing violence is therefore essential.

3.2. GREVIO's Country Reports in the context of due diligence standard

GREVIO, which is called the "Group of Experts on Action against Violence against Women and Domestic Violence" and monitors the Istanbul Convention's implementation, has gathered many findings regarding the implementation of the due diligence standard in its country reports. In this section, the findings compiled from the GREVIO country reports will be included.

In its report on Italy, GREVIO emphasized that the full realization of due diligence standard depends on investing equally in the necessary prevention, investigation, punishment, reparation, and protection actions of all State's institutions, starting with the transformation of patriarchal gender structures and values that perpetuate and root violence against women[19].

Determining that the policy in Italy is to criminalize acts of violence and to combat the inadequacies of penal laws, GREVIO said that these policies tend to see them as a restrictive legal problem rather than a violation of women's human rights. According to the GREVIO report, overemphasizing only the criminal aspects of violence against women overshadows many needs, such as addressing institutional deficiencies in response to violence against women, working on prejudices and gender inequality, and allocating adequate resources[20]. For these reasons, GREVIO recommended that the legislation on punishing violence should pay attention to the stages of prevention, protection, investigation, punishment, and provision of remedies under the due diligence standard in art. 5 of the Convention.

According to GREVIO, the due diligence obligation set out in the Istanbul Convention requires States to consider the needs of women who face multiple intersecting discriminations and disadvantages[21]. In the GREVIO Serbia report, it was stated that the characteristics of women, for example, because they belong to a minority group, do not know the local language, or are disabled, can interact in a way that increases discrimination. In order to prevent

[19] GREVIO, Baseline Evaluation Report Italy, *https://rm.coe.int/grevio-report-italy-first-baseline-evaluation/168099724e*, (accessed on 17.08.2021), par. 28.

[20] *Ibid.*, par. 29.

[21] GREVIO, Baseline Evaluation Report Malta, *https://rm.coe.int/grevio-inf-2020-17-malta-final-report-web/1680a06bd2* (accessed on 17.08.2021), par. 19.

women from exercising their right to live free from violence and be protected effectively, interventions to the forms of violence experienced should take into account individual rights and be sensitive to women's needs or particular situations[22].

In its report on Spain, GREVIO determined that information and data on administrative and judicial cases brought against State officials could not be provided because they did not take preventive and protective measures and did not show due diligence. According to GREVIO, it shows that public officials are rarely held responsible for failing to fulfill their due diligence obligations[23]. It is accepted both by the UN and within the scope of the Istanbul Convention that State officials can be held responsible if they do not show due diligence. Therefore, States are expected to properly carry out the processes related to judicial, criminal, or administrative cases filed on this issue.

When the obligation to show due diligence is examined within the scope of GREVIO reports and the reports of the UN Special Rapporteurs, it can be seen that this standard is used as a criterion for States to fulfill their obligations under the Convention rather than a theoretical obligation. Put differently, due diligence standard is a critical tool in formulating government accountability. In this context, it can be stated that this standard actually brings an obligation to implementation. It covers all processes from social change regarding violence against women to legal regulations, administrative/criminal/judicial sanctions, to the behavior of State

[22] GREVIO, Baseline Evaluation Report Serbia, *https://rm.coe.int/grevio-report-on-serbia/16809987e3*, (accessed on 17.08.2021), par. 17. For similar approach see, GREVIO, Baseline Evaluation Report Finland, *https://rm.coe.int/grevio-report-on-finland/168097129d*, (accessed on 17.08.2021), par. 12.

[23] GREVIO, Baseline Evaluation Report Spain, *https://rm.coe.int/grevio-s-report-on-spain/1680a08a9f*, (accessed on 17.08.2021), par. 27.

officials. Therefore, it is not enough for States to regulate their legal regulations. It is expected that States and other non-state actors participate effectively in combating violence against women and that the Convention is fully implemented within a system.

4. Concluding remarks

Violence against women is a problem that exists in all societies and has not diminished in value. Despite local, regional and international regulations, the increase in femicides proves that the violence is not over and that there is more struggle in this regard. Combating violence against women, the participation of all non-state actors and individuals in this struggle is as crucial as the States'. The objective of this study is to provide a brief history of the due diligence standard for its current application. In this context, it has been examined why the obligation to show due diligence has become an essential standard in combating violence against women and how it should be implemented. The following findings include the conclusions and recommendations made during the evaluation of the overall study:

- The due diligence standard is a cornerstone in combating violence against women. Much progress has been made in this process, which began with the responsibility of States for the actions of third parties and has moved towards international regulation to combat violence against women. Currently, states have an obligation to exercise due diligence in combating violence against women. The due diligence standard essentially eliminates the dichotomy between the public and private spheres by preventing women from experiencing violence in the private sphere. This development refuted States' "so-called" justifications that they could not intervene in the private sphere.

- The due diligence standard ensures that states can no longer be spectators of violence in the private sphere. Consequently, effective and active participation of States is expected at every stage of combating violence against women.

- It can be stated that there is no consensus on the definition and scope of the due diligence obligation. However, this standard shows some common features in regional and international documents and reports. First of all, it can be said that States are under the obligation to show due diligence in preventing, investigating, prosecuting, and punishing violence and providing compensation to victims in combating violence against women. It is also widely accepted that it is insufficient for States to regulate the matter only in the legal field.

