

PROXIMITY VIOLENCE IN MIGRATION TIMES

A Focus in some Regions
of Italy, France and Spain

Edited by Ignazia Bartholini

FrancoAngeli

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3. The EU's legislative framework and the issue of violence perpetrated against migrant women

by *Rafaela Hilário Pascoal*

3.1 Introduction

In keeping with the rationale of the introductory section of this book, the present chapter approaches the intersectional evolution of the phenomenon of gender-based and proximity violence¹ and migration, from a legal perspective, at European level. Nevertheless, in order to grasp the complex evolution of European Law governing gender-based violence, intersected with the notion of administrative status, in all its complexity, one needs to obtain a thorough understanding of the concept of gender-based violence, including gender discrimination and inequality, as well as of the different categories of migrants and their access to rights.

In 1957, European policies regarding gender discrimination were woven into the Foundation Treaty of the European Union, as an aspect of the economic aims of the free market it prospected although referred to the public sphere and workplace only (Walby, 2004). The watershed of the European legal framework regarding gender discrimination appeared later, with the ratification of the Treaty of Amsterdam in 1997 (Van Der Vleuten, 2007; Rossilli, 2000). However, despite developments in the adoption of gender mainstreaming, feminist scholars continued to criticise the reproduction of patriarchal ideology in the legislation of the European Union (Hoskyns, 1991). These critiques focused on the initial policies, ignoring the structured gender inequality present in society assumed as the habitus and automatic place of interaction between genders, disregarding the conditions of both European and third-country women.

The notion of the intersection between violence and migration was introduced only during the last two decades within the European legal framework regulating asylum. The European policies, informed by the Geneva Convention, seemed, initially, to be gender neutral and were limited to the violence

¹ The term gender-based violence is combined in this volume with the theoretical concept of proximity violence, a broad umbrella term, of which gender-based violence is a component.

suffered in the country of origin of the victims. Despite the structured and common gender-based violence shared by female asylum seekers, the EU's International Legal framework on asylum, the Refugee Convention, ignores women as a "particular social group" (Pickering, 2010), even after the adoption of the UNHCR's guidelines that make an appeal for the adoption of a "gender sensitive interpretation" of the Convention (UNHCR, 2002).

Despite the fact that women tend to be subjected more than other migrants to violent experiences during their journey because of their position of social, physical and cultural disadvantage (Pickering, 2010), European policies seem to disregard the issue of gender-based violence experienced during migration. Experiences of violence often include early and forced marriage, transactional sex or sexual exploitation, domestic violence, rape, sexual harassment and physical assault within the migratory context (UNHCR *et al.*, 2016). Gender-based violence is one of the motives that lead women to escape from their countries of origin and also tends to be a feature of their journey to Europe. Furthermore, once they arrive in the host country, many women continue to be victims of violence, experiencing rape or sexual abuse which makes them liable to ostracism by a future husband. However, violence is not only limited to the private sphere because women that try to escape from abusive partners tend to be rejected by their own communities and suffer social and cultural isolation (Pickering, 2010).

A view of gender-based violence that is not only transversal to the migratory process, is also present in several forms and requires the development of a European legal framework based both on the identification of victims and on bridging the gap to rights that tends to overlook settings of structural violence (Farmer, 2003). The issue of violence experienced during the migratory journey is often catalysed by the gender mainstream, yet, an increase in violence during migration, independently of gender, age or particular vulnerabilities, has been verified (IOM, 2017). Hence, the current situation of migrants tends to defy the old concepts of "gender-based violence" or "violence against women", whereas an inclusive concept is deemed more appropriate. In this case, the concept of proximity violence (Bartholini, 2013) provides a broader, encompassing concept of violence that includes all potential types of abuse, in its several forms. Furthermore, the concept of proximity violence surpasses the categorisation of victims reflected in the European legal framework, by assuming possible intersections between forms of violence and the need for a holistic approach to the protection of victims.

