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Edited by

Valentina Bonini and Elettra Stradella

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Editorial
Access to Justice: a Gender Perspective

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

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

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

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

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

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

[2] *Ibidem*

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

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

2. *The main «Focus» of the Issue*

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

3. *Access to Justice, Gender and Multiculturalism*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[29] Ibidem.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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RIVISTA DI DIRITTI COMPARATI

Come evolve il diritto all'identità di genere? Fattori strutturali, culturali e dogmatici nella giurisprudenza costituzionale italiana e colombiana. Un'analisi comparata*

Stefano Osella

SOMMARIO: 1. Introduzione. – 2. Categorie binarie e identità multiple. Alcune nozioni introduttive. – 3. Il caso colombiano. – 4. La prospettiva italiana. – 5. In conclusione: Un racconto di due (o più) Corti.

1. *Introduzione*

Il 4 febbraio 2022, la Corte costituzionale colombiana ha sancito l'esistenza di un diritto alla rettificazione degli atti anagrafici in un «terzo sesso». Con la medesima decisione, la Corte ha anche dichiarato l'illegittimità del limite temporale di dieci anni tra la prima e le successive rettificazioni anagrafiche, fino a quel punto richiesto dalla legge[1]. Qualche anno prima, nel 2015, la Corte aveva garantito la possibilità di rettificare i propri atti anagrafici tramite una semplice procedura dichiarativa, censurando espressamente ogni precondizione – medica, psicologica o comportamentale – per il godimento di tale diritto[2].

Anche la giurisprudenza costituzionale italiana si è pronunciata a più riprese sulla legittimità della legislazione nazionale in materia[3], nonché sui requisiti per ottenere la rettificazione anagrafica, sostanzialmente andando a disciplinare i contorni di un diritto

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[1] Corte Constitucional, *Sala Sexta de Revisión*, 4 *febrero* 2022, *sentencia* T-033/22, https://www.corteconstitucional.gov.co/Relatoria/2022/T-033-22.htm.

[2] Corte Constitucional, *Sala Primera de Revisión*, 13 *febrero* 2015, *sentencia* T-063/15, https://www.corteconstitucional.gov.co/RELATORIA/2015/T-063-15.htm.

[3] Legge 14 aprile 1982, n. 164.

al riconoscimento dell'identità di genere[4]. Gli esiti, tuttavia, appaiono molto differenti rispetto a quelli che hanno caratterizzato l'evoluzione colombiana. Il 21 ottobre 2015[5], richiamando una sentenza della Corte di cassazione di qualche mese precedente[6], la Corte costituzionale ha escluso la necessità di un trattamento chirurgico sugli organi sessuali primari al fine di ottenere la rettificazione anagrafica. Al contempo, il Collegio ha ritenuto imprescindibile una trasformazione permanente degli «aspetti psicologici, comportamentali e fisici» del richiedente il riconoscimento, che deve essere valutata dal giudice con il supporto dei sanitari[7]. La Corte ha perciò escluso radicalmente un diritto all'autodeterminazione di genere. Due anni dopo, nel giugno 2017[8], il giudice costituzionale ha confermato queste conclusioni ed espresso un «netto rifiuto […] del superamento del dualismo di genere»[9].

Dal punto di vista degli esiti, Italia e Colombia offrono due discipline totalmente diverse della medesima vicenda. Mentre il soggetto sessuato colombiano sembrerebbe disincarnato, quello italiano appare incarnato – *unencumberd* piuttosto che *encumbered*[10]. Eppure, i due paesi mostrano somiglianze quanto alla generale sensibilità in tema di diritti e una certa attenzione per il pluralismo e protezione delle minoranze. È dunque rilevante per chi si occupa di diritto comparato, nonché di diritto costituzionale, indagare le condizioni e le ragioni di questa divergenza da cui si può apprendere molto sull'evoluzione della tutela delle persone trans. La questione può essere esplorata da almeno due punti di osservazione complementari: quali possono essere alcune delle ragioni per cui la Corte costituzionale colombiana difende un approccio incentrato sull'autodeterminazione, mentre quella italiana richiede trasformazioni fisiche, psicologiche e comportamentali? E quali elementi possono influenzare la graduale apertura o la resistenza alle istanze delle persone trans e non binarie[11]?

Per rispondere a questa duplice domanda di ricerca, questo articolo intende ricostruire e confrontare i principali passaggi dell'evoluzione giurisprudenziale del

[4] Si richiama qui lo scritto di M. Dogliotti, *La Corte costituzionale riconosce il diritto all'identità sessuale*, in *Giurisprudenza italiana*, 1987, p. 236. Il termine «identità sessuale» è aggiornato all'uso corrente quale «identità di genere». Nel prosieguo, si farà riferimento alla giurisprudenza sul diritto all'identità di genere.

[5] Cost., 21 ottobre 2015, n. 221. Tutte le sentenze della Corte Costituzionali sono liberamente disponibili sul sito istituzionale https://www.cortecostituzionale.it/.

[6] Cass. civ., sez. I, 20 luglio 2015, n. 15138, disponibile in *dejure.it*, nonché, *open access*, in http://www.articolo29.it/wp-content/uploads/2015/08/Cass-civ-15-n.-15138-Rettifica-del-sesso-senza-intervento-chirurgico.pdf.

[7] Cost., 221/2015, § 4 *in diritto.*

[8] Cost., 20 giugno 2017, n. 180; Cost., 21 giugno 2017, n. 181.

[9] A. Lorenzetti, *Il cambiamento di sesso secondo la Corte costituzionale: due nuove pronunce (nn. 180 e 185 del 2017)*, in *Studium iuris*, 2018, p. 452.

[10] M. Cartabia, *Le avventure giuridiche della differenza sessuale*, in *Iustitia*, 2011, p. 294.

[11] Come chiarito *infra* nel testo, per persona trans si intende chiunque abbia un'identità di genere – vale a dire il profondo e individuale sentito dell'esperienza di genere – diversa da quella assegnata alla nascita. L'identità non binaria è, genericamente, l'identificazione in un terzo genere, non riducibile a quello maschile o femminile.

diritto all'identità di genere nelle due giurisdizioni. Il tema è pressante. Andando ad incidere sulla categorizzazione in base al sesso, l'espansione dei diritti delle persone trans sembra infatti avere un effetto profondamente trasformativo sul costituzionalismo di genere[12]. Inoltre, com'è noto, la protezione dell'identità trans è sovente causa di controversie acrimoniose nel dibattito pubblico, ed è anche per questa ragione che si rinnova la necessità di un'analisi approfondita della materia.

Come si cercherà di illustrare, da questa indagine comparata emerge che l'evoluzione del diritto in discussione è influenzata da una triade di fattori culturali, dogmatici e strutturali. Partendo dal caso colombiano, osserviamo che, da punto di vista *culturale*, a partire dagli anni '90 del secolo scorso la Corte costituzionale ha gradualmente esteso la protezione dei diritti delle persone intersex e trans. Occorre specificare che le esperienze di questi due gruppi di persone non sono sovrapponibili. Le loro rivendicazioni sono sovente diverse[13]. È però altrettanto vero che la giurisprudenza colombiana, analizzando le richieste sia delle persone intersex che trans, si è di fatto trovata a porre in questione concetti come la necessità della registrazione del sesso alla nascita, il binarismo sessuale, e la rettifica degli atti anagrafici. Cogliendo l'occasione, la Corte si è dimostrata recettiva alle teorie *queer* e ha abbracciato una visione plurale e complessa della diversità sessuale. Quest'impostazione teorica ha avuto il suo pendant *dogmatico* nella centralità dei diritti di autonomia, come il diritto al libero sviluppo della personalità. *Strutturalmente*, poi, la Corte ha protetto l'eguaglianza delle persone LGBTQI+, ad esempio riconoscendo il matrimonio tra persone dello stesso sesso. La forza del binarismo sessuale è perciò diminuita, lasciando maggiore libertà di elezione al singolo.

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[12] Si veda a tale proposito, R. Rubio-Marín, *Global gender constitutionalism and women's citizenship. A struggle for transformative inclusion,* Cambridge, 2022, nonché sia consentito un riferimento a S. Osella-R. Rubio-Marín, *Gender recognition at the crossroads: Four models and the compass of comparative law*, in *International Journal of Constitutional Law*, 2023, p. 574 ss..

[13] Come chiarisce l'ufficio dell'Alto Commissario per i diritti umani, essere intersex è un dato fisico, e non identitario. Le persone intersex «nascono con caratteristiche sessuali (tra cui genitali, gonadi e modelli cromosomici) che non corrispondono alle tipiche nozioni binarie di corpo maschile o femminile. Intersex è un termine generico usato per descrivere un'ampia gamma di variazioni corporee. In alcuni casi, i tratti intersessuali sono visibili alla nascita, mentre in altri non sono evidenti fino alla pubertà. Alcune variazioni cromosomiche intersex possono non essere evidenti dal punto di vista fisico» (United Nations, Office of the High Commissioner for Human Rights. Free & Equal Campaign Fact Sheet: Intersex; La traduzione, come tutte le traduzioni nell'articolo, sono ad opera dell'autore). Le persone intersex non sono necessariamente non binarie, e possono, come il resto delle persone non intersex, avere un'identità binaria. La principale domanda che unisce i movimenti intersex è la cessazione immediata dei trattamenti non volontari amministrati per ragioni socioculturali e non per salute fisica. Solo alcuni movimenti intersex, e non tutti, insistono per il riconoscimento del genere non binario. Facendo delle domande intersex una questione identitaria, si è quindi argomentato, si rischierebbe di imporre a queste persone obiettivi per loro primari. L'appropriazione politica sarebbe del tutto evidente. Si veda: M. Carpenter, *The human rights of intersex people: addressing harmful practices and rhetoric of change*, in *Reproductive Health Matters*, 2016, p. 79. Sia consentito un riferimento a: S. Osella, *When comparative law walks the path of anthropology: The third gender in Europe*, in *German Law Journal*, 2022, p. 935 ss.

Se guardiamo alla medesima triade nel contesto nazionale, non si può non eccepire che l'evoluzione giurisprudenziale italiana è molto differente. *Culturalmente*, nonostante sviluppi giurisprudenziali, l'identità trans è stata definita in termini medicalizzati e patologizzati. Il corpo sessuato è inoltre concepito come binario. Ogni fisicità intersessuale è relegata alla patologia, mentre il corpo sano è definito esclusivamente nei limiti del maschile e femminile. Come si vedrà, questa narrativa è stata utilizzata per rafforzare il binarismo sessuale anche con riferimento alle identità riconosciute nel diritto. *Dogmaticamente*, il ruolo del diritto alla salute è stato prioritario. Infine, *strutturalmente*, la matrice eterosessuale del matrimonio e, più in generale, della famiglia ha avuto un ruolo determinante nel motivare controlli sul sesso inteso come categoria anagrafica. Questa comparazione suggerisce quindi che l'assegnazione dell'individuo a un sesso anagrafico piuttosto che a un altro non dipende tanto da valutazioni di ordine naturalistico – cui si contrappone un approccio «volontaristico» – ma piuttosto da una serie di contingenze e valutazioni essenzialmente politiche e culturali.

Prima di procedere, occorrono ancora alcune specificazioni metodologiche. La funzione della comparazione offerta dall'articolo e, dunque, la prospettiva di analisi prescelta, è essenzialmente conoscitiva[14]. Il presente contributo vuole cioè isolare le variabili che possono contribuire a spiegare l'evoluzione del diritto all'identità di genere in un senso più o meno favorevole alle istanze delle persone trans. Non si intende tuttavia suggerire che i fattori identificati siano gli *unici* rilevanti, quanto piuttosto sottolinearne il ruolo nelle vicende che riguardano i diritti in questione in entrambi gli ordinamenti[15]. Un ulteriore ventaglio di ragioni potrebbe essere ipotizzato, quali – senza pretesa di esaustività – il ruolo della corte all'interno dell'architettura costituzionale, la presenza di azioni di costituzionalità diretta (come l'azione di *tutela*, anche nota come *amparo*) e, da un punto di vista sociogiuridico, il ruolo dei movimenti sociali e altri attori politici. Continuando con i *caveat*, nemmeno si vuole suggerire che uno dei due casi sia un modello da seguire o «trapiantare» nell'altro ordinamento.

Italia e Colombia appaiono pertanto due casi comparabili per questo scopo conoscitivo. Pur scontando qualche grado di approssimazione, si può infatti affermare che esistano elementi che garantiscono la tenuta dello sforzo comparativo. In particolare, entrambi gli ordinamenti hanno al loro centro costituzioni in cui la protezione della persona è valore d'ispirazione. Cionondimeno, nessuno dei due testi

[14] Sul ruolo della comparazione come strumento conoscitivo, si veda per tutti G. de Vergottini, *Diritto costituzionale comparato*, VI ed., Padova, 2004, p. 4 ss.

[15] Ulteriori ambiti di analisi potrebbero essere il ruolo dei movimenti sociali nell'avanzare le istanze trans, o i poteri attribuiti alle due corti costituzionali. La corte colombiana, com'è noto, è caratterizzata da poteri considerevoli – incluso l'esame delle azioni di *tutela*, direttamente poste dai cittadini alla corte in caso di violazione dei loro diritti fondamentali (Articolo 86 *Constitucion Politica* – d'ora in poi, CP). Cfr: D. Landau, *Constitutional court of Colombia*, in *Max Planck Encyclopedia of Comparative Constitutional Law* (June 2016). Per un'analisi più approfondita: J. Boesten, *Constitutional origin and norm creation in Colombia*, London, 2022.

costituzionali protegge esplicitamente il diritto all'identità di genere – protezione che, seppur saltuariamente, si è iniziata a registrare in recenti esperienze[16]. Nonostante condizioni di partenza sostanzialmente simili, i due sistemi tuttavia approcciano i diritti delle persone trans in maniera opposta. Il raffronto intende proprio fare emergere alcune delle ragioni che conducono a tale diversità di esiti. Quello che si intende utilizzare è cioè un approccio c.d. di «small-N», che compara in profondità un numero ridotto di casi. Si intende selezionare due giurisdizioni con delle similarità di fondo (come quelle descritte) ma che si differenziano per alcune variabili (gli elementi dogmatici, strutturali, e culturali identificati). Queste differenze, dunque, paiono spiegare, perlomeno in parte, gli elementi di diversità tra i due ordinamenti in relazione alla disciplina specifica[17]. Ulteriori ragioni che suggeriscono un focus su queste giurisdizioni sono poi la presenza, in entrambe, di una ricca giurisprudenza costituzionale su questioni di genere. La volontà di includere una giurisdizione del Sud Globale, e di andare così oltre ai «soliti noti» del diritto comparato, appare infine confortare questa scelta.

Passando al quadro epistemologico e valoriale in cui si situa l'analisi, è importante chiarire la «chiave di lettura» delle evoluzioni che seguiranno. Questo contributo esamina la materia «dal basso». Si intende porre «al centro […] una visione concreta della persona e del personalismo, dando primario rilievo ai fatti in cui la prima è coinvolta»[18]. Questo approccio, seguito sia nel diritto costituzionale che negli studi socio-giuridici[19], dà risalto alla esperienza soggettiva di chi si trova a dover interagire con i diritti fondamentali – nel caso specifico, le persone trans e non binarie. Nonostante la critica dogmatica non venga abbandonata, il presente contributo non si limita ad essa, ma offre dunque una discussione basata anche sulle istanze degli attivisti e su alcuni risultati delle scienze sociali[20]. Non solo quest'approccio riflette al meglio i principi personalisti e pluralisti che animano la costituzione italiana[21], ma riporta «l'umano» al centro di quelli che sono «diritti umani». Un'ulteriore specificazione è qui opportuna: l'articolo non avanza un argomento «di giustizia». Al di là delle opinioni personali di chi scrive, non si sostiene in questa sede che una delle due evoluzioni sia preferibile all'altra. Nonostante l'analisi «dal basso», approcciata da una prospettiva

[16] Cfr., l'articolo 42 della costituzione cubana del 2019, che proibisce la discriminazione basata sull'identità di genere. Si veda anche l'articolo 25, co. 4, della bozza di costituzione cilena, rigettata nel 2022 tramite referendum popolare, entrambe disponibili su https://www.constituteproject.org.