- Within the scope of the due diligence obligation in combating violence against women, States are required to work on many issues from the individual to the society, from the legal legislation to the officials implementing the legislation, from education to social awareness. For this reason, the evaluations of United Nations Special Rapporteurs Manjoo and Ertürk are essential. In our opinion, Manjoo's distinction between individual and systematic due diligence is guided in this regard. On the other hand, the four different levels that Ertürk has identified within the scope of the State's duty of due diligence show that this standard is vital in combating violence beyond a simple violation of rights.

- Another mechanism that should be mentioned in terms of being a guide is GREVIO. Observing the practices of the States party to the Istanbul Convention, this organization makes some important determinations in its reports on how to apply the due diligence standard throughout the Convention. These reports, which are valuable in preventing rights violations and proper implementation of the Convention, are also crucial. These reports

provide numerous examples of the application of the due diligence standard in the context of States' particular situations.

- In combating violence against women, active participation of States and individuals, societies, and all other non-state actors is particularly required. As a final point, it is necessary to focus on the studies for the implementation of this standard rather than the discussions on whether the due diligence standard is necessary or not.

The absence of prostitution from the Istanbul Convention: an effective limit?

Cristina Luzzi

1. Attempts to overcome the absence of forced prostitution from the Istanbul convention

Female prostitution accounts for most of the sex market, yet the Istanbul Convention does not cover this topic, removing the obligation for States parties to ban prostitution or prevent it. This essay focuses on the absence of prostitution from the Istanbul convention and investigates how it must be interpreted.

In our opinion, the reasons of the absence of prostitution could be the impossibility to find uniform domestic regulations between States parties' internal laws[1] and a "peaceful" debate on this point; the difficulty to define what prostitution is, given that there are

[1] For an overview to the different national legislations regulating prostitution in EU see Danna D., *Report on prostitution laws in the European Union*, *Autumn 2013 – revised 5th February 2014*, in *La Strada International*, *Documentation Centre*, 1 ss.; Reinschmidt. L., *Prostitution in Europe between regulation and prohibition. Comparing legal situations and effects*, in *https://www.sociopolitical observatory.eu/en/keytopics/equality*, 2016, 1.

several different ways, even without bodily contact, in which a body and sexual needs can interact[2].

Nevertheless, if these grounds probably could explain the absence of voluntary prostitution from the Istanbul Convention, they do not justify the exclusion of forced prostitution from the classification of serious and structural forms of violence against women that the Istanbul Convention pledges to contain. Some scholars[3] have called for the creation of an additional protocol to fight and prevent forced prostitution.

It must be noted that the preamble of the Istanbul convention mentions other international instruments that could be used indirectly to combat at least the exploitation of forced prostitution, such as the Council of Europe's convention on action against trafficking in human beings, the Council of Europe's convention on the protection of children against sexual exploitation and sexual abuse, and, recently, also the European convention on human rights[4].

On this matter, it must be mentioned the judgment of the European court of human rights S.M. v. Croatia issued on 25 June 2020[5]. In

[2] About the different sexual services can be included into prostitution or "sex work" see Zeno Zencovich V., *Sex and the Contract*, 2nd ed., Rome, Roma3 press, 2015, 35.

[3] See De Vito S., *Donne, Violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d'Europa del 2011*, Milano, Mimesis, 2016, 222.

[4] To be thorough, it has been noted Istanbul convention makes no mention of the additional Protocol of Palermo, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against Transnational Organized Crime, adopted in 2000 and came into force in 2003 that imposes the prevention of human trafficking, exploitation of prostitution and other forms of sexual exploitation on States Parties.

[5] See ECHR, *S.M. v. CROATIA*, Application no. 60561/14, Judgment of 25 June 2020, with the contributions of Stoyanova V., *The Grand Chamber Judgment in S.M. v Croatia: Human Trafficking, Prostitution, and the Definitional Scope of Article 4 ECHR*, in *https://strasbourgobservers.com/*, 3 July 2020; Tammone F., *Tratta di esseri umani e sfruttamento della prostituzione quali forme contemporanee di*

this case, the Court adds forced prostitution to the conceptual apparatus of art. 4 ECHR (the right not to be held in slavery or servitude or to be required to perform forced or compulsory labour) and states «the notion of 'forced or compulsory labour' under Article 4 of the Convention aims to protect against instances of serious exploitation, such as forced prostitution, irrespective of whether, in the circumstances of a case, they are related to the specific human-trafficking context».

Thus, even if prostitution is not included in the Istanbul convention nor is listed among the acts of violence against women, there are other international instruments, specifically recognized by the same Istanbul convention, such as the ECHR, that can effectively support the fight against forced prostitution even when the latter is not related to human-trafficking. A few considerations can be drawn; firstly, there is an increasing international level of protection of women who are victims of forced prostitution. Secondly, this growing international standard of protection for victims of forced prostitution, indirectly mentioned by the Istanbul convention, could reinforce the idea that women victims of forced prostitution, even in the absence of an expressive provision, can have access to the supporting measures provided by the Istanbul Convention itself, such as safe accommodations or legal, social, and healthcare services[6].

2. From the dubious enforceability of the Istanbul convention to voluntary prostitution…

In the light of the above, the absence of forced prostitution from the Istanbul convention can be overcome thanks to other international instruments; nevertheless, more doubts remain unanswered

schiavismo: la pronuncia della Grande Camera nel caso S.M., in *Diritti umani e diritti internazionali*, Bologna, il Mulino.