3.2 From gender inequality to gender-based violence

The European Union was based initially on economic grounds above all (Defeis, 1999), something which led to a post-war period of female emancipation in the labour market (Summerfield, 2012; Van Der Vleuten, 2007). Consequently, the issue of inequality between women and men was initially woven into the principles of the European Union contained in the 1957 Treaty of Rome, the document upon which the newly-born Union was founded. The principle of equality, considered as the first ever expression of legal recognition of violence towards women on the European agenda, received a significant boost with the Maastricht Treaty of 1992 (Pollack & Hafner-Burton, 2011). This initial introduction into the European legal framework of norms regulating gender inequality in the labour market, also sought to influence other domains of gender inequality (Walby, 2004). However, the fact that the European approach to the subject of violence was restricted to the public sphere also reflects the Union's initial unwillingness to enter legislatively into "the private households" of European citizens (Mazey, 2002).

In 1997, with the adoption of the Amsterdam Treaty, which sought to safeguard fundamental rights, the issue of gender inequality finally became one of the fundamental principles of the European Union (Van Der Vleuten, 2007; Rossilli, 2000). The Treaty advocates equality between men and women, extending the space of inequality so that it embraces a structural kind of gender discrimination regarding the "underrepresented sex" and its potential intersection with phenomena like gender, race or ethnic origin, religion or belief, disability, age or sexual orientation (Defeis, 1999). However, despite the introduction of an intersectional concept of "discrimination", the subject of gender-based violence remained a secondary issue for the framework of European policy until the introduction of European Directive n. 2000/78/EC. Finally, the EU framework approached the multiplicity of discrimination against women, acknowledging the existence of an intersection between age, disability, race, ethnicity and religious minority (Van Der Vleuten, 2007), yet, discrimination continued to regard the workplace. Furthermore, the understanding of female discrimination based only on the above-mentioned characteristics ignored the assumption of fabricated roles and "social relationships constructed by gender" (Vogel-Polsky, 2000).

Finally, Directive n. 2002/73/EC represented a step forward in the deconstruction of gender discrimination, as it clearly referred to different types of discrimination. Article 2 of the Directive in particular provided an explicit definition of harassment and sexual harassment: "any form of unwanted verbal, non-verbal or physical conduct of a sexual nature that occurs with the purpose or effect of violating the dignity of a person, in particular when cre-

ating an intimidating, hostile, degrading, humiliating or offensive environment” (Van Der Vleuten, 2007). Despite the insistent battle of the European Union in favour of formal gender equality, in particular the integration of women in the workplace and the promotion of their citizenship (Rossilli, 2000), the issue of violence against women remained secondary and internal, locked, as it was, into the private sphere.

3.3 Gender-based violence in the European legal framework on migration

The overlap between asylum and violation of human rights was introduced into the European legal framework only over the past few decades (Schmeidl, 1997). Despite this, gender crimes remained an unknown quantity when it came to European policies concerning asylum. Therefore, the European legal framework on asylum, informed by the Geneva Convention, did not reflect the experiences of women during the process of asylum (Crawley, 1997). Furthermore, despite the fact that marriage seemed to be a regular legal instrument used to enter the European Union, migrant women who underwent violence in the host country remained an issue that European policies failed to cover.

The introduction of the question of violence into the European Legal Framework – overlapping with migration – is restricted to asylum seekers, who have been victims of violence in their countries of origin. Therefore, although the adoption of legislation on migrants does guarantee these victims a minimum standard of treatment, it ignores those migrant women who have been submitted to violence in the host country. Furthermore, the kind of violence undergone in the country of origin to be reported in order to claim asylum, is limited mainly to the public sphere, considered normally as community and state violence, while violence occurring within the family circle is generally considered a private matter, and, therefore, not admitted as proof when claiming asylum (Indra, 1987).

In 2001, the Council of Europe adopted Council Directive n. 2001/55/EC regulating mass influxes of displaced people. This Directive, based on the Geneva Convention, aimed at targeting people escaping from territories where violence is endemic. Therefore, based on the root causes of displacement, Art. 13 comma 4 of the Directive acknowledged the need to provide medical care or special assistance to those who declare their “special needs”, as is the case of “unaccompanied minors or persons who have undergone torture, rape or other serious forms of psychological, physical or sexual violence”. In these cases, the Directive foresees the existence of multiple types of violence in a situation of forced displacement, for example, “torture, psychological, physical or sexual violence” that are not based on gender.