[17] L'approccio è chiaramente ispirato al lavoro di R. Hirschl, *Comparative matters. The renaissance of comparative constitutional law*, London-New York, 2014, p. 246.

[18] P. Veronesi, *Il corpo e la costituzione*, Milano, 2007, p. 7 ss.

[19] E. Desmet, *Analysing users' trajectories in human rights: A conceptual exploration and research agenda*, in *Human rights and international legal discourse*, 2014, p. 121 ss.

[20] Per un'analisi di come gli studi antropologici possano essere utilizzati nello studio del costituzionalismo di genere, sia consentito un riferimento a Osella, *When comparative law walks the path of anthropology*, cit.

[21] P. Veronesi, *Corpi e questioni di genere: le violenze (quasi) invisibili*, in *Genius*, 2021, p. 13.

trans, possa probabilmente portare ad accogliere con maggior favore la giurisprudenza colombiana, discorso ben diverso è darne un giudizio circa l'opportunità generale. Una tesi di questo genere richiederebbe infatti un'indagine più approfondita, in cui seria considerazione è data non solo alle istanze delle persone trans e non binarie, ma anche ai detentori di interessi contrapposti e alle modalità di bilanciamento di principi in tensione tra loro.

L'articolo procede dunque come segue. Nel prossimo paragrafo si illustreranno alcuni concetti teorici utili per comprendere l'argomento sviluppato dall'articolo. In dettaglio, saranno illustrati il ruolo del sesso all'interno del sistema giuridico, alcune nozioni di teoria e antropologia queer e le rivendicazioni delle persone trans e non binarie. Nel terzo paragrafo verrà presentata l'evoluzione della disciplina colombiana con riferimento alle persone intersex e trans, a partire dagli anni '90 fino alle più recenti trasformazioni. Il paragrafo 4 si concentrerà sul sistema italiano. Quello successivo offrirà alcune considerazioni conclusive.

2. *Categorie binarie e identità multiple. Alcune nozioni introduttive*

La creazione di categorie di persone dotate di status giuridici differenziati è pratica ricorrente nell'organizzazione pubblica[22]. Particolarmente diffuse e risalenti sono le categorie sessuali binarie, attestate almeno a partire dall'introduzione del moderno stato civile a seguito della Rivoluzione francese[23]. Tale categorizzazione risultava necessaria specialmente in una società patriarcale basata sulla dottrina della «separazione delle sfere»[24]. In un contesto di discriminazione strutturale, il sistema giuridico doveva assicurare che le donne rimanessero in una «sfera privata», associata alla cura e alla riproduzione. Agli uomini invece era riservata la «sfera pubblica» della politica e del lavoro retribuito. Questa bipartizione aveva – e tutt'ora ha – il suo *côté* nel costituzionalismo occidentale[25]. In questo senso, il sesso anagrafico non sarebbe tanto la rappresentazione di una realtà pre-giuridica. Avrebbe piuttosto un valore funzionale. Il rifiuto pressoché costante di creare un'eccezione al binarismo, per esempio per registrare le persone intersex, la cui anatomia (e non identità) non è chiaramente assegnabile agli standard maschile o femminile, potrebbe rafforzare questa lettura. È stato infatti sottolineato che, nonostante in tempi prossimi alla promulgazione del Codice civile francese del 1814 si fosse già discussa l'introduzione del terzo sesso nello

[22] P. Starr, *Social categories and claims in the liberal state*, in *Social research*, 1992, p. 263 ss.

[23] A.E. Linton, *Hermaphrodite outlaws: ambiguous sex and the civil Code in nineteenth-century France,* in *Representations*, 2017, p. 87; Gabrielle Houbre, *Un «sexe indéterminé»? L'identité civile des hermaphrodites entre droit et médicine au XIX siècle*, in *Revue d'histoire du XIXe siècle*, 2014, p. 63.

[24] C. Pateman, *The sexual contract*, Stanford, 1988; L. Herault, *«Le sexe de l'enfent est légitime». À propos de la mention de sexe à l'état civil et de sa modification*, in J. Courduiès – C. Dourlens – L. Hérault (dir.), *État civil et transidentité. Anatomie d'une relation singulière. Genre, identité, filiation*, 2021, Aix-en-Provence, p. 30.

[25] R. Rubio-Marín, *Global gender*, cit.

stato civile, quest'ultimo è stato generalmente negato per preservare l'organizzazione sociale e giuridica costruita intorno al binarismo[26].

Il principio di eguaglianza non pare aver ridimensionato l'importanza del sesso anagrafico. Al contrario, la sua dimensione sostanziale (per esempio, tramite le azioni positive) ha ulteriormente rafforzato l'utilità di questa categoria, che rimane inoltre rilevante in una pluralità di ambiti. Si pensi, ad esempio, alla preservazione di un diritto di famiglia esclusivamente – o, quantomeno, primariamente – eterosessuale. Quando il matrimonio resta limitato alle coppie di sesso diverso, il sesso anagrafico (per determinare chi ha titolo di sposare o di unirsi civilmente con chi) rimane l'elemento qualificante per accedere all'istituto matrimoniale. La preservazione dell'eterosessualità del matrimonio – e del diritto di famiglia più in generale – appare poi nella prassi un fattore, per così dire, pesante nell'influenzare i requisiti per l'accesso alla rettifica degli atti anagrafici. Come si dimostrerà sia per il caso colombiano che per quello italiano, infatti, le corti hanno connesso la limitazione del diritto all'identità di genere con la necessità di evitare alterazioni alle forme famigliari riconosciute nel diritto nazionale.[27] Questo, bisogna evidenziare, non è particolarmente sorprendente da un punto di vista teorico. È stato infatti ampiamente sostenuto, specialmente all'interno delle teorie femministe e queer, che la preservazione di identità binaria immediatamente intellegibile, mutualmente esclusive, e stabili è motivata dalla necessità di mantenere un sistema di eteronormatività istituzionale[28]. Il mantenimento di una diversa età di pensionamento o l'amministrazione di strutture pubbliche separate (quali gli istituti di detenzione) sono poi ulteriori esempi della rilevanza di tale classificazione[29].

[26] Si veda in questo senso, e con riferimento all'ordinamento francese, Herault, *op. cit.* Cfr. anche G. Mak, *Doubtful sex in civil law: Nineteenth and early twentieth century proposals for ruling hermaphroditism*, in *Cardozo Journal of Law and Gender*, 2005, p. 197. Considerazioni simili possono essere fatte anche a proposito dell'ordinamento italiano, come chiarito *infra* nel testo.

[27] Sia consentito, per un'analisi del dettaglio, un riferimento a S. Osella, *Reinforcing the binary and disciplining the subject: The constitutional right to gender recognition in the Italian case-law*, in *International Journal of Constitutional Law*, 2022, p. 454 ss.

[28] J. Halley, *Split decisions. How and why to take a break from feminism*, Princeton and Oxford, 2006, p. 136; J. Butler, *Gender trouble*, II ed., New York and London, 1999, p. 22-23. Per un'analisi femminista invece che queer, si rinvia, per esempio, a A. Rich, *Compulsory heterosexuality and lesbian existence*, in *Signs*, 1980, p. 631 ss.

[29] Recentemente, il Governo belga, in un giudizio sulla costituzionalità della cd. «legge trans» (*Loi du 25 juin 2017 réformant des régimes relatifs aux personnes transgenres en ce qui concerne la mention d'une modification de l'enregistrement du sexe dans les actes de l'état civil et ses effets*) ha dichiarato che esistono in Belgio, solamente a livello federale, 194 leggi che differenziano in base al sesso. Il giudizio concerneva la costituzionalità della «legge trans» ove non concedeva la possibilità di un terzo sesso nello stato civile e imponeva limitazioni alle rettificazioni successive alla prima. Cfr. P. Cannoot, *The limits to gender self-determination in a stereotyped legal system. Lesson from the Belgian Gender Recognition Act*, in E. Brems – P. Cannoot – T. Moonen (eds.), *Protecting trans rights in the age of gender self-determination*, Cambridge, 2020, p. 11 ss., e sia consentito un riferimento a S. Osella – R.Rubio-Marín, *Gender recognition at the crossroads*, cit.

Nonostante le evoluzioni sociali e giuridiche, tutt'oggi le categorie sessuali nello stato civile sembrano cioè mantenere il loro ruolo di «tecnica di governo»[30].

Presupposto dell'efficacia di tale tecnica è la stabilità dello status individuale, che assume quindi un valore pubblicistico[31]. In quest'ottica, il cambio d'identità – e dell'insieme delle posizioni giuridiche ad essa correlate nei confronti dei singoli e dell'autorità pubblica[32] – può rappresentare un elemento di incertezza. L'imposizione di doveri e obblighi differenziati in base al sesso anagrafico, potrebbero alcuni sostenere, diverrebbe di difficile attuazione laddove il sesso anagrafico può essere mutato senza restrizioni. Associare al sesso anagrafico elementi facilmente tangibili, come ad esempio alcuni caratteri fisici, può quindi funzionare come stabilizzatore[33].

Quest'esigenza di stabilità entra tuttavia in collisione con la complessità della vicenda umana e con la diversità di genere. Nel 1993, la biologa femminista Anne Fausto-Sterling ha sostenuto che le categorie sessuali dovrebbero essere almeno cinque[34]. Qualche anno dopo ha aggiunto che nemmeno questo numero può adeguatamente catturare la complessità del sesso[35]. Sin dagli albori del XX secolo, studi etnografici hanno poi attestato la molteplicità dei generi. Tale letteratura ha sottolineato come la concezione binaria e permanente dell'identità di genere sia solamente *una* delle varie forme culturali tramite cui quest'ultima si manifesta. L'antropologa Serena Nanda, per esempio, ha dimostrato come varie forme di terzo sesso siano presenti in molte culture[36].

La prevalenza del binarismo, al contrario, è stata criticata come residuo della dominazione culturale e politica europea[37]. In effetti, non sono mancati esempi di repressione della diversità di genere da parte di poteri coloniali, che hanno tentato di eradicare identità non binarie viste come immorali o corruttive del tessuto sociale[38]. Come sostenuto dall'antropologa Ara Wilson, tuttavia, il principale risultato dell'antropologia femminista e queer non è solo la documentazione di generi differenti.

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[30] P. Currah, *Sex is as sex does. Governing transgender identity*, New York, 2022.

[31] Per un'analisi sul ruolo pubblicistico dello status, e alle teorie di Jellinek, si veda R. Alexy, *A theory of constitutional rights*, Oxford, 2002, p. 163. Per uno sguardo nazionale, cfr. A. Corasaniti, *Stato delle persone*, in *Enciclopedia del diritto Giuffré*, Milano, 1990, p. 963.

[32] R. Alexy, *op. cit.*, p. 163-164.

[33] Con specifico riferimento all'identità di genere, si veda J. Clarke, *Identity and form*, in *California Law Review*, 2015, p. 747, in particolare p. 756.

[34] A. Fausto-Sterling, *The five sexes. Why male and female are not enough*, in *The Sciences*, 1993, p. 20.

[35] *Ibid*, p. 18.

[36] S. Nanda, *Neither man nor woman. The hijras of India*, II. ed., London, 1999, p. 128.

[37] M. Lugones, *Heterosexualism and the colonial/modern gender system*, in *Hypatia*, 2007, p. 186 ss.; M. Lugones, *Toward a decolonial feminism*, in *Hypatia*, 2010, p. 742 ss.

[38] Il riferimento è al *Criminal Tribes Act* 1872, con cui le autorità britanniche repressero la diversità sessuale nell'India coloniale. Cfr: S. Khan, *Khwaja sara, hijra, and the struggle for rights in Pakistan*, in *Modern asian studies*, 2017, p. 1283 ss; G. Reddy, *With respect to sex. Negotiating hijra identity in South India*, Chicago/London, 2005, p. 26.

Infatti, queste discipline dimostrano anche come le identità varino a seconda di circostanze concrete, come religione, nazionalità, classe e razza[39].

Tra le forme di diversità di genere rientrano ovviamente le persone trans. Il termine trans è normalmente inteso come un «ombrello» sotto cui sono riunite tutte le persone per le quali la profonda percezione del sé si discosta dal genere assegnato alla nascita. Tra le identità trans, probabilmente più nota nel discorso giuridico è la transessualità, associata al desiderio di trasformazione del corpo, vissuto come un limite allo sviluppo individuale[40]. Tuttavia, questa narrativa incentrata sull'essere «intrappolati in un corpo sbagliato», per quanto adeguata a catturare alcune realtà, non rappresenta l'intero panorama trans. Sotto questo «ombrello» si collocano infatti persone che non hanno un'identità permanente, né desiderio o bisogno di sottoporsi a terapie mediche per trasformare i propri caratteri sessuali[41]. Alcune, poi, si identificano nel binario, mentre altre – appunto, quelle non binarie – si identificano con un terzo sesso.

Le persone trans, almeno a partire dagli anni '60 del secolo passato[42], si sono mobilitate per ottenere un diritto alla rettifica del proprio sesso anagrafico. Tale riconoscimento, si è sostenuto tra attivisti e in letteratura, garantisce una complessiva inclusione e una piena cittadinanza[43]. Ha inoltre conseguenze socioeconomiche positive[44]. La dissonanza tra identità vissuta e sesso anagrafico può causare discriminazione, con considerevoli strascichi pregiudizievoli nell'accesso a opportunità e risorse[45]. Tuttavia, le autorità pubbliche hanno sovente posto limitazioni al diritto alla possibilità di rettificare il sesso che costituisce parte dell'identità giuridica della persona. Particolarmente diffuse sono le varie precondizioni mediche[46], che spaziano dalla diagnosi di disforia di genere[47], ai soli trattamenti ormonali[48], alla sterilizzazione

[39] A. Wilson, *Queer anthropology*, in *The Cambridge Encyclopedia of Anthropology*, https://www.anthroencyclopedia.com/entry/queer-anthropology.

[40] B. Pezzini, *Transgenere in Italia: Le regole del dualismo di genere e l'uguaglianza*, cit., in G. Vidal Marcìlio Pompeu – F. Facury Scaff (eds.), *Discriminação por orientação sexual. A homossexualidade e a transsexualidade diante da experiência constitucional*, Florianopolis, 2012.

[41] T.M. Bettcher, *Trapped in the wrong theory: rethinking trans oppression and resistance*, in *Signs*, 2014, p. 383; M. Wayar, *Travesti. Una teoria lo suficientemente buena*, Buenos Aires, 2018, p. 115.

[42] P. Antignani, *Sulla natura delle diagnosi di sesso (a proposito di alcune sentenze)*, in *Diritto e giurisprudenza*, 1970, p. 513 ss.; S. Stryker, *Transgender history. The roots of today's revolution*, II. ed., New York, 2017.

[43] S. Hines, *Gender diversity, recognition and citizenship. Towards a politics of difference*, London, 2013, p. 7 ss.

[44] D. Spade, *Documenting gender*, in *Hastings Law Journal*, 2008, p. 731 ss. Particolarmente utile è la Fig. 2, a p. 759.

[45] Occorre sottolineare, tuttavia, che tale dissonanza non è l'unica causa di discriminazione delle persone trans, e che la transfobia ha radici più profonde e più persistenti.

[46] Per una visione d'insieme J. Scherpe (ed.), *The legal status of transsexual and transgender persons*, Cambridge, 2015.

[47] *Gender Recognition Act* 2004, S. 2, come in vigore in Inghilterra e Galles.