[6] See De Vito S., *cit. supra* nota 3.

about voluntary prostitution. Can the Istanbul Convention and its related support measures be indirect applied to voluntary prostitution and, above all, is this potential application appropriate? In other words, in our opinion, it must be clarified whether or not voluntary prostitution has to be considered a form of structural violence against women.

As well known about this issue there is a lively debate among feminist scholars we can only give an overview of. Radical feminists, such as Catherine MacKinnon, do not recognize any difference between forced and voluntary prostitution[7]; forced and voluntary prostitution together with pornography are, according to their opinion, an expression of male dominance into society; an erotization of female degradation, a situation in which women do not exist for themselves but only for male consummation.

On the other hand, liberal feminists take exceptions to this kind of reading; they reclaim women's autonomy in deci-

[7] MacKinnon C., «The distinction between forced prostitution and voluntary prostitution has similar dimension of unreality (...) the point of the distinction is to hive off a narrow definition of force in order to define as voluntary the condition of sex equality, abuse and destitution that put most women in the sex industry and keep them there», in *Are Women Human?: And Other International Dialogues*, Cambridge MA, Harvard University Press, 2006, 249. To be thorough, it seems hard to imagine a different Catharine MacKinnon's opinion on voluntary prostitution, considering that, according to her, heterosexual sexuality is always dominated by male coercion to the point that «Women, as a survival strategy, must ignore or devalue or mute desires, particularly lack of them, to convey the impression that the man will get what he wants regardless of what they want. In this context, to measure the genuineness of consent from the individual assailant's point of view is to adopt as law the point of view which creates the problem», in Id., *Toward a feminist theory of the State*, Cambridge MA, Harvard University Press, 1989, 181. Along the same radical feminist line, reflects about how coercion economic affects workers' choices to enter commercial sexual exchange, Jeffreyes S., *The Industrial Vagina: The Political Economy of the Global Sex Trade*, London, Routledge, 2009.

sion-making over all kinds of sexual relations and reject because of the paternalistic victimization of voluntary prostitutes. If one identifies the radical feminist view on prostitution as an essentialist position that promotes policies for women without really taking their voices and desires[8]into account; another one, starting from the same point of view, considers prostitution a "scandalous" work, a female way to reverse official morality according to which women are not able to have sexual relations for payment and outside domestic space[9]. It must be added only considering prostitution as work guarantees the recognition and the implementation of sex workers' labour rights and, accordingly, their full enjoyment of other fundamental rights[10].

[8] Against MacKinnon's theory, see García Pascual C., *Liberazione senza autonomia*, in *Rivista di filosofia del diritto*, 2003, 2, 339, who states «Se non vogliamo cadere nel pericolo di politiche a favore delle donne che non prendono in considerazione i loro desideri e le loro decisioni, una specie di dispotismo illuminato "tutto per le donne senza le donne" al momento di affrontare le sfide a cui "l'accesso all'umanità" assoggetta, dovremmo non perdere di vista il riconoscimento della loro».

[9] Rodríguez Ruiz B., *Género y Constitución. Mujeres y varones en el orden constitucional español*, Lisbon, Editorial Juruá, 2017, 232. However, even if Rodríguez Ruiz reflects about positive effects on traditional morality and gender roles of prostitution, she does not overlook sex work can be a dangerous work, above all for street prostitutes and she does not hide that, in a capitalistic and patriarchal context, prostitution converts men both into customers, potentially increasing male dominance. On the contrary; replies to the anti-capitalistic feminist critiques to sex work, using sex workers' writings, Berg H., *Working for Love, Loving for Work: Discourses of Labor in Feminist Sex-Work Activism*, in *Feminist Studies*, 2014, 3, 693; rejects male responsibility, promoting a turning point of view from the sex worker to the client, Serughetti G., *Prostitution and Clients' Responsibility*, in *Men and Masculinities*, 2013, 16, 35.

[10] In time of Covid 19, for example, given that prostitutes are not considered workers, in many Countries prostitutes had lost their incomes and have not had access to benefits from the emergency measures of social security; see *Sex workers*

To demonstrate how the debate on prostitution is still heated also in national systems, it can be interesting to mention the judgment no. 141/2019 of Italian Constitutional court[11]. With this judgment the Constitutional court rejects a constitutional challenge and judges current Italian law on prostitution not unconstitutional. The legislative framework on the issue, from 1958, marked the transition by regulationism, traditional system of state control of prostitution (which generally includes establishments of brothels, registration of prostitutes, medical check-ups, and police controls) to abolitionism. An abolitionist model suppresses prostitution, insofar as it could, and creates laws aimed both at repressing any economic exploitation of the prostitution of others, encouraging women, who engaged in it, to leave their profession[12]. According to the Court, criminalization of solicitation of prostitution does not represent a violation of women's right to make autonomous decisions about their sexuality given that prostitution cannot be considered expression of sexual freedom but only an economic activity. However, the difficulty to establish when sex work represents an effective free choice justifies the criminaliza-

in the time of COVID-19, in *https://elan.jus.unipi.it/events/other-events/news/sex-workers-in-the-time-of-covid-19/*, 19 April 2020.