Migrants with “special needs” belong to a group of vulnerable people who have suffered some kind of violence, yet the definition of “special needs” is vague and undefined in legal terms. Therefore, the determination of the “special needs” of migrants is related only to the type and level of violence suffered. The adoption of a similar term, characterised by its indeterminacy, within the domestic legal framework, provides the Member States with a space within which to manoeuvre when granting specific rights to migrants.

According to Stefania d’Avanzo (2012) indefinite borderline adjectives with strong evaluative connotations may carry redundant meanings, reducing the legal efficiency of the concession of rights.

In 2003, Council Directive n. 2003/9/EC regulating standards for the reception of asylum seekers, finally identified potentially vulnerable categories claiming special needs. The identification of vulnerable categories within the group of asylum seekers led to heterogeneous distinctions, based on individual experiences, within the universal category (Brand & Czech, 2015). The Directive, by adopting the concept of vulnerable categories, surpassed the concept of “special needs” previously adopted by Directive n. 2001/55/EC. Therefore, the concept of vulnerable groups, based on the principle of universal vulnerability, tends to provide a broader view of vulnerable persons, primarily identified “as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”.

Besides the identification of universal groups, as mentioned in Art. 17, the Directive does not identify the vulnerable groups only according to their common characteristics, but also considers the particular features of individuals, verified by means of adequate, appropriate, individual assessment. However, despite the implicit mention of a procedure for the identification of specific vulnerabilities, the Directive does not explicitly require any particular procedure by means of which one may claim asylum (Jakuleviciene, 2016). Furthermore, the Directive emphasises the need for the treatment of victims of violence, by urging, in Art. 20, that Member States ensure that victims of violence receive the care they need. In this case, the assessment of the special needs of asylum seekers does not aim solely at an accurate material response in terms of health-care and accommodation, but also proves useful when testifying to the violence suffered (European Commission, 2006).

Despite the fact that asylum seekers who experienced violence were already cited in the previous EU Directives, the satisfaction of their “particular needs” during assistance, their effective protection as per their legal status, are considered only through implementation of Council Directive n. 2004/83/EC (Bazo, 2007). This Directive bestows greater depth on the Geneva Convention by granting International Protection to victims of violence

who have suffered “torture or inhuman or degrading treatment or punishment [...] in the country of origin; or serious and individual threat [...] to life [...] by reason of indiscriminate violence in situations of international or internal armed conflict”.

The vulnerable categories listed in the above-mentioned Directive – such as minors, unaccompanied minors, disabled persons, the elderly, pregnant women, single parents with minors, victims of human trafficking, persons with mental disorders and those who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence – remain. The Directive proved important to the European Legal Framework on Asylum, by introducing the principle of Subsidiary Protection. This form of protection is granted to asylum seekers who do not qualify as refugees, but who may be granted legal status (Thielemann & El-Enany, 2010).

As we can see, in the previous European Directives, the issue of violence was considered only during concession of International Protection to asylum seekers, therefore, protection was granted only to those who presented a claim to asylum. In actual fact, however, victims of violence who are not authorised by the host country, are taken into consideration only by Council Directive n. 2004/81/EC. This Directive limits the granting of residence permits to victims of Human Trafficking only, thus establishing a hierarchy based on notions of deserving and undeserving victims (Askola, 2007).

Gender-based violence is mentioned in the Directive and regards the need to cater for all the special needs of victims, including the exigencies of pregnant women, disabled persons and victims of sexual or other forms of violence. However, these special needs are satisfied only in cases where trafficking is confirmed. Furthermore, the grant of residence permits depends on collaboration between the victim and the authorities (Raffaelli, 2009). However, this obligation often prevents victims from seeking and undertaking a protection pathway, because they fear not only reprisals in the host country, but also retaliation against their relatives in their countries of origin (Probst, 2018).