[48] Cfr. *Ley 3/2007, de 15 de marzo, reguladora de la rectificación registral de la mención relativa al sexo de las personas*, articolo 4.

chirurgica[49]. Da altra prospettiva, come la recente evoluzione francese insegna, il controllo sulla transizione può essere interamente demedicalizzato – dettaglio che, soprattutto nel contesto italiano, dove si tende ad associare de-medicalizzazione e «volontarismo», sarebbe utile ricordare. Dopo la riforma introdotta con la *loi justice* del 2016, al richiedente la rettificazione è comunque richiesto di dimostrare, tramite il proprio comportamento o altri atti, di vivere conformemente agli standard culturali associati con il sesso anagrafico in cui si chiede di transire[50]. Il nuovo articolo 61-5 del Codice civile garantisce infatti il cambio anagrafico a «ogni persona […] che dimostri con un numero sufficiente di fatti che la menzione relativa al sesso negli atti dello stato civile non corrisponde più a quello in cui essa si presenta e in cui è conosciuta».

In ragione dell'importanza del riconoscimento dell'identità di genere, gli effetti coercitivi di eventuali precondizioni, le quali assumono la forma di «un'offerta che non si può rifiutare», hanno attirato attenzione e critiche[51]. In particolare, le condizioni mediche sono state oggetto di censure a causa della loro invasività. Comprensibilmente, la sterilizzazione delle persone trans, procurata per forma chirurgica o farmacologica, ha ricevuto le maggiori critiche, poiché annulla ogni potenzialità procreativa[52] – incidentalmente, in modo particolarmente irrazionale visto il declino demografico che le società europee e italiana stanno da diversi anni sperimentando[53]. Inoltre, la medicalizzazione del riconoscimento di genere rinforza una (controversa) concezione patologica dell'identità trans, aggiungendo stigma a una minoranza indubbiamente discriminata[54]. Neppure le precondizioni comportamentali – pur obiettivamente meno intrusive – non sono andate indenni da scetticismi poiché, problematicamente, rinforzano anch'esse nozioni stereotipate di mascolinità e femminilità[55]. I movimenti trans stanno quindi rivendicando un diritto all'autodeterminazione del genere, cioè a correggere il proprio status per via dichiarativa, senza precondizioni da soddisfare[56]. Questo diritto, si sostiene,

[49] Come sostanzialmente richiesto in Italia fino alle evoluzioni del 2015. Cfr. *infra* nel testo, sezione 4.

[50] Cfr. articolo 61-5 ss. Code civile, aggiunti con la *Loi n° 2016-1547 du 18 novembre 2016 de modernisation de la justice du XXIe siècle*.

[51] A.E. Silver, *An offer you can't refuse: Coercing consent to surgery through medicalization of gender identity*, in *Columbia Journal of Gender and Law*, 2013, p. 488 ss.

[52] P. Dunne, *Transgender sterilisation requirements in Europe*, in *Medical law review*, 2017, p. 554 ss.

[53] Si specifica molto chiaramente, e a scanso di equivoci, che il requisito della sterilizzazione sarebbe profondamente irrazionale e contrario ai diritti fondamentali della persona trans *anche* qualora non si stesse assistendo al declino demografico.

[54] J. Theilen, *Depathologisation of transgenderism and international human rights law*, in *Human rights law review*, 2014, p. 327.

[55] M-X. Catto, *Changer de sexe à l'état civil depuis la loi du 18 novembre 2016 de modernisation de la justice du xxie siècle: Un bilan d'application*, in *Cahiers droit, sciences & technologies*, 2019, http://journals.openedition.org/cdst/1087.

[56] Principio 31, Yogyakarta Principles +10, *Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression*

consentirebbe ad ogni persona di re-immaginare autonomamente la propria identità in relazione alla propria fisicità senza dover seguire necessariamente standard ai quali gli individui possono sentire o decidere di non uniformarsi[57]. In queste rivendicazioni, un ruolo centrale è attribuito alle corti – supreme, costituzionali, dei diritti umani – che quindi si confermano come attrici principali di quest'opera di apertura al pluralismo[58]. Ovviamente, la tensione tra la certezza delle posizioni giuridiche e l'autodeterminazione di genere sembra raggiungere, in questo caso, la sua acme.

3. *Il caso colombiano*

La Corte costituzionale colombiana ha sancito il diritto all'autodeterminazione di genere, inclusivo di un terzo sesso e aperto alle identità fluide. Ha inoltre ripetutamente difeso una nozione non binaria del sesso, nonché propugnato una comprensione individualizzata e de-medicalizzata dell'identità trans, inclusa quella non binaria[59]. È utile premettere che, fino a tempi recenti, il diritto alla rettifica del sesso anagrafico non era oggetto di disciplina legislativa specifica nell'ordinamento colombiano. Il *decreto ley* 1260 del 1970 sull'ordinamento civile stabilisce che le modificazioni dello stato possono essere effettuate tramite scrittura pubblica o giurisdizione volontaria[60]. Il procedimento da seguire per la rettifica del sesso non è tuttavia chiarito. Determinante si è pertanto rivelata la giurisprudenza costituzionale. In prima battuta, e per oltre vent'anni, la Corte ha ritenuto necessario un procedimento di giurisdizione volontaria. Quest'interpretazione è cambiata con la sentenza T-063/15, con cui la Corte ha ritenuto sufficiente la scrittura pubblica. L'attuazione di tale decisione è oggetto del decreto 1227 del 2015[61], con cui si è stabilito un diritto all'autodeterminazione di genere essenzialmente basato sulla dichiarazione giurata della persona che intende cambiare sesso[62]. Tuttavia, sino alla recente sentenza T-033/22,

and Sex Characteristics to Complement the Yogyakarta Principles, http://yogyakartaprinciples.org/principle-31-yp10/.

[57] Queste teorizzazioni sono state particolarmente presente nel contesto latino-americano. Cfr., M. Wayar, *op. cit.*; C. Rizki, *Latin/x american trans studies: toward a travesti-trans analytic*, in *TSQ: Transgender studies quarterly*, 2019, p. 145 ss.; M. De Mauro Rucovsky, *The travesti critique of the gender identity law in Argentina*, in *TSQ: Transgender studies quarterly*, 2019, p. 223 ss.

[58] In principal modo con riferimento al matrimonio tra persone dello stesso sesso, cfr. A. Sperti, *Le corti costituzionali tra tutela del pluralismo e delle singole identità*, in *DPCE Online*, 2019, www.dpceonline.it, p. 2151 ss.

[59] La comprensione dell'identità trans è stata oggetto di un'ampia evoluzione che non costituisce oggetto del presente studio. Tuttavia, si veda: M.A. Ruiz Nieves, *El concepto transgénero en las sentencias de tutela (Colombia)*, in *Revista Verba Iuris*, 2018, p. 95 ss.

[60] Articolo 95, *decreto ley* 1260 del 1970.

[61] *Decreto 4 junio* 2015, n. 1227.

[62] Articolo 2.2.6.12.4.5, decreto 1227 del 2015.

tale scelta era espressamente limitata al binario maschio-femmina[63]. Inoltre, era imposto il limite di due cambi di sesso, tra i quali doveva trascorrere un lasso temporale di almeno dieci anni[64].

I precedenti nei diritti delle persone intersex e LGB

Prima di affrontare l'evoluzione della giurisprudenza relativa alle identità trans, tuttavia, appare utile una breve digressione sui diritti delle persone intersex e LGB, le quali sono state oggetto di attenzione da parte della Corte colombiana sin a partire dagli anni '90 del secolo passato[65]. Unica nel contesto comparato per ampiezza e complessità è la tutela assicurata alle persone intersex, sovente neglette a livello istituzionale nonostante le ripetutamente documentate – e particolarmente significative – violazioni dei loro diritti fondamentali[66]. Ed è proprio la protezione dei diritti intersex a rappresentare una base imprescindibile dell'autodeterminazione di genere nel contesto colombiano. In questa giurisprudenza, tutta volta a proteggere la diversità sessuale dei corpi dissonanti, la Corte ha sancito innovative tutele dell'identità di genere e offerto nuove nozioni circa il binario sessuale.

In primo luogo, la giurisprudenza colombiana proibisce le riassegnazioni sessuali involontarie, sancendo la signoria del singolo sulla propria identità di genere. Nel 1995, la Corte ha analizzato il caso di un bambino che aveva subito l'asportazione del pene a seguito di un incidente domestico. Seguendo i protocolli del cd. «optimal gender of rearing», il minore era stato cresciuto nel genere femminile[67]. Divenuto più maturo, il minore aveva tuttavia contestato la riassegnazione subita e preteso l'immediata cessazione di ogni terapia volta a mantenerlo nel genere femminile. A tale scopo, chiedeva *tutela*[68] per i diritti violati, fondando la propria domanda prevalentemente sulla

[63] Articolo 2.2.6.12.4.3, decreto 1227 del 2015.

[64] Articolo 2.2.6.12.4.6, decreto 1227 del 2015.

[65] J. Lemaitre Ripol, *Love in the time of cholera: LGBT rights in Colombia*, in *Sur- International journal on human rights*, 2009, p. 73 ss.

[66] Per una discussione dettagliata dei diritti costituzionali delle persone intersex in Colombia, sia consentito rimandare a S. Osella – R. Rubio-Marín, *The right to gender recognition before the Colombian Constitutional Court: A queer and* Travesti *theory analysis,* in *Bulletin of latin american research*, 2021, p. 629 ss. Si veda inoltre: G. Maldonado Colmenares – S. Delgado Madonado, *Menores con ambiguedad sexual. Un análisis del consentimiento informado desde el punto de vista del concepto de corporalidad*, in B. Espinosa Pérez (ed.), *Cuerpos y diversidad sexual. Aportes para la igualdad del reconocimiento*, Bogotá, 2008, p. 97 ss. Per una costruzione dei discorsi sull'intersessualità, e sul superamento del paradigma medico, cfr: O. Caro Garzón, *Hermafroditas en Colombia: Estudio de la jurisprudencia constitucional*, in *Revista eletrônica direito e política*, 2010, p. 218 ss.

[67] La prassi di riassegnare al genere femminile i bambini biologicamente maschi il cui pene era assente o ritenuto troppo piccolo per gli standard culturali associati alla mascolinità si fondava sul protocollo medico stabilito sin a partire dagli anni '50 dai Prof. John Money, Joan Hampson, e John Hampson, operanti presso il Johns Hopkins' Medical Center. Risulta adesso essere rigettato dai più moderni standard medici. Cfr. J. Repo, *The biopolitics of gender*, Oxford, 2015, p. 25 ss.

[68] Articolo 86 CP.

protezione dell'infanzia contenuta nella costituzione colombiana[69]. Nella sentenza, la Corte stabilisce che «il sesso costituisce un elemento non modificabile dell'identità della persona e solo la stessa […] può consentire alla [sua] riassegnazione»[70]. Qualche anno dopo, nel 1999, la Corte ha ulteriormente limitato le operazioni sui bambini intersex[71]. Allo scopo, ha stabilito uno standard di consenso rafforzato – «informato, qualificato, e persistente» – cui è tenuto chi esercita la responsabilità genitoriale[72]. Tale conclusione era stata raggiunta grazie al contributo, nella veste di *amici curiae*, di esperti di questioni intersex di caratura internazionale[73], inclusa Cheryl Chase, fondatrice dell'Intersex Society of North America, la storica Alice Domurat Dreger e il pediatra Milton Diamond. Nelle motivazioni, la Corte riconosce la complessità dell'esperienza sessuale umana, la molteplicità dei corpi e la radice culturale delle diverse forme di concezione del sesso, e ne fonda la salvaguardia sulla dignità umana[74], sulla già citata protezione dell'infanzia, e sul diritto al libero sviluppo della personalità[75]. Implicitamente riprendendo ampia parte della letteratura antropologica, la sentenza sottolinea la variabilità della dimensione sociale e psicologica della sessualità[76]. È enfatizzata per esempio la diversa percezione dell'intersessualità in «altre società e periodi storici», quando tale diversità non era solo tollerata, ma addirittura apprezzata[77]. Coerentemente con quest'impostazione, la Corte definisce il binario sessuale come «un'idea»[78]. Parafrasando, la sentenza sembra derubricare il binarismo da criterio universale a *una*

[69] Articolo 44 CP.

[70] Corte Constitucional*, Sala Séptima de Revision*, 23 *octobre* 1995, *sentencia* T-477/95, § 13.1, https://www.corteconstitucional.gov.co/relatoria/1995/t-477-95.htm. Per una descrizione più approfondita della giurisprudenza costituzionale colombiana in tema di diritti intersex, sia consentito un riferimento a S. Osella – R. Rubio-Marín, *The right to gender recognition*, cit.

[71] Corte Constitucional, *Sala Plenaria*, 12 *mayo* 1999, *sentencia* SU-337/1999, https://www.corteconstitucional.gov.co/relatoria/1999/SU337-99.htm.

[72] In particolare, si era ritenuto che la proibizione completa di tali interventi avrebbe eccessivamente compresso il diritto all'autonomia famigliare (Articolo 43 della *Constitucion Politica* (CP)). Inoltre, considerando il clima di diffusa ostilità alla differenza sessuale, la Corte temeva che una completa moratoria avrebbe incentivato operazioni clandestine comunque richieste dai genitori, e che pertanto il sistema del consenso sarebbe stato più produttivo. Non si intende qui prendere posizione su questo complicato tema, che meriterebbe un'approfondita disamina separata.

[73] La prassi di coinvolgere un ampio numero di *amici curiae* ed esperti dal mondo della società civile ed accademici per la definizione dei giudizi costituzionali risulta costante in tutte le decisioni analizzate in questo articolo.

[74] Articolo 1 CP.

[75] Articolo 16 CP.

[76] CC., SU-337/99, § 29 *fundamentos juridicos.*

[77] CC., SU-337/99, § 36 *fundamentos juridicos.* Si veda, per esempio, B. Schnarch, *Neither man nor woman: Berdache— A case for non-dichotomous gender construction*, in *Anthropologica,* 1992, p. 105; fondamentale è poi: W. Hill, *The status of the hermaphrodite and transvestite in Navaho culture*, in *American anthropologist,* 1935, p. 273.

[78] CC., SU-337/99, § 36 *fundamentos juridicos.*

delle varie forme in cui sesso può essere concepito. Al contempo, il rifiuto dell'intersessualità è ridotto a un topos della cultura contemporanea[79].

Queste considerazioni sono state essenzialmente riproposte nella giurisprudenza successiva. Nonostante le critiche per non avere proibito i trattamenti intersex *tout court*[80], la Corte ha assicurato elevati standard di protezione anche per bambini di età più matura[81]. Una sentenza del 2013 ha poi protetto il diritto a non specificare nell'atto di nascita il sesso dei bambini intersex ove quest'ultimo sia di difficile discernimento. In quest'occasione, la Corte ha avuto modo di esplicitare alcune delle funzioni della categorizzazione secondo il sesso, menzionando espressamente il mantenimento dell'eterosessualità del matrimonio e la protezione delle donne e madri[82]. In sintesi, pare possibile affermare che queste decisioni abbiano veicolato una nuova concezione – più aperta e flessibile – del corpo sessuato e orientato verso l'inclusività di genere la cittadinanza sessuale colombiana[83].

Tanto chiarito, appare dunque rilevante e opportuno ricordare anche la giurisprudenza in tema di diritti inerenti all'orientamento sessuale. Anche questa, infatti, pare essersi dimostrata consequenziale per lo sviluppo dell'autodeterminazione di genere[84]. Pronunciandosi a favore del matrimonio egualitario, la Corte costituzionale ha statuito che l'autonomia di decidere sulla propria sessualità, senza interferenze da parte dello Stato, è protetta dalla costituzione colombiana e, in particolare, dalla generale protezione dei diritti fondamentali come compito dello stato[85]. In una successiva sentenza in tema di discriminazione nel godimento di beni e servizi basata sull'orientamento (omo)sessuale, la Corte costituzionale ha affermato che la libertà nelle scelte in materia sessuale gode di franchigia costituzionale, in particolare riferimento ai principi di libertà, eguaglianza e non discriminazione[86].

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[79] CC., SU-337/99, § 36 *fundamentos juridicos.*

[80] J. E. García León – D. L. García León, *Sujetos intersexuales y matriz heterosexual: Los cuerpos que le importan a la jurisprudencia colombiana. Una lectura* queer, in *Latin American Research Review* 2017, p. 124 ss.