[11] See Corte costituzionale, 7 July 2019, no. 141, with a contribution about the question of constitutionality of Italian law on prostitution by Salazar C., *Il corpo delle donne e la Costituzione. Alcune domande intorno alla questione di costituzionalità proposta dalla Corte di appello di Bari sulla "legge Merlin" e qualche riflessione sui recenti sviluppi giurisprudenziali in tema di gpa*, in *70 anni dopo tra uguaglianza e differenza. Una riflessione sull'impatto del genere nella Costituzione e nel costituzionalismo*, A. Lorenzetti, B. Pezzini (eds.), Torino, Giappichelli, 2019, 161.

[12] About how administrative and governmental practices, using infralegal regulatory instruments, in our opinion, put Italian abolitionist regulation on prostitution near to a neo abolitionist model, see Mazzarella M., Stradella E., *Le ordinanze sindacali per la sicurezza urbana in materia di prostituzione*, in *Le Regioni*, 2010, 1-2, 237.

tion of solicitation of voluntary prostitution (but not of voluntary prostitution itself) and the limitation of women's free enterprise. In fact, there are several factors that can limit the decision to enter sexual market exchanges, such as economic problems, situations of emotional distress or family and social relationships; it could mean, even where prostitution seems to be chosen freely, leaving sexual market, and starting a new different job can be difficult or dangerous too. In few words, according to radical feminists' point of view, the Court doubts on voluntary prostitution's ability to help women's empowerment.

Coming back to our task, taking into account feminist debate about prostitution, different (and still disputed) models of prostitution policies into domestic laws of States parties, establishing if voluntary prostitution represents a form of structural violence against women, or not, seems quite difficult.

2.1. …some reasons to understand the absence of voluntary, and forced, prostitution from the Istanbul Convention

From this point of view the absence of voluntary prostitution from the Istanbul Convention should not be understood as an implied indicator of the Istanbul convention support to feminist scholars and movements that ask the decriminalization of solicitation of prostitution and sex workers' labour rights recognition. On the contrary, this reading would be more plausible if there was an expressed provision of the Istanbul Convention against forced prostitution only.

At the same time, even if pointed out by some scholars, the absence of any provision on voluntary prostitution from the Istanbul Convention cannot be overtaken either (as in the case of forced prostitutes) by presuming the enjoyment of support services provided by the Istanbul Convention for voluntary sex workers who want to leave their job because this interpretation implies the con-

sideration of all forms of prostitution as a radical violence against women[13].

Nevertheless, the absence of prostitution from the Istanbul Convention can be read as a "feminist choice" from two different feminist points of view. First, combining all forms of prostitutions, forced and voluntary, would have obviously meant delegitimating regulationist national legislations and leaving voiceless sex workers – who struggle to dignify their job – and, secondly, as we have seen, covering just forced prostitution could have been read as an implicit "legitimation" of voluntary prostitution.

In other words, the absence of any provision on prostitution can be interpreted as an uncertainty with respect to how much prostitution represents an expression of women's empowerment or, better, to how much the ability of a prostitute to live sex work just as a job affects the change of traditional gender roles and makes relations between men and women more equal[14].

That said, maybe it will be more interesting to investigate how (and if) the achievement of the final goal of the Istanbul Convention, eliminating violence against women and domestic violence or, at least, promoting more equality between women and men, will influence the dispute about prostitution. Will the awaited extinction of structural violence against women, and their full advancement, ensure a change of gender roles? Will it be the proof of sex workers' agency or the abolition of sexual services' demand?

[13] See De Vito S., *cit. supra* nota 3.

[14] About negative effect of forced and voluntary prostitution on equality between women and men, see the European Parliament resolution of 26 February 2014 on *Sexual exploitation and prostitution and its impact on gender equality*, in *https://www.europarl.europa.eu/*.

CHAPTER 4

THE PERSPECTIVE OF NATIONAL AND SUPRANATIONAL INSTITUTIONS

The GREVIO's perspective

Simona Lanzoni
GREVIO First Vice-President

First of all, I would like to thank the University of Pisa for the conference organized on the 10th anniversary of the Istanbul Convention.

The tenth anniversary celebrations in all the countries that have ratified the Istanbul Convention are an important opportunity to take stock and recognize how far we have come in advancing the protection of women and girls in the states that have signed this Convention. But not only that. This landmark treaty is making progress in ways that we are not always necessarily aware of, and that is important to recognize.

Much has been said about the growing opposition to women's rights –a development that is witnessed around the world and that has not exempted the Istanbul Convention. False claims and deliberate misrepresentations about the purposes of this important treaty are being circulated widely and often without any control, often for a purely political purpose. Legal norms carefully shaped and drafted by all 47 member states of the Council of Europe a decade ago are now considered unconstitutional, a threat to the traditional family, or the promotion of homosexuality and immigration. These continued pushes to go against the Convention, despite not knowing about it, have had an impact on creating a misconception of the Convention among certain segments of public opinion and

has affected the slowdown in the ratification of the Convention to the point of taking the unprecedented step of withdrawing by one state party: Turkey.

On July 1, Turkey's final exit from the Istanbul Convention will be sanctioned. Does this close one chapter? It is not up to us to give an answer. We know that many women's and Human right organizations in Turkey are preparing for a major, transnational mobilization that will put the Istanbul Convention again at the center of an international debate. Turkey's exit is a *unicum* in the history of human rights for the Council of Europe.

The Convention is not just an issue that concerns Turkey. The provisions of the Convention are the result of a long process that saw an international forum of technicians and politicians come together for three years to write a text and have a treaty that reflects and respects the international framework of human rights. This text was ratified first of all by Turkey. The issue of Turkey's exit is a fact that goes beyond the Convention itself, because it concerns the life and death of millions of women who experience male violence and do not receive adequate responses to be free from such violence and fear.