In 2005, the Council of Europe Convention on Action against Trafficking in Human Beings, the so-called Warsaw Convention, enhanced the reflection period for human trafficking victims, previously mentioned in Council directive n. 2004/81/EC. The reflection period establishes a minimum of 30 days with a view to favouring the victim’s estrangement from the trafficker (Sembacher, 2006). Furthermore, the Convention adopts a gender mainstream victim-centred approach that enhances the protection of the victims, especially as far as secondary victimisation is concerned (Gallagher, 2006). The European Council’s 36/2011 Directive on Human Trafficking followed the Warsaw Convention adopting a victim-centred approach characterised by a gender perspective. However, contrary to the Convention, the 36/2011

Directive urges the Member States to render the reflection period unconditional in order to verify “the victim’s willingness to cooperate in the criminal investigation, prosecution or trial” (Lievana & Waisman, 2016: 18).

In 2011, the implementation of European Directive n. 95/2011 managed to harmonise concession of International Protection by the European Member States. The Directive is aligned with the previous International Agreements on the issue and with cases judged by the European Court of Human Rights (ECRE, 2013). Based on the Geneva Convention, the Directive calls for a common concept of “membership of a particular social group” (Ferreira *et al.*, 2018), including “issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting, for example, in genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution”. In fact, women often flee their countries of origin on account of structural gender-based violence, that tends to be perpetrated in route up until arrival at their final destination (Pickering, 2010). Furthermore, the Directive presents an open-ended definition of “persecutory acts” and in Art. 9, it includes also “acts of physical or mental violence and sexual violence” (EASO, 2016).

In that same year, 2011, the Council of Europe took an important step forward in the battle against violence to women by ratifying the so-called Istanbul Convention, the Council of Europe’s Convention on the prevention of and fight against violence to women and domestic violence (Simonovic, 2014). The Convention succeeded in bridging a gap within the European Legal Framework regarding rooted inequality, by enhancing the rights of female victims (Peroni, 2016), by adopting a broad definition of violence against women, defining it as “a violation of human rights and a form of discrimination against women, and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life” (De Vido, 2016: 5).

The Convention adopts a holistic, intersectional view, by including cultural otherness (Bauman, 1993) and by approaching several socio-cultural factors, customs, traditions and gender stereotypes, reflected in acknowledgment of victims’ vulnerabilities and particular needs, their legal status, for example (Jurasz, 2015). One of the most advanced measures of the Convention is Article 59 which foresees the concession of residence status to victims of forced marriages, whose administrative status is legally dependant on their spouses (Peroni, 2016). Article 60 completes previous legislation on asylum, by urging the implementation of adequate gender-sensitive legislation. Furthermore, Art. 61 of the Convention urges the Member states to guarantee the principle of non-refoulement in cases of victims of “violence against

women” and to adopt procedures in consonance with the International Legal Framework (De Vido, 2017). The concession of an autonomous residence permit is often essential to women who risk being rejected by the communities in their country of origin in cases of repatriation (Raj and Silverman, 2002).

The concession of autonomous residence permits to victims of domestic violence is not based on the collaboration between the victims and the authorities. However, the Convention does not specify either the procedure or the schedules to follow, since the decisional rights remain the prerogative of the authorities of the Member States (De Vido, 2017). Therefore, despite the enormous steps forward the International Legal Framework had taken with regard to the rights of victims, the lack of obligatory transposition of the Convention into national-level legislation can have an impact upon actual access by victims to certain rights. Furthermore, there still exists a consistent legal gap regarding victims of proximity violence (Bartholini, 2013), since the definition of this type of violence tends to focus on the domestic sphere. Hence, despite safeguards at individual, structural and institutional levels and regardless of the legal status of the victim as foreseen by the Convention, the text seems to focus on the understanding that “the vulnerability of a person” is considered an intrinsic characteristic of the individual tending, therefore, to disregard “situational vulnerability” (Peroni, 2016).