[81] Corte Constitucional, *Sala Quinta de Revisión*, 27 *novembre* 2002, *sentencia* T-1025/02, https://www.corteconstitucional.gov.co/relatoria/2002/t-1025-02.htm; Corte Constitucional, *Sala Tercera de Revisión*, 18 *septembre* 2008, *sentencia* T-912/08, https://www.corteconstitucional.gov.co/relatoria/2008/t-912-08.htm.

[82] Corte Constitucional, *Sala Secunda de Revision*, 16 *julio* 2013, *sentencia* T-450A/13, § 4.5.3, *fundamentos juridicos*, https://www.corteconstitucional.gov.co/relatoria/2013/t-450a-13.htm.

[83] L. Céspedes-Báez – J. Sarmiento-Forero, *¿Cómo mira el estado? Constitución de 1991 y compromisos de género del estado colombiano*, in *Revista de estudios socio-juridicos*, 2011, p. 389 ss.

[84] Per una discussione del ruolo dei movimenti sociali per il raggiungimento di questo risultato, si veda M. Albarracín Caballero, *Social movements and the constitutional court: Legal recognition of the rights of same-sex couples in Colombia*, in *Sur – International journal on human rights*, 2009, p. 7 ss.

[85] Articolo 2 CP; cfr, Corte Constitucional, *Sala Plena*, 26 *julio* 2011, *sentencia* C-577/2011, § 4.4.2. *fundamentos juridicos*, https://www.corteconstitucional.gov.co/relatoria/2011/C-577-11.htm.

[86] Corte Constitucional, *Sala de Revision*, 1 *diciembre* 2011, *sentencia* T-909/11, §62 *consideraciones y fundamentos*, https://www.corteconstitucional.gov.co/relatoria/2011/t-909-11.htm.

Un diritto costituzionale all'autodeterminazione di genere[87]

Come accennato, sino al decreto 1227 del 2015, la legge colombiana non stabiliva una procedura precisa per la rettificazione degli atti anagrafici, lasciando all'interprete il compito di determinare il procedimento più appropriato tra giurisdizione volontaria e scrittura pubblica. La risoluzione della questione ha, in effetti, rappresentato il punto di partenza di buona parte dell'elaborazione giurisprudenziale in materia. Il problema è stato risolto a favore della procedura giurisdizionale una prima volta nel 1994[88], quando la Corte ha considerato che il sesso anagrafico rappresenta una componente «oggettiva» della personalità dell'individuo. Il coinvolgimento del giudice era quindi stato ritenuto necessario per verificare l'effettiva transizione fisica[89]. Nonostante l'importanza della decisione, che riconosceva un diritto alla rettifica del sesso anagrafico, è con la sentenza T-918 del 2012 che la protezione dell'identità di genere pare assumere la portata soggettivistica che tutt'ora la caratterizza[90]. Il caso non riguarda in realtà la rettificazione, ma il diritto a ricevere trattamenti sanitari di conferma del genere a carico del servizio sanitario. Cogliendo l'occasione, la Corte ha tuttavia stabilito che «l'identità sessuale della persona si riferisce direttamente a quella che la persona determina nel suo foro interno e che intende esternare verso il prossimo»[91]. Lo Stato, in ragione dell'esistenza di un diritto al libero sviluppo della personalità, all'autodeterminazione[92], e alla dignità umana[93], «non può frapporre barriera alcuna affinché l'individuo possa decidere del suo sviluppo vitale, del suo modo d'essere, e della sua condizione sessuale»[94]. Nella sentenza si specifica poi che i diritti alla salute e all'eguaglianza garantiscono l'accesso ai trattamenti sanitari desiderati dalla persona e, per poter conseguire un adeguato livello di benessere, anche alla successiva rettificazione degli atti anagrafici[95].

Queste conclusioni sono state ampliate dalla successiva sentenza T-063 del 2015[96]. In essa, la Corte costituzionale ha consacrato un diritto al riconoscimento dell'identità di genere interamente basato sull'autodeterminazione, da ottenersi

[87] La presente sezione si basa ed espande precedente ricerca dell'autore, e in particolare Osella – Rubio-Marín, *The right to gender recognition before the Colombian Constitutional court*., cit.

[88] T-504/94. Cfr: D.C. Moreno Pabón, *Derecho, persona, e identidad sexual. El debate jurídico de la documentacion de las personas trans*, in *Universitas estudiantes de Bogotá*, 2014, 123.

[89] Id., §§ 2-4.

[90] Corte Constitucional*, Sala Quinta de Revisión*, 8 *noviembre* 2012, *sentencia* T-918/12, https://www.corteconstitucional.gov.co/relatoria/2012/T-918-12.htm#_ftnref25.

[91] Id., §3.4.

[92] Articolo 16 *Constitucion Politica*.

[93] Articolo 1 *Constitucion Politica*.

[94] C.C., T-918/12, §3.4.

[95] C.C., T-918/12. § 5 e 6*, consideraciones y fundamentos*.

[96] Per un'analisi approfondita della sentenza, si veda: J.S. Bernal Crespo, *Los derechos fundamentales de las personas transgénero*, in *Cuestione constitucionales*, 2018, p. 229 ss.

mediante un procedimento dichiarativo[97]. Oggetto del caso è nuovamente la giurisdizionalizzazione della rettificazione anagrafica. Com'è a questo punto chiaro, dietro questo dubbio apparentemente tecnico si cela infatti una differenza sostanziale di non poco conto. La Corte si è trovata a decidere se al sesso anagrafico corrisponde un dato oggettivo, identificabile, e pertanto da «scoprire» giudizialmente – come ritenuto nel 1994 – o piuttosto un sentito interno che non può essere determinato da altri se non della persona interessata. In tal caso, allo stato rimane il ruolo di accogliere e proteggere tale decisione e, pertanto, una procedura dichiarativa appare più indicata. Optando per la seconda ricostruzione, la Corte ha reso una sentenza particolarmente significativa – la prima, a livello globale, a garantire un diritto costituzionale alla piena autodeterminazione di genere.

Appare utile esplorare in qualche dettaglio il ragionamento della Corte. In primo luogo, reiterando la giurisprudenza che aveva caratterizzato i diritti intersex, viene rigettata la comprensione del sesso anagrafico come rappresentazione delle caratteristiche fisiche della persona. Al contrario, esso è ricondotto ad una «costruzione identitaria» che sorge in conseguenza di una «decisione libera e autonoma dell'individuo»[98]. La concezione patologica dell'identità trans viene egualmente rifiutata, anche in omaggio alle novità contenute nella quinta edizione del *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5), in cui l'identità trans, in sé, è depatologizzata[99]. Al contrario, la Corte ha definito le identità di genere non conformi come un'opzione di vita legittima e protetta dal diritto costituzionale, che ha (anche) lo scopo di contrastare la diffusa discriminazione nei confronti delle persone trans[100]. Rifacendosi ai propri precedenti, la Corte poi puntualizza che la giurisdizione volontaria non è necessaria in tutti i casi in cui si richieda una rettificazione del sesso anagrafico. Nel caso in cui sia la persona cis[101] a richiedere la rettificazione del sesso erroneamente registrato alla nascita, infatti, è stata ritenuta adeguata la scrittura pubblica[102].

A questo punto, la Corte passa a considerare se, e in quale misura, il procedimento di giurisdizione volontaria sia in tensione con i diritti stabiliti in Costituzione. Il collegio coglie cioè l'occasione per determinare la base giuridica del diritto all'identità di genere. Il ragionamento s'incentra sul principio di dignità[103] che,

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[97] C.C., T-063/15.

[98] C.C., T-063/15, § 5.2., *consideraciones y fundamentos*.

[99] *ibid*. In particolare, e scusandosi per la rozzezza dell'esposizione, sembra potersi affermare non è più il comportamento difforme dagli standard di genere ad essere patologizzato, ma la sofferenza che questa «disforia» genera. Occorre tuttavia sottolineare come anche quest'approccio sia percepito come profondamente problematico. Per un approfondimento, *cfr.* Z. Davis, *The DSM-5 and the politics of diagnosing transpeople*, in *Archives of Sexual Behaviour*, 2015, p. 1165 ss.

[100] C.C., T-063/15, § 5.4., *consideraciones y fundamentos*.

[101] Vale a dire, la cui identità di genere corrisponde con il sesso assegnato alla nascita.

[102] T-231/15.

[103] Articolo 1 CP.

nella dottrina colombiana, include il diritto a «vivere come si desidera» (*vivir como quiera*). L'autonomia di effettuare scelte di vita fonda il diritto al libero sviluppo della personalità[104], con cui la legge fondamentale salvaguarda la facoltà di ogni persona di autodeterminare le proprie «opzioni vitali» e di vedere riconosciuta la propria individualità. La Corte aggiunge che a questo diritto ne corrisponde un altro al riconoscimento della personalità giuridica[105], vale a dire a vedersi riconosciuta nello stato civile la costruzione identitaria che l'individuo ha liberamente sviluppato[106].

Questi diritti, ritiene la Corte, sono compressi in modo sproporzionato quando il diritto all'identità di genere è riconosciuto solo tramite procedimento giurisdizionale. A tale riguardo, la Corte individua una serie di problemi. Il primo è rappresentato dai costi derivanti dal necessario patrocinio legale, censurati come un significativo ostacolo per il riconoscimento dell'identità di genere, specialmente per le persone trans che, sovente, si ritrovano in condizioni socioeconomiche svantaggiate. La notevole durata del procedimento costituisce un secondo ostacolo, soprattutto alla luce dell'urgenza che normalmente accompagna la necessità di una rettificazione. La Corte si dimostra poi particolarmente preoccupata rispetto a una terza questione consistente nella ricerca di «prove» oggettive della transizione che caratterizza il procedimento giudiziale. Una simile indagine, secondo la Corte, comporta il coinvolgimento di esperti di ambito medico, contribuendo a una narrazione patologizzante dell'identità trans. Inoltre, tale giudizio genera valutazioni stereotipate del comportamento della persona, costretta a posizionarsi in un «estremo eteronormativo» per ottenere una valutazione positiva ai fini del riconoscimento. Un quarto profilo problematico rilevato dalla sentenza è l'imposizione discriminatoria della giurisdizione volontaria alle sole persone trans. Infatti, alle persone cis che correggono un errore nei registri civili non è richiesto un simile procedimento. Nonostante le due situazioni non siano totalmente sovrapponibili, la Corte ritiene che esse siano comparabili. Infatti, in entrambi i casi, si assiste all'istanza di una persona che desidera la corrispondenza tra il proprio sesso anagrafico con la propria identità di genere. Poiché l'identità cis non può considerarsi più corretta o «vera» di quella trans, si legge in sentenza, ogni differenza di procedimento risulterebbe ingiustificatamente differenziale. Questo passaggio, appare opportuno evidenziare, è particolarmente significativo: in esso, la Corte relativizza ogni discorso naturalistico circa l'identità di genere e proclama l'eguaglianza tra persone trans e cis, in pratica bandendo ogni preferenza istituzionale per le seconde. Quello che la Corte sembra dire, insomma, è che una parte della popolazione (le persone cis) già gode del diritto all'autodeterminazione di genere (infatti, le persone cis vedono la piena corrispondenza tra il proprio sentito di genere e classificazione anagrafica *de plano*). Un'altra parte (le persone trans), invece, deve sottoporsi a un percorso medico-legale per ottenere la stessa protezione. Dato ma non concesso che questa differenza

[104] Articolo 16 CP.
[105] Articolo 14 CP.
[106] C.C., T-063/15, § 4 *consideraciones y fundamentos*.

nel trattamento sia accettabile quando l'identità cis è ritenuta più «vera» rispetto a quella trans, certamente cessa di esserlo quando tali identità sono equiparate.

La Corte non ignora neppure l'obiettivo legittimo del procedimento di giurisdizione volontaria. Esso consente la certezza delle relazioni giuridiche, sia a beneficio dei consociati che della persona interessata. Tuttavia, il collegio ritiene che richiedere questo procedimento non sia necessario, considerando meccanismi meno invasivi parimenti idonei a soddisfare lo stesso scopo (per esempio, dichiarazioni giurate; un preventivo cambio di nome; oppure la testimonianza di persone informate)[107].

Nella giurisprudenza successiva, la Corte ha ripetutamente confermato queste conclusioni, affermando la piena parità delle identità trans e reiterandone una comprensione non patologica, non medicalizzata, e di egual valore alle identità cis. A tale scopo ha sancito l'autodeterminazione di genere per consentire alle persone trans di acquisire tutte le posizioni giuridiche associate al nuovo sesso anagrafico. Per esempio, la Corte ha protetto l'istanza di una donna trans che intendeva godere dei benefici pensionistici all'età prescritta per le donne cis[108]. In un altro caso, la Corte ha ritenuto illegittima la sanzione pecuniaria inflitta ad una donna trans – assegnata al genere maschile alla nascita – che non prestava il servizio di leva cui gli uomini erano normalmente assoggettati[109]. In diverse decisioni, poi, la Corte ha esteso il diritto al riconoscimento dell'identità di genere anche alle persone che non hanno ancora raggiunto la maggiore età[110]. Dimostrando una certa capacità di ragionamento intersezionale, i giudici costituzionali hanno riconosciuta l'importanza di proteggere la gioventù trans, sovente oggetto di discriminazione ed estremamente vulnerabile in una pluralità di ambiti, incluso quello educativo, con effetti specialmente avversi sulla possibilità di inclusione sociale.

Non definendo speciali precondizioni per la rettifica del sesso anagrafico, e anzi censurandole esplicitamente, la Corte costituzionale ha creato un meccanismo capace di accogliere la diversità sessuale nelle sue molteplici manifestazioni. Così facendo, ha sostanzialmente accolto le considerazioni dell'antropologia femminista e queer sulla *situazionalità* dell'identità sessuata. Evitando di eleggere *un* modello di identità trans come riconoscibile – ad esclusione degli altri – la Corte ha aperto alla possibilità di

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[107] C.C., T-063/15, § 7.2.7, *fundamentos jurídicos*.

[108] Corte Constitucional, *Sala Plena*, 9 *diciembre* 2021, *sentencia* SU-440/21, https://www.corteconstitucional.gov.co/Relatoria/2021/SU440-21.htm.

[109] Corte Constitucional, *Sala Quinta de Revisión*, 10 *marzo* 2015, *sentencia* T-099/15, https://www.corteconstitucional.gov.co/RELATORIA/2015/T-099-15.htm.

[110] Corte Constitucional, *Sala Séptima de Revisión*, 3 *agosto* 2017, *sentencia* T-498/17, https://www.corteconstitucional.gov.co/relatoria/2017/t-498-17.htm; Corte Constitucional, *Sala Tercera de Revisión*, 15 *noviembre* 2017, *sentencia* T-675/17, https://www.corteconstitucional.gov.co/relatoria/2017/t-675-17.htm; Corte Constitucional, *Sala Sexta de Revisión*, 27 *septiembre* 2019, *sentencia* T-447/19, https://www.corteconstitucional.gov.co/relatoria/2019/t-447-19.htm.

riconoscimento ad una pluralità di individui che possono vivere la loro esperienza di genere e relazione con il corpo in modi diversi e non standardizzati. Al contempo, appare evidente che la Corte abbia diminuito la capacità di controllo sulle categorie sessuali. Questo era anche dovuto, occorre sottolineare, ad una diminuita importanza di queste categorie nel diritto di famiglia che, aprendo al matrimonio e alla genitorialità tra persone dello stesso sesso, era meno dipendente dal binarismo sessuale. Come specificato, la Corte stessa aveva infatti individuato nel matrimonio una delle ragioni principali della preservazione di un ordine binario ed eterodeterminato della categorizzazione sessuale[111], in conformità con una delle tesi più centrali della teoria *queer* (vale a dire, la connessione tra binario sessuale e l'eterosessualità istituzionalizzata)[112].