I want to emphasize that the Istanbul Convention does not create new definitions of family or new standards with respect to how families should or should not be, whether they are traditional or other types; violence is always a violation of human rights. I remember that statistics speak for themselves, 70-80% of violence against women takes place in the context of intimate relationships, in a domestic context. This is the reality of the facts.

And the Istanbul Convention also does not promote illegal migration or homosexuality. The Istanbul Convention guarantees respect and refers to all the principles of the "mother Convention", the European Convention for the Protection of Human Rights and Fundamental Freedoms Signed in 1950 by the Council of Europe,

aimed at protecting human rights and fundamental freedoms in Europe. The Convention established the European Court of Human Rights, aimed at protecting people from human rights violations. Violence against women and girls is a human rights violation.

The Istanbul Convention, as you know, provides provisions on the prevention of gender-based violence, protection of those who suffer violence, punishment of perpetrators and integrated policies that a state should be able to apply in collaboration with civil society and defines the forms of gender-based violence that are those experienced by women because they are women, such as genital mutilation or forced abortion and forced sterilization, or that are experienced predominantly by women, such as physical violence, sexual violence, rape and many other forms.

Working with those – mainly women at all ages – who experience gender-based violence, is not a matter of pity, it is not a matter of goodwill, it is a matter of human rights and a path to equal opportunity for all human beings. Without full equality between women and men, we will never end violence against women and domestic violence. Every violation of human rights, every GBV, is a further obstacle to the path of empowerment in the family life and in the public life.

The Convention, therefore, is a tool that offers a vision of a fair, egalitarian, non-violent society, towards which we must work, now more than ever, because the COVID-19 pandemic has further exacerbated the condition of violence in which millions of women and children live, and furthermore has set many more women back from the common goal of achieving gender equality.

I'm now sharing with you examples on how the Convention is changing lives of women and girls affected by violence and how it is giving professionals the tools, budget, and institutional support to ensure prevention and protection from it.

It is a news of these days that Lichtenstein has ratified the Istanbul Convention as Director Luciani mentioned. Another positive event is what happened on June 4: the Latvian Constitutional Court adopted a judgment declaring that the provisions of the Istanbul Convention, in particular art. 3(c), 4(3) and 12(1), are in conformity with the Latvian Constitution. The Constitutional Court found, *inter alia*, that the scope of the Istanbul Convention includes only the elimination of violence against women and domestic violence, and that it does not require the acceptance or introduction of a specific form of marriage or family. In addition, Latvia adds that gender-based violence is present in its country and affects mainly women, therefore, the implementation of special measures towards women is necessary and aims to achieve effective equality between men and women. In addition, Kosovo shortly gave the Convention constitutional status to apply its provisions. The United Kingdom has stated that it will ratify the Convention soon.

There is a great interest in the provisions of the Istanbul Convention also outside the member states of the Council of Europe; for example, Kazakhstan and Tunisia have begun a process of ratification and this makes us very positive.

GREVIO is also working on its first general recommendation that will establish a comprehensive set of recommendations to ensure implementation of the Convention in the broad field of online and technology-facilitated violence against women. The recommendation will be published at the end of 2021.

Ten years after the convention was signed, we are seeing the result of its continued implementation and the results of the monitoring work.

The 2nd General Report on GREVIO's activities, recalled by Director Luciani, was released just a month ago and contains a detailed description of trends and challenges in implementing the

Convention's standards in the area of specialized support services, including the impact of the COVID-19 pandemic. Since the Convention entered into force, many States Parties have amended their legislation to bring it into compliance with the Istanbul Convention. I would like to give some brief examples of how the Convention impacts states and women victims of violence lives.

In Sweden, after the entry into force of consent-based sexual violence legislation, in which the burden of proof must be on the perpetrator of rape and not on the victim, the number of prosecutions has increased because many cases that previously were not qualify as rape can now be prosecuted.

Some countries have, for the first time, introduced emergency barring orders, making this tool an almost universal standard in ensuring the safety of women in abusive relationships.

Another example is Andorra's legislation that has been expanded to cover more forms of violence against women and recognize the gendered nature of violence against women. Other state parties, such as Spain, have recognized the need to expand their policy approaches and have taken steps to scale up responses to forms of violence against women beyond domestic violence.

It is a recurring finding of our monitoring that implementation of the Istanbul Convention focuses on measures related to domestic violence as one of the main forms of violence against women. However, this is not associated with the ability to prosecute crimes related to domestic violence, either at the investigative or trial stages in both criminal and civil cases. GREVIO evaluation reports systematically address the need to ensure implementation of all measures in relation to all forms of violence against women. There can be no discrimination among all form of violence.

Therefore, it is encouraging to see that States are making efforts to recognize all forms of violence equally by offering a comprehensive and appropriate set of services that can prevent and protect

victims of violence. As a result, States are acting to be aligned from the standpoint of legislation and governmental and local measures to expand States' capacity to respond and offer more services. We recall, for example, the increase of services for legal support and funding for specialized women's centers to work with victims of sexual violence, stalking, sexual harassment, FGM, and forced marriage.

New specialized support services for women victims of sexual violence offering medical support, forensic examinations, DNA preservation, and counselling as required by art. 25 of the Istanbul Convention were set up after the monitoring of GREVIO in Portugal, Finland, Denmark, Belgium, and particularly in Turkey in relation to child victims of sexual violence and forced marriage.