In 2012, the European Union approved Directive n. 2012/29/EU to complement the rights of the victims of violence, in all its forms (EWL, 2016). The Directive adopted a gender mainstream view, asserting, in Recital 56, that Member States should consider inter alia the “personal characteristics of the victim”, his/her “gender and gender identity or expression, [...] sexual orientation”, as well as the characteristics of the crime perpetrated and, among other things, “whether it is a hate crime, a bias crime or a crime committed with a discriminatory motive” (Peers, 2013: 5). Directive n. 2012/29/EU is not restricted to gender-based violence alone, but also takes into consideration other personal characteristics like age, ethnicity, race, religion, health, disability, residence status, communication difficulties, relationship to or dependence on the offender and previous experiences of crime.

The Directive acknowledges «violence in a close relationship, regardless of whether the offender was in a position of control or not», demonstrating its pioneering approach, on the understanding that violence is often based on a balance of trust (Bartholini, 2013), but also on an unbalanced distribution of power (Bourdieu, 1998), which may transcend the domestic sphere. The notion that violence occurs in a situation of proximity, within an asymmetric relationship of power (ibidem) is an enormous step towards a comprehensive and inclusive definition of violence, and therefore, of a more inclusive definition of the victim.

According to the Directive, a victim is «(i) a natural person who has suffered harm, including physical, mental or emotional harm or economic loss,

which was directly caused by a criminal offence». The Directive is a pioneering legal document because of its consideration of direct and indirect victims of violence seen as the «(ii) family members of a person whose death was directly caused by a criminal offence and who have suffered harm as a result of that person's death». However, despite the evolution regarding the inclusion of indirect victims, the Directive recognises their existence only in cases of the death of the direct victim. Hence, it excludes those closely related to the survivor obliged to deal with the consequences of the violence perpetrated (Sousa, 2014).

Article 22 of the Directive urges the Member States to provide for individual assessment to be conducted on the basis of the special needs of the victim. These special needs are due not only to the personal characteristics of the victim, but also to the type or nature of the crime committed as well as to the circumstances of the crime, for example, discriminatory or biased violence based on the victims' characteristics or «victims whose relationship to and dependence on the offender make them particularly vulnerable». In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered. It is also relevant to highlight the fact that Art. 9 refers to the need to provide the victims with support services, especially “victims of sexual violence, victims of gender-based violence and victims of violence in close relationships, including trauma support and counselling”.

In 2013, the Common European Asylum System featured the implementation of the latest Directives concerning procedures for the concession of International Protection and reception of applicants claiming International Protection. Directive n. 2013/32, based on Directive 2011/55 has as its main objective the stipulation of «the standards for the qualification of third-country nationals as beneficiaries of international protection», enhancing the previous legal harmonization established under the Directive 2011/95.

This Directive appreciates the importance of identifying the particular needs of asylum seekers due to factors like age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. It is important to identify and verify the potential particular needs of asylum seekers before reaching first-instance decisions. The identification of these special needs not only guarantees full assistance to asylum seekers, but also strengthens demand of asylum for international protection (Salome, 2016).

Directive 2013/33/EU establishes the conditions required for reception of asylum seekers whose claims are based on the gender approach, in order to prevent occurrence/reoccurrence of assault and gender-based violence (Hen-

nessy, 2014). Furthermore, besides separation by gender and age, the Directive also entreats Member States to provide asylum seekers with special conditions, according to their relevant particular needs as per Art. 21 (AIDA, 2017). The European Human Rights Court has declared that asylum seekers are a vulnerable category per se, due to their dependence on host Member States. However, the adoption of an unlimited definition of vulnerable subject obliges the Member States to identify the specific needs of asylum seekers, by means of individual assessment (AIDA, 2017).