L'apertura oltre il binario

Nonostante questo *corpus* giurisprudenziale già rendesse la Colombia un riferimento per il diritto all'identità di genere, rimanevano – e, in una certa misura, tuttora rimangono – una serie di coni d'ombra. In parte, questi coni d'ombra erano (e sono) ascrivibili alla concreta operatività dei diritti contenuti in queste pure altisonanti dichiarazioni. A ciò si aggiungono episodi di diffusa esclusione e violenza nei confronti delle minoranze sessuali[113]. Rilevante nel contesto colombiano è poi il problema dell'inclusione delle istanze LGBTQI+ all'interno del processo di pace[114]. Ma al di là di queste considerazioni pratiche, era la stessa giurisprudenza a lasciare irrisolte alcune questioni. In primo luogo, la Corte non aveva avuto modo di pronunciarsi sul riconoscimento di un terzo sesso[115]. Il superamento del binarismo è tuttavia cruciale nell'attivismo trans, specialmente in America Latina, dove sono attestate una pluralità di identità non binarie. Un esempio particolarmente rilevante possono essere le persone *travesti*, che sono state al centro di un'intensa analisi antropologica[116] e che, in tempi recenti hanno dimostrato grande dinamismo culturale e politico. L'attivismo *travesti* si è posto all'avanguardia delle istanze delle minoranze sessuali nella regione[117],

[111] C.C., T-450A/13.

[112] J. Halley, *Split decisions. How and why to take a break from feminism*, Princeton and Oxford, 2006, p. 136; J. Butler, *Gender trouble*, II ed., New York and London, 1999, p. 22-23.

[113] Colombia Diversa – Fundación Grupo de Acción y Apoyo a Personas Trans – Diversas Incorrectas, *Informe sombra para el Comité de la CEDAW-Situación de mujeres lesbianas, bisexuales y trans en Colombia 2013–2018*, Bogotá, 2019; Aquelarre Trans, *Trans rights in Colombia*, Bogotá, 2019.

[114] *Ibid.*

[115] Criticano la mancanza di riconoscimento delle persone non binarie J.R. Palomares García – C. A. Rozo Ladino, *El registro civil de las personas y el modelo no binario*, in *Ius et praxis*, 2019, p. 113 ss.

[116] Don Kulick, *Travesti. Sex, gender, and culture among Brazilian transgendered prostitutes*, Chigago, 1998. A. García Becerra, *Tacones, siliconas, hormonas y otras críticas al sistema sexo-género*, in *Revista colombiana de antropología*, 2009, p. 119 ss.

[117] M. Wayar, *op. cit.,* p. 25; L. Berkins, *Un itinerario politico del travestitismo*, in D. Maffía (ed.) *Sexualidades migrantes: género y transgénero*, Buenos Aires, 2003, p. 127 ss.

invocando una completa re-immaginazione delle strutture di genere, da ricostruire con creatività e immaginazione o, nelle parole di Marlene Wayar, «con gli occhi di un bambino»[118].

La Corte non aveva avuto occasione di pronunciarsi neppure sulle identità fluide. Tuttavia, proprio questo profilo merita attenzione. Le identità di genere possono infatti essere caratterizzate da processi di crisi, evoluzione e ridefinizione, comportando la necessità di rettificazioni di sesso ulteriori alla prima eventualmente ottenuta. Pur in assenza di pronunciamenti espressi, l'enfasi della Corte sull'autodeterminazione sembrava garantire una solida base anche per il riconoscimento delle identità non binarie e fluide. Tuttavia, questa lettura è apparsa sin da subito non scontata. Il decreto di applicazione 1227 del 2015 limitava infatti la scelta al binario, restringeva il numero di volte in cui si poteva ottenere il riconoscimento di genere (due), e imponeva intervalli temporali (almeno dieci anni) tra le varie rettificazioni – in conformità, peraltro, ad un gran numero di giurisdizioni.

Questi limiti sono stati superati con la sentenza T-033/22. Influente nella determinazione di questo caso pare l'evoluzione globale in tema di diritti trans che, rispetto al 2015, è andata espandendosi. Nel 2015 il diritto al terzo genere era stato garantito a livello costituzionale solamente in quattro casi[119]. Al momento della decisione, nel febbraio 2022, questi erano aumentati a sette, compreso quello deciso dall'influente Corte costituzionale federale tedesca[120]. Inoltre, nel 2019, prima a livello globale, la Corte costituzionale belga ha sancito un diritto all'autodeterminazione di genere inclusivo di un'opzione non binaria. Questa Corte ha inoltre protetto esplicitamente il diritto delle persone *gender fluid* a ottenere molteplici riconoscimenti di genere senza necessità di restrizioni o procedure aggravate.

A livello sovranazionale, evoluzioni di primaria importanza hanno avuto luogo nel sistema inter-americano. Nel 2017, la Corte Inter-Americana dei Diritti Umani ha enunciato un diritto alla piena autodeterminazione di genere sia in senso binario che non binario[121]. Nel 2020, la Commissione Inter-Americana dei Diritti Umani ha invitato gli Stati membri a garantire protezione alle persone con un'identità di genere

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[118] M. Wayar, *op. cit.,* p. 25.

[119] India (*National Legal Service Authority* vs *Union of India*, *WP* (*Civil*) *No* 604 *of* 2013 (15 *April* 2015) (India)), Nepal (*Sunil Babu Pant and Others v Government of Nepal and Others* (2008)1 *Writ No* 917 2064 BS (2007 AD) 2NJALJ (2008) 261 (21 *December* 2007)), Pakistan (*Khaki v. Rawalpindi*, 2009), Australia (*SW Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 2 *April* 2014 S273/2013).

[120] BVerfG, 1 BvR 2019/16, Oct. 10, 2017. Per una discussione approfondita del contesto tedesco, si rinvia a F. Azzarri, *Identità sessuale e stato civile*, in *Rivista critica del diritto privato*, 2018, p. 419. La Corte esplicitamente menziona: Argentina, Australia, Austria, Belgio, Canada, Danimarca, Germania, India, Islanda, Malta, Nepal, Paesi Bassi, Pakistan, Stati Uniti (Cfr. T-033/22, § 22).

[121] Corte Interamericana de Derechos Humanos, *Opinion Consultiva* OC-24/17 de 24 *Noviembre* 2017, *solicitada para la Republica de Costa Rica*, «*Identidad de Género, e Igualdad y No Discriminación a Parejas del Mismo sexo*», p. 43-70, https://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf.

che costituisce una sfida «per le convenzioni o per le categorie convenzionali»[122] incluse, «tra le molte altre possibilità», le persone che si collocano fuori dal binomio M-F. Tra queste «altre possibilità», la Commissione ha esplicitamente incluso le «identità ancestrali» dell'America Latina, «che non hanno equivalenti precisi nelle categorie occidentali» e che sono, con un certo grado di approssimazione, assegnabili a forme di terzo sesso. La Commissione ha fatto riferimento alle persone *muxhe* messicane, *wigunduguid* degli indigeni Kuna a Panama e in Colombia, e Due Spiriti. Sebbene discutibilmente «ancestrali», la Commissione ha poi menzionato le già citate persone *travestí*. Tutte queste identità, occorre rimarcare, tradizionalmente non godono di alcun riconoscimento giuridico. In questo senso, pare che la Commissione abbia riecheggiato il legame tra de-colonialità e diversità di genere, confermando nel discorso giuridico quella dottrina che ha identificato nel binarismo una forma di oppressione coloniale[123].

I tempi apparivano dunque maturi anche in Colombia per il riconoscimento delle persone non binarie e fluide. La persona ricorrente, identificandosi come *travestí* dalle caratteristiche femminili ma non come una donna, aveva richiesto la rettificazione in un terzo sesso (lettera «X» o sesso «indeterminato»), che non era consentito dalla legge colombiana[124]. Inoltre, la persona ricorrente aveva ottenuto un riconoscimento nel genere femminile solo cinque anni prima. Era quindi precluso un ulteriore cambio per altri cinque anni[125]. Pronunciandosi a favore del* ricorrente, la Corte ha nuovamente ritenuto che la normativa confliggesse con il principio di dignità, con il diritto al libero sviluppo della personalità, e alla personalità giuridica. Nella sentenza, la Corte ricorda poi che la costituzione colombiana garantisce eguaglianza e pluralismo, e che lo Stato è tenuto supportare le minoranze storicamente subordinate – tra cui, appunto, le persone non binarie. Le minoranze sessuali, la Corte enfatizza, sono sovente vittime di svalutazioni culturali che il riconoscimento giuridico può rimediare, conducendo anche a conseguenze socioeconomiche tutt'altro che trascurabili.

Un approccio – diremmo – volontaristico caratterizza la sentenza. L'identità anagrafica viene considerata come espressione della volontà dell'individuo (*arbitrio*), del tutto autonoma, in costante evoluzione e non univocamente dettata dalla corporalità[126] – nuovamente in piena corrispondenza con le dottrine antropologiche in materia. Venendo al nocciolo della questione sotto giudizio, la Corte chiarisce che l'esclusivo

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[122] Comisión Interamericana de Derechos Umanos, *Informe sobra Personas Trans y de Género Diverso, y Sus Derechos Economicos, Sociales, Culturales, y Ambientales*, 7 agosto 2020, Doc. 239, OEA/SER.L/V/II, § 87-88, https://www.oas.org/es/cidh/informes/pdfs/PersonasTransDESCA-es.pdf.

[123] M. Lugones, *op. cit.*

[124] La persona ricorrente chiedeva anche un secondo cambio di nome. La disciplina del cambio del nome è tuttavia distinta da quella concernente la rettificazione degli atti anagrafici e non è purtroppo possibile esaminarla in questa sede.

[125] Questo in ragione dell'intervallo obbligatorio di dieci anni tra il primo e il secondo riconoscimento (Articolo 2.2.6.12.4.6, decreto 1227 del 2015).

[126] T-033/22, § 40-44.

riconoscimento dei sessi binari nega l'identità della persona ricorrente, e costituisce una restrizione discriminatoria dei suoi diritti fondamentali. Egualmente, l'intervallo temporale minimo tra la prima e la seconda rettificazione viene visto come un requisito «sproporzionato» e limita la possibilità dell'individuo di realizzare sé stesso[127].

Sembra poi opportuno menzionare una questione correlata, ma analiticamente distinta, discussa dalla Corte, cioè la possibile eliminazione del sesso come categoria dello stato civile[128]. Tale ipotesi è stata tuttavia esclusa. La Corte ha rimarcato la legittimità e la necessità della registrazione del sesso, in quanto criterio organizzativo che consente *policy* pubbliche in molteplici ambiti del diritto, dai trattamenti pensionistici alle azioni positive ed all'identificazione della persona[129]. Con il correttivo previsto per le identità difformi – cioè il diritto all'autodeterminazione di genere, inclusivo di un'opzione non binaria e strutturato in modo fluido – l'assegnazione di ogni persona ad un sesso veniva considerata proporzionata e legittima[130].

In conclusione, la Corte ha deciso di preservare il sesso come categoria organizzativa dello stato civile, tuttavia abbracciandone una concezione nuova. Da categoria strutturata su basi anatomiche e verificabili, il sesso diviene una categoria puramente identitaria. Per tale ragione, essa è rimessa alla decisione dell'individuo, lasciando alle autorità pubbliche un ruolo di registrazione. Questo implica la possibilità di accedere anche ai benefici correlati al cambio di sesso – da un più precoce pensionamento, all'assenza di obblighi di leva, alle azioni positive per il raggiungimento dell'eguaglianza sostanziale tra uomini e donne, giusto per menzionarne alcuni. Essenziale per raggiungere queste conclusioni appare la concezione di identità trans adottata e ripetuta dalla Corte come normale variante della personalità umana, in nessun modo patologica. Alla luce di essa, infatti, il coinvolgimento di esperti medici diviene ingiustificabile. Il sesso anagrafico diviene liberamente determinato, voluto, dall'individuo.

Questo approccio può comportare tensioni e contestazioni. L'ipotesi di atteggiamenti strumentali – se non addirittura fraudolenti – non pare logicamente escludibile. Questo problema non è tanto connesso al riconoscimento delle identità non binarie – alla fine, quali possono essere gli indebiti vantaggi associati con la registrazione nel terzo sesso in sistemi strutturati sul binarismo? – quanto alla procedura dichiarativa in sé. È però necessario puntualizzare che mancano al momento ricerche empiriche che dimostrino i rischi concreti di tale eventualità. La legittimità della restrizione di diritti fondamentali sulla base di ipotesi logiche, ma più speculative che empiricamente fondate risulterebbe dubbia, soprattutto a fronte dell'abbondanza di studi che dimostrano la complessità delle identità sessuali, la localizzazione culturale

[127] T-033/22, § 61.
[128] T-033/22, § 66-67.
[129] T-033/22, § 68.3.
[130] T-033/22, § 68.5.

e la limitazione storica dell'approccio binario ed eterodeterminato, nonché gli effetti avversi del diniego del riconoscimento di genere[131].

4. *La prospettiva italiana*

La disciplina della rettificazione del sesso anagrafico ha subito un'evoluzione differente nel contesto italiano[132]. La legge 14 aprile 1982, n. 164 garantisce un diritto alla rettificazione a «seguito di intervenute modificazioni dei […] caratteri sessuali»[133]. Il diritto fondamentale a rettificare la registrazione anagrafica è stato poi affermato e protetto dalla Corte costituzionale, che ha avallato un'interpretazione costituzionalmente orientata della legge[134]. Il requisito dell'intervento di normoconformazione sugli organi sessuali primari è stato così superato, perlomeno nella giurisprudenza costituzionale e di legittimità. La rettificazione è comunque vincolata a una trasformazione complessiva degli «aspetti psicologici, comportamentali e fisici che concorrono a comporre l'identità di genere»[135]. Tale modificazione deve essere accertata giudizialmente[136], come affermatosi nella prassi e rimarcato dalla Corte costituzionale e dalla Corte di Cassazione. L'autodeterminazione di genere è stata cioè esplicitamente esclusa per salvaguardare il principio della certezza delle relazioni giuridiche. D'altro canto, il terzo sesso non è mai stato oggetto di espresso diniego, nonostante sia evidente che il rigido binarismo nell'assegnazione del sesso lo rende difficilmente ipotizzabile. Inoltre, esso sembrerebbe attualmente precluso dalla giurisprudenza costituzionale. La transizione, inoltre, deve essere permanente, come sia la Corte di cassazione che la Corte costituzionale hanno enunciato. Nel prosieguo non si intende offrire una ricostruzione dettagliata della disciplina, che già è presente in letteratura[137]. Sarà invece sufficiente sottolineare alcune peculiarità culturali e tecniche di quest'evoluzione, allo scopo di chiarire l'origine delle limitazioni poste al diritto in questione. Inoltre, si intende complicare la ricezione generalmente positiva con cui le decisioni che hanno superato il requisito chirurgico sono state accolte dalla letteratura più vicina alle istanze trans. Da questo punto di vista permangono, infatti, considerevoli elementi critici.

131 Per un'analisi del diritto all'autodeterminazione di genere tramite il giudizio di proporzionalità, sia consentito il rinvio a R. Rubio-Marín – S. Osella, *La autodeterminación de género*, cit.

132 Questa sezione riprende ed espande la ricerca precedente dell'autore, e in particolare S. Osella, *Reinforcing the binary,* cit.

133 Articolo 1, legge 14 aprile 1982, n. 164.

134 Cfr. n. 3 e il testo che la accompagna.

135 Cost., 221/2015, § 4.1 *in diritto.*

136 Sugli aspetti processuali, si veda, da ultimo: C. Perago, *Il procedimento di rettificazione di attribuzione di sesso e la tutela del diritto all'identità di genere*, in *Il Foro Italiano*, 2020, p. 23 ss.

137 A. Lorenzetti, *Diritti in transito. La condizione giuridica delle persone transessuali*, Milano, 2013; F. Bilotta, *Transessualismo*, in *Digesto delle discipline privatistiche*, Torino, 2013; C. Angiolini, *Transessualismo e identità di genere. La rettificazione del sesso tra diritti della persona e interesse pubblico*, in *Europa e diritto privato*, 2017, p. 263 ss.