In addition, the provision of shelters for victims of domestic violence has been improved – or funding increased (Finland/Albania) – and good practices are emerging, such as the creation of shelters specifically for women victims of domestic violence who belong to the LGBTI community, as in Portugal. GREVIO has also seen an important increase in shelters in Turkey for women. This demonstrates the transformative momentum created by the Istanbul Convention as well as the high degree of engagement among States Parties has positively influenced their actions, including in the past in Turkey.

Many important steps have been taken to improve the structural requirements of the Istanbul Convention that are necessary to enable governments to truly respond to the many forms of violence that women and girls experience. This includes the collection of data based on categories disaggregated by sex, relationship between victim and perpetrator, among others, but also prevalence data.

Structural improvements to implement the Istanbul Convention also include the need to establish the necessary coordinating bodies so that implementation is ensured on the basis of a compre-

hensive policy involving all actors and levels of government. We are seeing many developments in this regard as well. In Spain, this coordinating body has recently seen its mandate aligned with the scope of the Istanbul Convention and provided with an annual budget and sufficient staff. Malta and Finland are also examples of significant developments on their coordinating bodies, and discussions/plans for improvement are underway in several other countries.

Important to note is that funding has been increased in several states and specific budget lines for violence against women are emerging, which gives us hope about the effectiveness of our work.

The list of examples showing the Convention's success is, of course, much longer. We need to build on these positive trends and promising practices as inspiration and motivation to ensure that the next 10 years of the Convention push us even harder to prevent and combat violence against women and domestic violence.

On the 10th anniversary of the Istanbul Convention

Anna Rossomando
Senator

I wish to thank wholeheartedly the organisers of today's inter-university meeting, which is part of the ELaN Project. My great appreciation goes to the University of Pisa and the Criminal Law and Criminology Research Centre of the University of Istanbul.

Today's meeting can help us reflect upon the Italian and Turkish experience in terms of the results and targets yet to be achieved in combating gender violence and affirming women's rights. It can also be useful to zero in on what is happening in Turkey, to better understand to what extent Italy has further matured – by passing new laws – from a cultural and civil standpoint.

The very fact that violence against women is still a universal, cross-cultural occurrence involving all social classes and age groups proves that societies owe a debt to women, that equality and universalism both in the public and private spheres are yet to be achieved, that institutions and societies must still strive to bridge the existing gap that separates women, their experiences, their stories and their expectations from the rights laid down by the law.

With an eye to the future, let me echo the words of Johann Jakob Bachofen, a great scholar known for his studies on matriarchy: we are yet to promote an intellectual and political action to

prevent pain and inequalities from being demoted to mere literary captions and convert them into laws and projects capable of overcoming stereotypes and prejudice.

This concept is at the very core of the Istanbul Convention: combating gender violence and countering the idea that women's behaviours, projects and aptitudes should remain bound to the roles ascribed to them over time by dominant ideologies, cultural contexts, economic relations and social structures. We believe that such roles are questionable and, above all, that they can be changed.

The goal is to make it increasingly difficult to support any sort of conviction that somehow justifies relegating women to roles established by others. It must no longer be possible to build sexual and social hierarchies based on women's biology, on body differences and on women's view of the world.

We are talking about an ancient, structural and deeply rooted phenomenon that produces its effects on a regular basis. A phenomenon that lawmakers, women and men can further tackle through the Istanbul Convention.

Take Italy, for example: important laws have been passed on the issues highlighted by the Convention; some members of Parliament have been working hard to solve them (backed by a mobilisation of women that has raised social awareness as to their rights), drawing the institutions' attention, modifying the country's customs, albeit not enough – and that's something we'll never grow tired of stressing.

The Convention is one of the tools that can help us drive a change and make it easier to improve and actually enforce the regulatory framework, always bearing in mind that conservatism is constantly there, ready to strip it of its contents, take its revenge, delay the construction of a new legal system that supports a new social and civil quality. Clear evidence of this is to be seen in the

boycotting of the Zan bill, something that stems from conservatism's ideological basement.

Conservatism is hostile to equality between men and women, it continues to represent an ethical liberalism that rests on a patriarchal system. Whether this view wishes to reaffirm traditional male chauvinism or whether it points to its crisis, remains to be seen. Regardless, the outcome is the same. And we must always fight it, changing the common feelings that fuel it.

Consequently, it is wrong and belittling to think that combating violence against women and discrimination is an individual fact. On the contrary, it is an overarching issue that must be addressed if we want women to affirm their freedoms in the face of abuse of power, as well as their different civil identity, for disarming prejudice: both that of obscurantists and that which envisages democratic male chauvinism as a new male identity.

The Istanbul Convention sheds light on a phenomenon that – alas – is very relevant today.

The Convention also helps us all realise that offence or violence can never prevail and wreak havoc on a relationship that has come to an end.

In freedom, not everything is permitted.

Women were regularly suffering violence and discrimination even before the pandemic broke out. Such episodes exposed the solitude of the victims, the fear that overwhelmed them, the silence they often retreated into, the terror that dominated them. In the majority of cases, women suffered abuses in the domestic setting, in their own homes and families, in the context that should be the most reassuring one. And the perpetrator was usually someone they knew.

The pandemic has amplified this phenomenon and that's why we have asked that more tools be fielded and more attention be given to it. Curbing this phenomenon is not enough. We must up-

root it altogether. Co-existing with something that can never be deemed moral is simply not possible.