Despite the effective regulation foreseen by the Directives on the adaptation of the reception centres to meet the needs of asylum seekers, the implementation of effective procedures as per the regulation was only timidly put into practice (Mugnaini, 2017). This scarce application was due mainly to the increase in the number of applications for asylum presented in 2015 (ANCI, 2017), based mostly on age and gender or completed thanks to the work of International Organisations, especially in first-entry countries such as Italy and Greece, as established by the Dublin Regulation. The scarce implementation of services is also due to the fact that, in order to approach the particular vulnerabilities of victims of violence, there is a need for substantial funding that is not always available (EWL, 2016). Furthermore, funding is often managed by profit-oriented stakeholders who do not always comply with the European legal framework regarding asylum seekers' rights of access (Mugnaini, 2017).

In 2016, the European Women's Lobby published a report entitled *From conflict to Peace? Women's voices. Recommendations on Preventing and combating violence against women and girls on the move* positing that, because of exposure, women and girls run greater risks of suffering "male violence". The report urges the adoption of a gender mainstream policy in the asylum system, during all its phases, since "Gender-based violence can occur in the context of conflict, during the migration journey, and in host EU Member States" too (FRA, 2016).

In the same report, gender-based violence – focusing on women and girls' experiences – is intended as all forms of physical, sexual and psychological violence, including threats of such acts, coercion or arbitrary deprivation of liberty. The violence thus envisaged relates to incidents that occur either in public or private places. It can, therefore, encompass violence by family members (intimate partner violence and domestic violence by different family members), as well as forms of sexual harassment and other forms of sexual violence by different perpetrators. This understanding of multiple forms of violence urges the need for gender sensitive policies within asylum systems, not only to favour holistic protection of victims, but also the prevention of violence (EWL, 2016).

In 2016, the European Parliament endorsed new gender guidelines for asylum systems in its Resolution of the 8th of March 2016 relating to the

situation of women refugees and asylum seekers in the European Union. This resolution exposed the lack of recognition of gender-based persecution during asylum procedures, already mentioned in the Istanbul Convention. In actual fact, the resolution maintains the emphasis placed on violence determined by cultural otherness and accentuates «gendered forms of violence and discrimination, including, though not limited to, rape and sexual violence, FGM, forced marriage, domestic violence, so-called honour crimes and state-sanctioned gender discrimination, constitute persecution» (Peroni, 2016: 50).

The Resolution insists on the need to fulfil the basic fundamental rights of migrant women, whose administrative status depends on their spouses and stresses the necessity to enhance the individual rights of women and girls during the process of family reunification. However, the Resolution not only tends to limit the concept of victim to the sexual characteristic of the perpetrator, since the offender is defined as a male family member, but it also disregards the fact that violence may also occur outside of the familiar circle.

3.4 Conclusions

The issue of gender-based violence was timidly approached by European Union policies during the foundation stage, because, initially, the Union was informed mainly by the economic aims of a free market. Despite the chronological evolution of the adoption of gender mainstreaming, the implementation of counter measures against gender-based violence was restricted mainly to the public sphere. The European legal framework on migration, following the Convention of Geneva, revealed a limited notion of gender-based violence, by restricting the issue to cultural otherness involving, for example, instances of female genital mutilation, early marriage and forced marriage. Furthermore, the issue of violence against female migrants was restricted to asylum Directives only, *hic est*, to violence occurring in the country of origin. Therefore, violence occurring outside the borders of the country of origin tends not to be considered when appraising claims to asylum (Pickering, 2010).

The Istanbul Convention, in 2011, acted as the European Union's legal watershed for countering gender-based violence. The Convention finally approached the issue considering it a phenomenon intrinsic to European society and tolerated by customary norms and introduced a broader concept of gender-based violence. Furthermore, the Convention adopted a broader concept of the victim, approaching the specific situation of migrant women by connecting protection of migrant women to their administrative status. However, despite the holistic understanding of the intersectional vulnerabilities and

particular needs of victims (Jurasz, 2015), the lack of obligatoriness regarding its transposition fails to guarantee rigorous application of the Convention by the ratifying member States. The amalgamation of victims' rights into national legal frameworks emerged with the adoption of Directive n. 2012/29/EU, which finally completed the rights of victims of violence, by means of a holistic victim-centred approach which also acknowledged proximity violence (Bartholini, 2013).

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