I diritti intersex e l'accesso al matrimonio tra persone dello stesso sesso

Prima di discutere i diritti delle persone trans, è utile anche con riferimento al contesto italiano qualche breve cenno allo stato dei diritti delle persone intersex nonché alla persistente eterosessualità del matrimonio. Il quadro giuridico in materia è infatti correlato all'attuale forma del diritto all'identità di genere. Per quanto riguarda i diritti intersex, a livello comparato e sovranazionale si vedono sviluppi impensabili fino a qualche anno fa[138]. Tuttavia, l'eco a livello nazionale pare ridotta, per non dire assente. Assistiamo infatti a una complessiva mancanza di fonti legislative o regolamentari direttamente concernenti il trattamento delle persone intersex[139], nonché di una significativa giurisprudenza in materia. Le poche e, a questo punto, datate fonti – peraltro non vincolanti – non sembrano offrire risposte congruenti alle principali domande degli attivisti.

In questo contesto, può assumere importanza pratica il rapporto del 2010 del Comitato Nazionale di Bioetica (CNB)[140]. In esso, il CNB stabilisce alcuni rilevanti principi, tra cui la necessità di garantire il benessere ai pazienti e l'irrinunciabilità del consenso informato. A questo scopo, il CNB considera spunti teorici molto simili a quelli valutati dalla – anch'essa citata – Corte costituzionale colombiana nella sentenza SU-337/99[141]. Tuttavia, nonostante queste aperture, il rapporto sembra tradire una certa chiusura nei confronti della diversità sessuale. In primo luogo, sono considerati «non solo […] leciti ma anche doverosi» gli «interventi irreversibili», purché volti al raggiungimento di «condizioni future per giungere ad una armonica identificazione, comprendendo fra le stesse anche l'esercizio della futura attività sessuale»[142]. Il CNB esclude gli interventi sulle persone intersex solo «eccezionalmente, in alcuni casi più

[138] Cfr., per esempio: J. Scherpe – A. Dutta – T. Helms, *The legal status of intersex persons*, Cambridge, 2018. Si veda anche A. Lorenzetti, *I profili giuridici dell'intersessualità*, in M. Balocchi (a cura di), *Intersex. Antologia multidisciplinare* G. Viggiani, *Un'introduzione critica alla condizione intersex*, in *Biolaw journal*, 2019, p. 433; A. Lorenzetti, *I profili giuridici dell'intersessualità*, in M. Balocchi, (ed.) *Intersex. Antologia Multidisciplinare*, Pisa, 2019. Per una prospettiva comparata: G. Cerrina Feroni, *Intersessualismo: nuove frontiere*, in *Diritto pubblico comparato ed europeo*, 2015, p. 303 e ss.

[139] Del genere che si sta sviluppando in Europa e nel mondo, che regola specificamente lo status dei trattamenti sulle persone intersex. Per fare alcuni recenti esempi non esaustivi, *cfr.* la legge tedesca sulla protezione dei bambini con una variazione dello sviluppo sessuale (*Gesetz zum Schutz von Kindern mit Varianten der Geschlechtsentwicklung*) del 21 maggio 2021, oppure l'articolo 19 della legge spagnola 4/2023 del 28 febbraio 2023 per l'eguaglianza reale ed effettiva delle persone trans e per la garanzia dei diritti delle persone LGBTI (*para la igualdad real y efectiva de las personas trans y para la garantía de los derechos de las personas* LGTBI).

[140] Comitato Nazionale di Bioetica (CNB), *Disturbi della differenziazione sessuale nei minori*, Roma, 2010.

[141] Tra le fonti citate, troviamo, ad esempio: I. A. Hughes – C. Houk – S. F. Ahmed – P.A. Lee – LWPES1/ESPE2 Consensus Group, *Consensus statement on management of intersex disorders*, in *Archives of Disease in Childhood*, 2006, p. 554 ss.; J. Butler, *op. cit.*; A. Domurat Dreger, *Hermaphrodites and the medical invention of sex*, Cambridge, 1998.

[142] CNB, § 6.2.

difficili (ossia i casi in cui non emergono dati obiettivi per l'assegnazione sessuale)»[143]. Non occorre qui esplorare in dettaglio come quest'approccio si ponga in conflitto con le domande degli attivisti[144] che richiedono la fine dei trattamenti non necessari per la salute fisica, rigettando tutti quelli volti alla preservazione di un supposto e largamente contestato benessere psicologico[145]. Piuttosto, è sufficiente considerare come il CNB sembri stigmatizzare la diversità dei corpi sessuati, visti come patologici e da correggere. La *ratio* della – eccezionale – proibizione degli interventi non sembra poi tanto volta alla salvaguardia dell'integrità fisica delle persone interessate quanto ad evitare un'assegnazione errata del sesso, che, in questa prospettiva, comporterebbe necessità di transizione futura[146].

Simile è l'atteggiamento nei confronti delle eccezioni al binario sessuale. Rigettando l'ipotesi di registrare i bambini intersex «come tali»[147], il CNB afferma, *in primis*, che garantire un terzo sesso anagrafico senza adeguato supporto normativo (comunque né consigliato né incoraggiato) comporterebbe «pesanti alterazioni» nell'ordinamento giuridico italiano; secondo, i bambini intersex registrati come non binari verrebbero additati come diversi; terzo, le fisicità intersex – «disturbi, anomalie e patologie […] manifestano una situazione di incertezza nell'assegnazione sessuale e sull'incertezza non ha senso costruire un'identità terza»[148]. Al netto di ogni ulteriore valutazione nel merito di queste affermazioni, appare chiaro il rigetto della diversità sessuale e il ruolo di questa concezione patologizzante nella preservazione del binarismo *anche* nel diritto. Il corpo sessuato è e rimane saldamente concepito come binario, mentre i corpi non conformi sono ridotti all'ambiguità e all'eccezione che, in quanto tale, delegittima un terzo sesso nello stato civile. Come è evidente, siamo agli antipodi rispetto all'approccio della Corte colombiana e alla celebrazione della diversità contenuta nella sua giurisprudenza.

Egualmente distante è la posizione sul diritto al matrimonio tra persone dello stesso sesso. Com'è noto, il matrimonio rimane, a livello legislativo, eterosessuale. L'introduzione delle unioni civili per le coppie dello stesso sesso, inoltre, ha in tutta probabilità rafforzato l'eterosessualità del matrimonio[149]. Appare inoltre pacifico che un diritto al matrimonio egualitario *non* è stato riconosciuto da parte della Corte

[143] *Ibid.*

[144] Sia consentito il rimando a Osella, *When comparative law walks the path of anthropology,* cit., p. 935 ss.

[145] *Ibid.*

[146] J. Repo, *op. cit.*

[147] Occorre menzionare che il CNB suggerisce la possibilità di annotare sull'atto di nascita «non [l']incerta attribuzione sessuale del neonato, ma [la] patologia di cui egli soffre» sulla base di una «rigorosa certificazione medica», da poter utilizzare in seguito per un'eventuale rettificazione anagrafica nel (CNB, *op. cit.*, p. 21). La terminologia adottata lascia effettivamente pochi dubbi sulla considerazione dell'intersessualità da parte del CNB.

[148] CNB, § 6.5.

[149] Legge 20 maggio 2016, n. 76.

costituzionale. Sulla sua ammissibilità alla luce del dettato costituzionale – cioè sulla discrezionalità del legislatore in materia – si registrano opinioni divergenti[150]. Non interessa ora prendere posizione in questo dibattito. Pare comunque innegabile che le enfatiche dichiarazioni sull'eguaglianza e autonomia sessuale contenute nella giurisprudenza colombiana non trovano replica nel contesto costituzionale italiano. Nonostante le significative differenze tra i contesti, occorre poi sottolineare come la stessa giurisprudenza della Corte Edu e della Corte di Giustizia dell'Unione Europea, nonostante alcuni sviluppi ben accolti nella letteratura più vicina alle istanze LGBTQI+[151], sia lontana dal supporto esplicito al matrimonio tra persone dello stesso sesso del sistema interamericano. Queste limitazioni nel diritto di famiglia, nell'opinione della Cassazione e della Corte costituzionale italiane, rappresentano un significativo limite per l'autodeterminazione di genere. Pare dunque accettabile affermare che il binarismo sessuale si intreccia con un'eteronormatività istituzionale, stabilendo quel legame tra i due fenomeni che è uno degli architravi della *queer theory* e del pensiero di Judith Butler[152]. Al netto di ulteriori considerazioni, il retroterra per il riconoscimento di forme diverse di identità sessuale – e per dei «guai di genere»[153] – non appare certamente ideale.

La nascita di un diritto medicalizzato all'identità sessuale

Nonostante la presenza di sentenze di merito e di legittimità sul riconoscimento dell'identità sessuale già a partire dagli anni '60 e '70 del XX secolo[154], la prima decisione

[150] Per una lettura della sentenza 138 del 2010 favorevole all'introduzione del matrimonio omosessuale per via legislativa, cfr., per tutti, B. Pezzini, *Il matrimonio same-sex si potrà fare. La qualificazione della discrezionalità del legislatore nella sentenza n. 138 del 2010 della Corte costituzionale*, in *Giurisprudenza costituzionale*, 2010, p. 2715. Contra: M. Cartabia, *op. cit.*; A. Pugiotto, *Una lettura non reticente della sentenza n. 138/2010: Il monopolio eterosessuale del matrimonio*, in *Forum di Quaderni Costituzionali*, 2011, http://www.forumcostituzionale.it/wordpress/images/stories/pdf/documenti_forum/paper/0226_pugiotto.pdf; R. Romboli, *Il diritto «consentito» al matrimonio e il diritto «garantito» alla vita familiare per le coppie omosessuali in una pronuncia in cui la Corte dice «troppo» e «troppo poco»*, in *Giurisprudenza costituzionale*, 2010, p. 1629 ss. La successiva sentenza n. 170 del 2004, con cui la Corte costituzionale sembra chiudere alla possibilità del matrimonio *same-sex*, sembra tuttavia avere dato ragione a questi ultimi. Cfr: R. Romboli, *La legittimità costituzionale del «divorzio imposto»: Quando la Corte dialoga con il legislatore ma dimentica il giudice*, in *Foro italiano*, 2014, c. 2680; P. Veronesi, *Un'anomala additiva di principio in materia di «divorzio imposto»: Il «caso Bernaroli» nella sentenza n. 170/2014*, in *forumcostituzionale.it*, 6 luglio 2014, https://www.forumcostituzionale.it/wordpress/wp-content/uploads/2013/05/0029_nota_170_2014_veronesi.pdf.

[151] Corte giust., 5 giugno 2018, C-673/13, *Coman*. In riferimento alla CEDU, si veda l'esaustivo: D. Gonzalez Salzberg, *Sexuality and transsexuality under the European Convention on Human Rights. A queer reading of human rights law*, London, 2019.

[152] J. Butler, *op. cit.*, p. 22; J. Halley, *op. cit.*, p. 136.

[153] Il riferimento è a J. Butler, *op. cit.*

[154] P. Antignani, *op. cit.*

costituzionale sul diritto all'identità sessuale risale al 1979[155]. La Corte era stata chiamata a giudicare sulla compatibilità con gli articoli 2 e 24 della Costituzione delle norme sulla rettificazione dell'atto di nascita[156] che, per costante interpretazione, escludevano il «transessualismo» dalle cause valide per la correzione dell'indicazione di sesso. Dando una lettura «chiusa» dell'articolo 2 della Costituzione, la Corte aveva escluso l'esistenza di un diritto all'identità sessuale e dichiarato l'infondatezza della questione, attirandosi peraltro critiche dalla dottrina[157]. Aveva puntualizzato in sentenza che la questione poteva «suscitare in Italia, come in altri Paesi, l'attenzione del legislatore» richiamandone tuttavia «i relativi limiti in ordine al matrimonio, che la Costituzione definisce fondamento della famiglia come 'società naturale'». Tale statuizione era forse un invito alla identificazione di una soluzione per via legislativa[158]. La sentenza indica tuttavia in modo molto chiaro il limite alla discrezionalità del legislatore, vale a dire la preservazione del matrimonio (eterosessuale). La concezione dell'identità trans – o meglio, secondo i termini dell'epoca, del «transessualismo» - riflette lo spirito del tempo, con una narrativa fortemente medicalizzata che non concepisce il fenomeno trans se non in termini di «intrappolamento in un corpo sbagliato»[159].

Quali che fossero le intenzioni della Corte, la decisione ebbe effetti radianti sulla comunità trans[160]. Fiorirono proteste coordinate dal Mit[161] e dal *Fuori!*[162], nonché sinergie con partiti politici che sfociarono in iniziative parlamentari. Il risultato, dopo alterne vicende, fu la legge 164 del 1982 – certamente innovativa nel contesto dell'epoca. Anche nel caso delle iniziative parlamentari, il soggetto beneficiario del

[155] Cost., 12 luglio 1979, n. 98.

[156] In particolare, si faceva riferimento agli articoli 165 e 167 del regio decreto legge 9 luglio 1939, n. 1238, e dell'articolo 454 del codice civile.

[157] Cfr. P. Veronesi, *Il corpo e la costituzione*, cit., p. 58 e la dottrina ivi richiamata, come: S. Bartole, *Transessualismo e diritti inviolabili dell'uomo*, in *Giurisprudenza costituzionale*, 1979, p. 1184 ss.; M. Dogliotti, *Identità personale, mutamento del sesso, e principi costituzionali*, in *Giurisprudenza italiana*, 1981, p. 27 ss.

[158] Parte della dottrina aveva ritenuto quest'espressione un invito al legislatore (M. Garutti – F. Macioce, *Il diritto all'identità sessuale,* in *Rivista di diritto civile*, 1981, p. 273 ss.) mentre altri dissentivano (S. Patti – M. R. Will, *La «rettificazione di attribuzione di sesso»: Prime considerazioni*, in *Rivista di diritto civile*, 1982, p. 729 ss.).

[159] Sulla concezione medicalizzata dell'identità trans all'origine dell'attuale disciplina, cfr. B. Pezzini, *Transgenere in Italia*, cit.

[160] La nozione di «radiating effect» è stata elaborata dall'antropologo del diritto Mark Galanter, che ha sottolineato come le decisioni giudiziali possano avere una serie ampia di effetti politici e sociali che vanno al di là del dato strettamente giuridico. Le sentenze infatti possono veicolare «a whole set of messages that can be used as resources in making (or contesting) claims, bargaining (or refusing to bargain), and regulating (or resisting regulation)», (M. Galanter, *The radiating effects of courts*, in K. Boyum – L. Mather (eds.), *Empirical theories about courts*, New Orleans, 1983, p. 136).

[161] Movimento italiano transessuali, attualmente rinominato Movimento d'identità trans, cfr: https://mit-italia.it.

[162] Fronte Unitario Omosessuale Rivoluzionario Italiano. Cfr: *See* G. Rossi Barilli, *Il Movimento Gay in Italia,* Milano, 1999.

diritto alla rettificazione del sesso anagrafico è la persona transessuale, intrappolata nel corpo sbagliato sin dall'infanzia e alla disperata ricerca di una trasformazione fisica cui seguisse una nuova identità giuridica. Le preoccupazioni della Corte circa l'articolo 29 della Carta sembrano riflettersi in una percepibile ansia che traspare da alcune dichiarazioni contenute nei dibattiti parlamentari. Qui è possibile trovare riferimenti alla continuazione della specie e alla moralità pubblica, che, come chiarisce Lorenzo Bernini, è sovente connessa all'eteronormatività[163]. I distinguo tra omosessualità e condizione trans appaiono essere un'ulteriore indicazione della tensione che animava il dibattito. Ogni preoccupazione veniva tuttavia tenuta a bada tramite una narrazione medicalizzata, percepita come la garanzia della serietà dell'intera vicenda trans[164]. Viene esclusa la volontarietà della condizione «transessuale», che pare invece essere un'afflizione di cui le vittime sono proprio le persone trans stesse[165].