Where does our community stand, in terms of social quality, if violations, discriminations, actions that produce physical, sexual and psychological harm, coercion, harassment, deprivation of women's liberties, both in the public and private spheres, are all still happening?

We could say, paraphrasing Tolstoj, that all unhappy women are unhappy in their own way. But the violence they have suffered is something they have in common. Therefore, under all circumstances, public authorities must intervene appropriately and promptly if the victims are to defeat their greatest enemy: doubting whether to ask for governmental response.

We have the right words to wipe out indifference and prevent the problem from being played down. And we have laws to make sure that not one single woman must live her life fearing violence and permanently experiencing a precariousness where deceit and perils blend.

That is why we have worked, and are working, to make our laws consistent with the Istanbul Convention, equipping ourselves with the due tools and modalities. The Parliament has added provisions to the domestic law dealing both with the criminal and enforcement aspects and with prevention policies, including education and training in order to change behaviours, protect and refund the victims, providing the appropriate institutions with the appropriate resources and checking that the tasks are fulfilled.

Modalities involve facilities, service and assistance networks, availability of information, professional training, as well as the assessment by independent experts, as indicated under the GREVIO Report (GRoup of Experts on VIOlence), drafted together with *Donne in Rete contro la violenza* (National Association of

Centres against Domestic Violence), which sets forth the following proposals:

- promoting equality should not involve the household and maternity only;
- a greater involvement of women's NGOs is needed, as well as better coordination on an institutional level;
- there should be greater use of laws concerning custody and visitation rights, removal from home, use of protection notices and injunctions.

The report also calls for increased focus on domestic abuse while stressing the need to bridge the territorial and quality divide of services and the need to improve funding mechanisms and prevention.

Following the ratification of the Convention, we have passed law no. 119/2013 for combating gender violence; law no. 107/2015 for promoting gender equality education, gender violence prevention and discrimination; law no. 212/2015 on victims' rights, including their right to assistance and protection; law no. 167/2017 which envisages the victims' right to compensation for crimes such as sexual assault or murder (increasing compensation thanks to law no. 77/2020); law no. 205/2017, which extends to domestic workers the right to leave as a means of protection from gender violence, aiming to protect anyone reporting abuses in the work place, enhance local services, centres against violence and women's shelters; we have set up the National Strategic Plan to counter men's violence against women (which allocated 31.5 million Euros in 2021); we established, in the Senate in 2017, a Committee of Enquiry into Femicide and Gender Violence.

Then we have law no. 69/2019 (known as *Codice Rosso*, Red Code) which amended the Criminal Code, the Code of Criminal Procedure, the Anti-Mafia Code and the Penitentiary Law, and

introduces four new crimes in the Criminal Code: deformation/disfigurement of a person's face; unlawful dissemination of sexually explicit images or videos; compelling a person to contract marriage; violation of family home removal measures and prohibition of approaching places frequented by the victim.

This law has also increased punishment for the following crimes: mistreating a family member or a cohabiting person, persecution, sexual assault (extending the deadline to report the abuse), sexual acts with minors, murder (committing it following a personal relationship now is an aggravating circumstance) and it states that suspension of the sentence shall be subject to rehabilitation. Lastly, I'll mention the law passed last January, with which Italy has ratified the International Labour Organisation's Convention C190 of 2019 on the elimination of violence and harassment in the workplace.

In this context, I should point out some figures.

There were 315 murders in 2019, 150 of which (equal to 47.5% of the total) were committed in the family or within a relationship: 93 victims, in the latter case, were women (83% of femicides), that's up 13% compared with 2018 and up 34.9% compared with 2017 – 61.3% of whom were killed by a partner or an ex-partner. The situation worsened in the first six months of 2020: femicides accounted for 45% of the total but peaked at 50% of the total during the March and April 2020 lockdown (90% of these murders were committed in the family).

The data ISTAT published on May 17 – concerning the year 2020 – and relating to centres against violence, shelters and phone calls to 1522 (toll-free number against violence and stalking) during the lockdown clearly tell us we cannot lower our guard. Such figures – which are the result of a "surge in violent behaviour" and the worsening of "situations where violence had already been experienced" – show a 79.5% increase, compared with the year 2019,

in the number of calls to the 1522 number to report physical and psychological violence, and show that 20,525 women turned to centres against violence. This is clearly an emergency within the emergency of the pandemic.

The actions taken on a political, legislative, cultural, social and institutional level by women's associations and by the part of society that is aware of the issue clearly call for further action, also requiring a more efficient legal system, as indicated in the Recovery Plan. We promised Europe and ourselves we would complete this reform to concurrently amend the legal system, laws, organisation and procedures.

For this reason, following a recommendation by the Femicide Committee, the Senate has passed a bill concerning gender violence statistics, so as to devise increasingly targeted measures and use real data to analyse not only the extent of the phenomenon, but also its features.

We all know that the Convention is much more than a binding regulatory framework. It is a shared programme, a cultural and ideal benchmark that stems from and lives in a cross-border dimension. That's why it having been shelved in a part of the international community means we have all been shelved.

It is through instruments like this that we nurture the finest part of European thinking, that we resort in order to give value to opinions, ideas, choices, that allow us to understand that what is happening in important States such as Turkey cannot leave us unresponsive. On the contrary, it stirs great apprehension and concern.