Poco dopo il legislatore, è stato il turno della Corte costituzionale. Rigettando la questione di costituzionalità sollevata dalla Cassazione – in cui se non esclusive, erano comunque centrali le preoccupazioni sulla tenuta dell'impianto eterosessuale della famiglia[166] – la sentenza 161 del 1985 ha sancito l'esistenza di un diritto fondamentale «all'identità sessuale» basato sul diritto alla salute[167]. Tale decisione – come ampiamente riconosciuto – offre alcuni passaggi di grande civiltà giuridica. Notevole è la protezione del pluralismo, con l'enfasi posta sulla necessità di accettazione delle minoranze e della diversità, anche quando esse possano apparire «anomale»[168]. La trasformazione in senso più complesso della nozione di «identità sessuale», distaccata dalla mera fisicità ma inclusiva di elementi psicologici e sociali appare tuttora innovativa, e capace di interpretazioni estensive che possono aprire a forme anche meno comuni di identità di genere[169]. Infine, l'enfasi sulla salute in senso ampio della persona – in ultima analisi, l'unica titolata a valutare il proprio benessere – sembra riattribuire signoria sul proprio corpo ai diretti interessati e, al contempo, eliminare la legittimità di opposizioni di terzi ad entrare in contatto con le persone trans. Questa decisione fu accolta positivamente e venne vista fondare il diritto di ogni persona a essere sé stessa, ad autorappresentarsi, e a essere accettata nella sua unicità[170]. Ad oggi, i principi che enuncia paiono di grande valore per improntare una società ove la diversità sessuale è protetta.

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163 L. Bernini, *Queer Apocalypses: Elements of Antisocial* Theory, London, 2017, p. 3-4.

164 Appare superfluo in questa sede esplorare le connessioni tra medicalizzazione e controllo della sessualità, specialmente delle sessualità devianti. La letteratura in materia è immensa, a partire da: M. Foucault, *The history of sexuality. Volume 1: An introduction*, tr. Alan Sheridan, New York, 1978.

165 Per un'analisi approfondita dei dibattiti parlamentari, si rimanda a: S. Voli, '*Il parlamento può fare tutto, tranne che trasformare una donna in un uomo e un uomo in una donna'. (Trans)sessualità, genere, e politica nel dibattito parlamentare della legge 164/1982*, in *Italia contemporanea*, 2018, p. 83-84.

166 Cass., sez. I, 15 aprile 1983, ord. 783.

167 Articoli 2 e 32 della Costituzione.

168 Cost., 12 luglio 1985, n. 161, § 4 *in diritto.*

169 Cost., 161/2015, § 3 *in diritto.*

170 M. Dogliotti, *op. cit.*, p. 236.

Tuttavia, appare innegabile che il paradigma medico è profondamente radicato nella decisione. In effetti, come sottolineato in dottrina, l'identità della persona trans è vincolata ad una struttura corporea piuttosto definita, inclusiva delle «diverse componenti fisiche e psicologiche, corporee e spirituali»[171]. La persona «transessuale» non viene cioè concepita se non in relazione alla trasformazione fisica, che in ogni caso è necessitata. La salute, diritto base dell'identità sessuale, pur prevalendo sul principio della certezza delle relazioni giuridiche[172], pare tuttavia fondare un diritto all'identità sessuale dove il coinvolgimento medico – funzionale a fare coincidere soma e psiche – è presupposto[173]. Sarebbe insomma la stessa centralità del diritto alla salute, perlomeno per come a oggi interpretato in relazione alle persone trans, a contribuire al collegamento tra riconoscimento dell'identità di genere e la trasformazione complessiva della persona che la richiede[174].

Il paradigma medico sembra poi utile per la preservazione degli interessi pubblici in contrasto con l'identità sessuale. Pur senza un formale bilanciamento tra posizioni contrapposte, la trasformazione fisica (che, sebbene non necessariamente per via chirurgica, è sempre presupposta) sembra essere concepita a salvaguardia della certezza delle relazioni giuridiche. Nelle parole della Corte:

«è certo che il far coincidere l'identificazione anagrafica del sesso *alle apparenze esterne del soggetto interessato* o, se si vuole, al suo orientamento psicologico e comportamentale, favorisce anche la chiarezza dei rapporti sociali e, così, la certezza dei rapporti giuridici» (enfasi aggiunta)

In questo passaggio, paiono riecheggiare le prospettazioni contenute nel parere del Ministero di Grazia e Giustizia al Collegio. Qui, si si legge che la rettificazione del sesso anagrafico «non […] genera uno sconvolgimento della vita di relazione […] perché nella quasi totalità dei casi i soggetti che chiedono di sottoporsi agli interventi hanno già una apparenza esteriore inequivoca nell'indicare l'appartenenza dell'altro sesso e come tali conseguentemente si comportano [. Quindi] *l'esigenza della chiarezza e della certezza dei rapporti giuridici viene soddisfatta proprio attribuendo, anche giuridicamente, rilevanza agli interventi, mentre solo confusione ed incertezza continuerebbe a regnare* nei rapporti

[171] M. Cartabia, *op. cit.*, p. 288.

[172] Fondamentale appare il contributo di B. Pezzini, *Transessualismo, salute ed identità sessuale*, in *Rassegna di diritto civile*, 1984, p. 461 ss. L'importanza della prospettiva della salute rispetto a quella dell'autodeterminazione nel contesto storico è chiarita da Pezzini, *Transgenere in Italia*, cit.

[173] In questo senso, A. Lorenzetti, *Diritti in transito,* cit., p. 35-36.

[174] Sembra potersi leggere in questo senso Cartabia, *op. cit.*, p. 289-292, specialmente quando l'Autrice contrasta l'approccio della Corte costituzionale con quello della Corte Edu che, in *I. v. UK* e *Christine Goodwin v. UK*, fonda il diritto all'identità di genere nel diritto a «determinare i dettagli della propria identità», derivato dall'autonomia protetta dall'articolo 8 CEDU.

intersoggettivi, *ove si volesse conservare*, ai soggetti di cui si tratta, *l'iniziale sesso anagrafico*»[175] (enfasi aggiunta). In altre parole, nonostante il diritto alla salute prevalga sul principio alla certezza delle relazioni giuridiche, quest'ultimo viene comunque preservato grazie alle trasformazioni fisiche che sembrano essere presupposte in ogni caso. Pare, insomma, che si assista ad un bilanciamento implicito[176]. Non stupisce pertanto che Porpora Marcasciano, figura storica dell'attivismo trans in Italia, si sia riferita al diritto all'identità sessuale così costruito come a «una sanatoria»[177]: le persone trans che desiderano il riconoscimento devono infatti definirsi secondo un genere binario, chiaramente riconoscibile e intelligibile come maschio o femmina[178].

Nonostante non sia immediatamente correlato al tema delle precondizioni per il riconoscimento dell'identità di genere, oggetto del presente contributo, appare comunque proficuo un brevissimo cenno alla questione del cd. «divorzio imposto». Infatti, come sostenuto in dottrina, la cessazione degli effetti civili del matrimonio contratto precedentemente alla rettificazione del sesso sarebbe la conferma del paradigma eterosessuale che anima la legge 164 del 1982[179]. A differenza di altre esperienze nazionali[180], la preservazione della matrice eterosessuale della famiglia è effettivamente l'unico interesse in tensione con la rettificazione degli atti anagrafici che il legislatore si è dato pena di regolare. La Corte costituzionale, con la sentenza 170 del 2014, non pare avere fondamentalmente alterato questo paradigma. Anzi, pur enunciando un diritto della persona trans a mantenere una relazione di coppia e a ottenerne un riconoscimento giuridico, il Collegio ha insistito che quest'ultimo *non* può avere forma matrimoniale e che la preservazione di un simile matrimonio entrerebbe in conflitto con l'articolo 29 della Costituzione. In breve, come scritto dalla Corte di cassazione nell'ordinanza di rimessione al giudice costituzionale, la legge 164 del 1982 è «interamente ispirata dall'esigenza di favorire la corrispondenza tra soma e psiche

[175] R. Romboli, *Commento sub. Articolo 5 del Codice Civile*, in A. Pizzorusso – R. Romboli – U. Breccia – A. De Vita, *Commentario del Codice Civile Scialoja Branca. Art. 1-10,* Bologna, 1988, p. 261, in particolare nota a piè di pagina n. 33.

[176] Per un'analisi circa il possibile bilanciamento operato dalla Corte, cfr. A. Lorenzetti, *Identità di genere e operazione di bilanciamento: modalità e limiti nella giurisprudenza delle corti nazionali e corti sovranazionali*, in *Bocconi Legal Papers*, 2013, p. 99 ss.

[177] S. Voli, *op. cit.*, p. 101.

[178] Cfr. L. Arietti – C. Ballarin – G. Cuccio – P. Marcasciano (a cura di), *Elementi di critica trans*, Roma, 2010, p. 99.

[179] B. Pezzini, *Il paradigma eterosessuale del matrimonio di nuovo davanti alla Corte Costituzionale: la questione del divorzio imposto ex lege a seguito della rettificazione di sesso (ordinanza 14329/2013 Corte di Cassazione)*, in *GenIus,* 2014, p. 21 ss.

[180] Per esempio, nel *Gender Recognition Act* del 2004, il legislatore britannico ha per esempio disciplinato gli effetti del riconoscimento di genere con riferimento al matrimonio, alla genitorialità, alla sicurezza sociale e benefici pubblici, diritto discriminatorio, diritto successorio, successione alle parìe del Regno, *trusts*, competizioni sportive, e crimini specifici per genere.

nell'individuazione della identità di genere senza modificare il preesistente regime giuridico dei rapporti coniugali»[181].

Le recenti evoluzioni in materia di intervento chirurgico sui genitali primari – Fu vera gloria?

Nel corso di circa tre decadi, la legge 164 del 1982 è stata applicata in maniera complessivamente uniforme[182]. La previa «modificazione dei caratteri sessuali» – da autorizzare con un precedente giudizio separato, «quando necessario» – normalmente includeva trattamenti chirurgici sui caratteri sessuali primari: in sostanza, la sterilizzazione chirurgica[183]. Venivano poi richieste modificazioni ai caratteri sessuali secondari, ossia tutti quei tratti associati alla corporalità sessuata ad esclusione degli organi immediatamente riproduttivi. La trasformazione sociale della persona era poi regolarmente esaminata. Pur non mancando casi di riconoscimento in assenza del trattamento sugli organi sessuali primari, essi si riducevano ad eccezioni motivate da ragioni tecniche o di salute. Il numero di casi simili era tuttavia diventato più significativo a partire dai primi anni 2010[184]. Al contempo si registravano evoluzioni a livello comparato e sovranazionale in Europa. La Suprema Corte Amministrativa e la Corte costituzionale austriache avevano rimosso il requisito di una sterilizzazione chirurgica nel 2009. Simili passi erano stati compiuti dalla Corte costituzionale federale tedesca nel 2011 e dalla Corte Amministrativa d'Appello svedese nel 2012[185].

Movimenti si potevano registrare anche a livello sovranazionale. Nel 2009, il Commissario per i diritti umani del consiglio di Europa aveva condannato il requisito della sterilizzazione, senza censurare forme, per così dire, meno intense di medicalizzazione, quali i trattamenti ormonali o la diagnosi psichiatrica[186]. Nel 2010, l'Assemblea Parlamentare del Consiglio d'Europa aveva invitato gli Stati ad assicurare il riconoscimento dell'identità sessuale «senza obbligo di sottoporsi a sterilizzazione o ad altra procedura medica»[187]. Con la risoluzione 2048 del 2015, l'Assemblea aveva poi invitato gli stati a garantire «procedure di rettificazione del sesso veloci, trasparenti,

[181] Cass., sez. I, 6 giugno 2013, n. 14329, § 4.

[182] Per una ricostruzione comprensiva delle evoluzioni precedenti la sentenza 221 del 2015, cfr. A. Lorenzetti, *Diritti in transito*, cit., p. 59 ss.

[183] Cfr. F. Bilotta, *Transessualismo*, cit., p. 760; S. Patti, *Transessualismo*, in *Digesto delle discipline privatistiche, sezione civile*, Torino, 1999, p. 423.

[184] A. Lorenzetti, *Diritti in transito*, cit., p. 59 ss.

[185] BVerfG, 11 gennaio 2011, 1 BvR 3295/07 (Germania); VwGH, 27 gennaio 2009, 2008/17/0054; VfGH, 3 dicembre 2009, B 1973/08-13 (Austria); Corte d'Appello Amministrativa di Stoccolma, caso n. 1968–12, 19 dicembre 2012.

[186] T. Hammarberg, *Commissioner for Human Rights of the Council of Europe*, *Human rights and gender identity*, Strasburgo, 29 luglio 2009, CommDH/IssuePaper (2009).

[187] *Resolution of the Parliamentary Assembly of the Council of Europe* 1728 (2010) *on Discrimination on the basis of sexual orientation and gender identity*, § 16.11.2., http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=17853.

accessibili, e basate sull'autodeterminazione»[188].Con la sentenza in *Y.Y. c. Turchia*, la Corte EDU aveva condannato la Turchia per violazione dell'articolo 8 CEDU, in quanto la sua normativa richiedeva la sterilizzazione quale prerequisito per accedere ai trattamenti medici di riassegnazione del genere[189]. Anche il diritto dell'Unione Europea registrava evoluzioni giurisprudenziali degne di nota e generalmente positive per le persone trans[190].

I tempi apparivano dunque propizi per evoluzioni nell'ordinamento nazionale. Nel 2015, con decisione comunemente ritenuta una vittoria per i diritti trans ma che pure non va esente da critiche, la Corte di cassazione ha escluso che la legge 164 del 1982 richieda in ogni caso l'intervento sugli organi sessuali primari[191]. La Corte ha fatto perno sull'ambiguità letterale della legge 164 del 1982. Poiché, secondo alcune ricostruzioni, il dettato normativo renderebbe facoltativa la possibilità dell'operazione sugli organi sessuali primari[192], la Cassazione ha ritenuto di poter offrire un'interpretazione costituzionalmente orientata senza dover sollevare questione di costituzionalità[193].

Tale incertezza normativa, si legge in sentenza, deve essere risolta tramite un giudizio di proporzionalità, che guidi l'interpretazione della disposizione. Il sesso anagrafico del singolo individuo si manifesta dunque come un bilanciamento di interessi contrapposti e diviene un compromesso tra principi in tensione. Da un lato, la Corte sottolinea la presenza di un interesse pubblico nella «chiara determinazione dei generi» nonché nella «certezza delle relazioni giuridiche», interessi che – viene esplicitato – sono ostacolo all'esistenza di un «tertium genus» composto dalle

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[188] *Resolution of the Parliamentary Assembly of the Council of Europe* 2048 (2015) *on Discrimination against transgender people in Europe*, § 6.2., http://assembly.coe.int/nw/xml/xref/xref-xml2html-en.asp?fileid=21736.

[189] Corte EDU, 10 marzo 2015, ric. 14793/08, *Y.Y. c. Turchia*.

[190] Sia consentito un rimando a S. Osella, *The Court of Justice and gender recognition: A possibility for an expansive interpretation*, in *Women's Studies International Forum*, 2021, 102493. Sebbene successiva alle principali evoluzioni italiane discusse nel testo, sembra interessante menzionare la *soft law* del Parlamento Europeo, che, ha accolto «con favore le leggi adottate in alcuni Stati membri che permettono il riconoscimento giuridico del genere sulla base dell'autodeterminazione [e] incoraggia[to] altri Stati membri ad adottare una legislazione analoga» (Risoluzione del Parlamento europeo del 14 febbraio 2018 sui diritti delle persone intersessuali (2018/2878(RSP)), § 9, https://www.europarl.europa.eu/doceo/document/TA-8-2019-0128_IT.html.).

[191] Cass., 15138/2015.