We support and stand by all those people who do not give up and continue to fight for women's rights. This is a human rights issue: its universal value can by no means be questioned.

Final Remarks

Prof. Dr. Adem Sözüer

I would like to start my speech by greeting the President and esteemed participants. First of all, I would like to congratulate and thank the organizers. We are increasingly organizing joint events with Italian law schools. Today's event is one of them. Another event was the Turkish – Italian Public Law Days in Modena in 2018. The fact that today is the 10th anniversary of the Istanbul Convention makes this conference all the more important.

Why is it so important? It is because, for the first time, member states of the Council of Europe had accepted an extensive convention on preventing violence and discrimination against women. The fact that some member states are not parties and that Turkey has attempted to withdraw from the convention is regrettable. Not being a party to a convention, withdrawing from or criticizing one is not extraordinary. However, the criticisms against the Istanbul Convention are more like a smear campaign. This smear campaign consists of inaccurate and hostile sentiments, particularly directed at scaring conservative families.

I must note that this phenomenon of hostility is not unique to Turkey and is observed in other countries as well. Indeed, opposers of the Istanbul Convention in Turkey adopted many arguments from groups in some European countries.

Turkey had become a party to the Istanbul Convention by unanimous parliamentary vote. Following the ratification of the

convention, the law on the prevention of domestic violence and violence against women was passed. I was a part of this law-making process. I can briefly talk about this process; in Turkey's European Union Membership Process all of the basic penal laws such as the Turkish Penal Code, the Code of Criminal Procedure, the Law on the Execution of Penalties and Security Measures and the Law on the Administrative Offences were taken into force. In these laws, I especially advocated and as such tried to protect women's rights. In this process, I worked in a close coordination with the women's organizations in Turkey to implement the Istanbul Convention, we played an important role in the preparation of the Law on the Prevention of Violence Against Women. In the period before these changes were made in our laws, the issue of domestic violence against women was seen as a family matter, to be kept secret. Another important change brought by the criminal law is related to sexual assault within the marriage. In the old law period, marital sexual assault was not considered as a crime because of the prevailing view that the woman consented to every sexual act by marrying. Thanks to the changes we have made, the act of sexual assault against the spouse accepted as a crime.

In addition to law-making studies, we have also been organizing the International Crime and Punishment Film Festival for 11 years. This festival is centered around the ideal of "justice for all". We are glad to take up various social, individual, economic, environmental and political problems from the perspective of justice. In the second year of the Festival, 2012, our topic was determined as "Violence and Discrimination Against Women".

Another event we are proud to organize is Law on the Bosphorus International Summer School. The theme of the Summer School held for the ninth time in 2021 was determined as Violence and Discrimination Against Women in the Context of the Istanbul Convention. Sub-themes were rights of women, international

human rights law, women rights in international law, violence and discrimination against women, European legal standards of criminal justice response to violence against women, protection for gender violence victims, domestic violence, gender equality and gender norms. In addition, on 8 March 2021, we organized an international symposium and examined violence and discrimination against women in the context of the Istanbul Convention.

Despite all the progressive work we have done, both the convention and the law have been increasingly demonized. Unfortunately, this process was successful. The very government that celebrated the convention started withdrawing from it. Withdrawing from a human rights and women's rights convention that bears the name of Istanbul is incompatible with our constitution. The constitution explicitly refers to positive measures with regard to women. Therefore, the government may not withdraw from the Istanbul Convention.

We must note that the current government is the architect of many reforms such as the improvement of constitutional protection of women's rights, the ratification of the Istanbul Convention, and gender equality in criminal law. It is with these democratic and human rights reforms that the Republic of Turkey was able to start the European Union membership process. Therefore, the question to be asked is, why has the very government that made these reforms started abandoning them?

Of course, the government is primarily to be blamed for its abandonment as it is destroying the reforms it built with its own hands, so to speak. The attempt to withdraw from the Istanbul Convention is a typical example of this. However, European friends must also consider this: aren't European leaders like Merkel, Sarkozy and Cameron, who have consistently opposed the membership of Turkey also to blame? More importantly, why were European friends silent when Turkey's democracy was threatened by a bloody coup

five years ago? Despite all these, I would like to reiterate that our government is still to be primarily blamed for the backward steps regarding women's rights.

Still, I am pleased to express that the withdrawal process has improved human rights consciousness in Turkey. Almost every day, a national or international event is organized around the topic of the Istanbul Convention. In Turkey and in the world, women are the main actors in the struggle for human rights, democracy, and justice. Accordingly, I congratulate the organizers of this event and thank you again for your interest in contributing to this significant issue.

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Valentina Bonini is associate professor of criminal procedure in the University of Pisa, Department of Law, and member of the teaching staff of ELaN, European Law and Gender project, coordinated by prof. Elettra Stradella and funded by the European Commission under the Jean Monnet Actions 2019-2022. She focused a part of her studies on the role and protection of victims in criminal proceedings, paying particular attention to victims of gender-based and domestic violence. These studies have resulted in numerous publications (among these, the book *The victim's protection system and its effects on liberty freedom*, Wolter Kluwers 2018), participation in national and international conferences, parliamentary hearings during the preparatory works for legal documents (in particular for law no. 69/2019, so-called Red Code), participation as an expert in working groups within European organizations (in particular, EFRJ's WG on Restorative Justice and Domestic Violence). Her research interests focus on the defendant's guarantees, negotiated justice, restorative justice, besides the victim's role in criminal proceedings.

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