[192] Come accennato, l'articolo 3 della legge 162 del 1982, prevede che «quando risulta necessario un adeguamento dei caratteri sessuali da realizzare mediante trattamento medico-chirurgico, lo autorizza con sentenza». Sull'interpretazione di tale «quando», si erano divisi gli interpreti, tra chi sosteneva che la disposizione rendesse facoltativo l'adeguamento, e chi sosteneva che l'adeguamento in sé non fosse facoltativo, ma che si potessero immaginare ipotesi in cui l'operazione non fosse necessaria (per esempio, perché avvenuta all'estero). Alcune pronunce di merito aveva accolto questa impostazione: Cfr. F. Bilotta, *Identità di genere e diritti fondamentali della persona*, in *Nuova Giurisprudenza Civile Commentata*, 2013, p. 1118-1120; A. Lorenzetti, *Diritti in transito cit.*, p. 39 ss.

[193] Fondata sugli articoli 2, 3, e 32 della Costituzione italiana, nonché sull'articolo 8 della CEDU.

caratteristiche di quelli maschile e femminile. L'introduzione di un simile sesso, continua la Corte, comporterebbe la creazione di «situazioni relazionali (unioni coniugali o rapporti di filiazione) non previste attualmente dal nostro sistema di diritto familiare e filiale». Proprio per questa ragione la Corte reputa «necessario per il mutamento di sesso un irreversibile cambiamento dei caratteri sessuali anatomici che escluda qualsiasi ambiguità»[194].

La Corte naturalmente riconosce le profonde evoluzioni che hanno interessato la materia. Tuttavia, l'identità trans viene ancora descritta in termini di «disforia di genere» ed associata ad un «lungo» processo di trasformazione fisica per consentire l'affermazione dell'identità individuale. La Corte ripropone cioè la narrativa – non errata, ma sicuramente parziale – del «corpo sbagliato». D'altro canto, la sentenza dà atto che la fine di questo processo di trasformazione medica non può essere predeterminata in modo uniforme per ogni caso. Al contrario, essa deve essere stabilita volta per volta da parte della persona interessata – alla fine dei conti, l'unica fondamentalmente titolata a dire se ha raggiunto l'equilibrio tra soma e psiche e un senso di benessere. Pertanto, la sentenza supera l'obbligatorietà dell'intervento sugli organi sessuali primari, ritenuto centrale agli albori della disciplina.

Tuttavia, per ben tre volte, la sentenza ribadisce che i trattamenti medici *devono* essere presenti. La transizione è definita come un percorso profondamente travagliato, irreversibile, necessitante senza eccezione di supporto medico e psicologico. Tale supporto, insiste la Cassazione, deve essere rigorosamente controllato tramite il coinvolgimento di esperti in campo medico e psicologico, anche per verificare la definitività della trasformazione individuale. Nel caso di specie, la ricorrente viveva nel genere femminile da molti anni ed era sostanzialmente sterile a causa di un protratto trattamento ormonale, ampiamente documentato da perizie mediche. La Corte ha quindi ritenuto che si fosse raggiunta l'irreversibilità della transizione. L'intervento non era perciò necessario.

La decisione, come menzionato, è stata accolta con favore dalla letteratura giuridica e non solo più vicina alle istanze trans. Da questo punto di vista, sicuramente, contiene molto per cui essere lodata. Partendo dall'ovvio: il requisito della sterilizzazione chirurgica è stato superato. Questo conforta la possibilità di un'applicazione meno stringente della legge[195], andando a soddisfare una domanda centrale degli attivisti. In questo senso, può essere positivamente accolta con una lettura «dal basso». Inoltre, la decisione sembra fare rientrare la tensione con il diritto sovranazionale. Una diversa interpretazione della legge 164 del 1982 entrerebbe in collisione con la giurisprudenza di Strasburgo. Con *AP, Garçon et Nicot c. Francia*, la

[194] Sulla centralità dell'eteronormatività nella legge 164 del 1982 e nella sua applicazione – specialmente, ma non solo, in riferimento alla disciplina del matrimonio della persona trans – si veda B. Pezzini, *Transgenere in Italia: Le regole del dualismo di genere e l'uguaglianza*, cit.

[195] Come specificato, la giurisprudenza di merito, con alcune pronunce (non certo maggioritarie), aveva aperto a questa possibilità. *Cfr.* n. 189 *supra.*

Corte EDU ha infatti condannato per violazione dell'articolo 8 della CEDU la sterilizzazione delle persone trans richiedenti il riconoscimento dell'identità di genere. Inoltre, l'enfasi sul raggiungimento di una condizione di benessere ed equilibrio quale fine fondamentale del diritto all'identità di genere attribuisce maggiore centralità al vissuto della persona trans, che, come già detto, risulta l'unica in grado di determinare se tale benessere è stato raggiunto o meno. Questo approccio apre dunque anche a potenziali *ulteriori* riduzioni dei requisiti medici. Laddove spetti all'individuo determinare la conclusione della transizione, tale determinazione potrebbe anche arrivare *prima* dei trattamenti ormonali (per esempio).

Al contempo, tuttavia, la Cassazione sembra fare sforzi erculei per rimarcare la necessità di medicalizzazione. La presenza dei medici è equiparata a serietà, e questo rigore è il punto di equilibrio tra il diritto all'identità sessuale e la struttura eterosessuale della famiglia[196]. La trasformazione dei caratteri secondari non solo non è condannata, nonostante essa non sia necessariamente anelata dalle persone trans. Addirittura, questa trasformazione sembra essere necessaria quale garanzia dell'irreversibilità della transizione – quest'ultima anche concepita come punto di incontro tra certezza delle relazioni giuridiche e istanze dei singoli[197]. Sicuramente scettico è l'atteggiamento della Cassazione verso le deviazioni dal binario sessuale. E invero il «tertium genus» viene rigettato in quanto incompatibile con le forme di famiglia riconosciute nell'ordinamento. Insomma, se da un lato questa decisione ha effettivamente accolto un'istanza dell'attivismo LGBTQI+, dall'altro ha controbilanciato quest'apertura con un radicamento del ruolo medico, del binario sessuale e della irreversibilità di una trasformazione fisica dei caratteri sessuali secondari – in coerenza, si ribadisce, con il dato dogmatico incentrato sul diritto alla salute[198].

Considerazioni simili si ripropongono con riferimento alla sentenza costituzionale 221 del 2015, di qualche mese successiva[199], nuovamente sul requisito chirurgico[200]. La questione di legittimità in riferimento all'articolo 1 della legge 164 del 1982 veniva dichiarata non fondata tramite un'interpretativa di rigetto, proprio alla luce della lettura offerta dalla Cassazione. Nuovamente, dunque, si afferma che il godimento del diritto all'identità di genere non può essere subordinato all'operazione

196 C.M. Reale, *Corte costituzionale e transgenderismo: l'irriducibile varietà delle singole situazioni*, in *Biolaw journal*, 2016, p. 285.

197 Si concorda con le critiche espresse da Salvatore Patti, che ha espressamente condannato la richiesta della trasformazione dei caratteri sessuali secondari (cfr: S. Patti, *Trattamenti medico-chirurgici e autodeterminazione della persona transessuale. A proposito di Cass., 20.7.2015, n. 15138*, in *Nuova giurisprudenza civile commentata*, 2015, p. 647-650).

198 A. Lorenzetti, *Diritti in transito*, cit., p. 37.

199 Cost., 21 ottobre 2015, n. 221.

200 Si lamentava la costituzionalità dell'articolo 1, legge 164 del 1982, che avrebbe imposto in ogni caso – nella lettura data dal rimettente – un'operazione chirurgica sulle caratteristiche sessuali del richiedente la rettificazione con gli articoli 2, 3, 32, e 117 della Costituzione – quest'ultimo in relazione con l'articolo 8 della CEDU.

sui genitali. Ciò nonostante, tale diritto è costruito nuovamente in termini medici. La decisione descrive la persona come titolare della scelta della modalità di transizione; tuttavia questa scelta non è solamente dell'individuo, ma si sviluppa «con l'assistenza del medico e di altri specialisti» che supportano il giudice nella valutazione[201]. Esclusa in radice è ogni apertura all'autodeterminazione nella sua forma più piena – o anche solo a un approccio che non includa trattamenti medici – poiché la transizione a scopo di rettificazione «deve comunque riguardare gli aspetti psicologici, comportamentali, e fisici» che formano l'identità di genere. Riprendendo la Cassazione, il giudice delle leggi considera che la complessità della transizione – in quanto sostenuta da presidi medici e psicologici da controllarsi tramite «rigoroso procedimento giudiziale» – offre garanzia di un adeguato bilanciamento con l'interesse pubblico alla certezza delle relazioni giuridiche che, nel contesto, pare evochino primariamente, sebbene non in via esclusiva, la struttura eterosessuale della famiglia.

Anche per questa sentenza valgono le osservazioni offerte in merito all'arresto della Cassazione. La decisione costituzionale ha molto di apprezzabile se la si guarda «dal basso», come ad esempio la «flessibilità» offerta alle persone trans[202], la ribadita centralità del diritto alla salute[203], e certamente l'accoglimento di un'istanza fondamentale dei movimenti[204]. In un certo senso, è stata vista conferire talmente tanta flessibilità che sono state da alcuni invocate correzioni legislative – che, per esempio, prevedano l'obbligatorietà di consulenze tecniche d'ufficio o lassi di tempo minimi di vita nel sesso rivendicato prima di potere ottenere la rettificazione[205]. Pare tuttavia chiaro che, se da una parte è stato offerto un *modicum* di flessibilità, dall'altra si è anche cementata un'interpretazione costituzionalmente orientata che impone un elenco di trasformazioni irreversibili da completarsi al fine di ottenere la rettificazione. Non solo si è riproposta la concezione medicalizzata dell'identità trans, ma è divenuto requisito la trasformazione del corpo della persona, che nella sentenza 161 del 1985 era piuttosto un implicito culturale (per quanto, per così dire, pragmaticamente molto comodo per bilanciare principi in tensione). Pur senza osteggiare espressamente le identità non binarie, il richiamo alla *ratio decidendi* della Cassazione non può che porre anche la sentenza costituzionale in un quadro di preservazione del duopolio di genere. In altre parole, sembra che questa decisione sia molto meno aperta al pluralismo del precedente del 1985.

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[201] Interessante e tutto da esplorare sarebbe il parallelismo tra questa disciplina e l'evoluzione del cd. *abortion constitutionalism*, dove la relazione tra donna e medico viene fatta oggetto di protezione. Cfr. R. Rubio-Marín, *Global gender constitutionalism and women's citizenship*, cit., p. 231. Per una prospettiva storica, si veda D. Herzog, *Sexuality in Europe. A twentieth century history*, Cambridge, 2011.

[202] I. Rivera, *Le suggestioni del diritto all'autodeterminazione personale tra identità e diversità di genere. Note a margine di Corte cost. n. 221 del 2015*, in *Consulta online*, 2016, p. 175 ss.

[203] C.M. Reale, *op. cit.*

[204] P. Veronesi, *Corpi e questioni di genere: le violenze (quasi) invisibili*, in *GenIus*, 2020, p. 15 ss.

[205] L. Ferraro, *La Corte costituzionale e la primazia del diritto alla salute e della sfera di autodeterminazione*, in *Giurisprudenza costituzionale*, 2015, p. 2059.

Tali conclusioni risultano essere state confermate – addirittura in senso restrittivo – nel 2017. Con la sentenza 180[206], la Corte ha reso un'interpretativa di rigetto[207] in cui, in primo luogo, conferma la non obbligatorietà dell'intervento di normoconformazione sui caratteri sessuali primari. Nella medesima decisione, la Corte ha risposto anche a quella che appariva una contestazione *tout court* di ogni modificazione allo scopo della rettificazione. Qui, la Corte ha sottolineato ulteriormente che il carattere non obbligatorio dell'intervento chirurgico sui genitali «non esclude affatto, ma anzi avvalora, la necessità di un accertamento rigoroso non solo della serietà e univocità dell'intento, ma anche dell'intervenuta oggettiva transizione dell'identità di genere. [Pertanto] va escluso che il solo elemento volontaristico possa rivestire prioritario o esclusivo rilievo ai fini dell'accertamento della transizione»[208].

Con un'ordinanza di manifesta infondatezza immediatamente successiva[209], la Corte conferma ancora una volta l'accessorietà dell'intervento sui genitali e insiste per una trasformazione medicalizzata. In particolare, la Corte sembra rifiutare l'autodeterminazione e l'apertura ai generi non binari[210]. Nel caso di specie, il tribunale rimettente aveva sollevato questione di costituzionalità in riferimento all'articolo 1 della legge 164 del 1982. A differenza delle altre ordinanze, tuttavia, il giudice a quo lamentava il nuovo corso giurisprudenziale. Il tribunale temeva che la facoltatività dell'intervento minacciasse un (pare potersi dire, piuttosto incerto) «diritto della gran parte dei consociati a conservare «il pieno duopolio uomo/donna» [imponendo] alla collettività la necessità di adeguarsi alla sua estrinsecazione anche nei confronti di minori, lavoratori, istituzioni, imponendo loro un mutamento dei tradizionali valori, comunemente accettati». Paventava inoltre che «la società non sarebbe più fondata sul «duopolio uomo/donna», ma su un numero indeterminato di generi» producendo regole di comportamento lontane da una – invocata con ricostruzione poco precisa[211] – tradizione secolare. Il giudice faceva riferimento a situazioni bizzarre e piuttosto pruriginose (evocando costumi succinti in spiaggia *et similia*) che si sarebbero create quando si assegna il genere in mancanza di normoconformazione[212].

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[206] Cost., 20 giugno 2017, n. 180.

[207] T. Mannella, *Sulla tecnica decisoria adottata dalla Corte costituzionale in occasione di due recenti pronunce in tema di rettificazione di attribuzione di sesso*, in *Giurisprudenza costituzionale*, 2017, p. 1680.

[208] Cost., 180/2017, § 4.1 *in diritto*.

[209] Cost., 21 giugno 2017, ord. n. 185.

[210] A. Lorenzetti, *Il cambiamento di sesso secondo la Corte costituzionale*, cit., p. 452 ss.

[211] Per esempio, si veda la ricchissima elaborazione antropologica in merito ai «femminielli», un'identità che si potrebbe definire non binaria tipica della città di Napoli, che ha origini piuttosto risalenti. *Ex multis*: M. Mauriello, *An anthropology of gender variance and trans experience in Naples. Beauty in transit*, London, 2021; M. C. Vesce, *Altri transiti. Corpi, pratiche, e rappresentazioni di femminielli e transessuali*, Roma, 2017.

[212] I. Rivera, *La rettificazione anagrafica del sesso e l'intervento medico- chirurgirco tra istanza personale e certezza sociale*, in Articolo29 (21 giugno 2017), http://www.articolo29.it/2017/la-rettificazione-anagrafica-del-sesso-e-lintervento-medico-chirurgirco-tra-istanza-personale-e-certezza-sociale/.

Il Collegio, con l'ordinanza di palese infondatezza, non ha riconosciuto alcun merito alla rimessione[213]. Non solo. In chiusura, sembra censurare le immaginifiche ricostruzioni del giudice rimettente, troncando in radice ogni discussione circa la necessità di salvare i consociati dalla loro «credulità». Tuttavia, non pare abbia sconfessato il «diritto al duopolio» invocato dal tribunale *a quo*. Al contrario, il provvedimento afferma come la «necessità di un accertamento rigoroso» volto alla transizione «di tutte le componenti», anche fisiche, associate all'identità di genere sia una risposta alle «esigenze evidenziate dallo stesso rimettente». Parafrasando (forse con un po' di – ma non troppa – libertà), la questione non è manifestamente infondata perché le preoccupazioni sollevate non sono meritevoli di tutela costituzionale, ma perché esse sono adeguatamente tutelate dal bilanciamento operato dalla Corte.

È qui utile fare una breve chiosa sull'errore concettuale che un'interpretazione poco generosa potrebbe vedere in queste decisioni. Non sembrerebbe del tutto incorretto sostenere che esse prospettino un'alternativa secca tra le «precondizioni» fisiche, comportamentali, e psicologiche da un lato, e la piena autodeterminazione di genere dall'altro. Lasciando da parte le complesse considerazioni sulla nozione di «volontarismo» o arbitrio della volontà, che comunque ha ricevuto attenzione in dottrina[214], è necessario rimarcare che tra soluzione «all'italiana» e «alla colombiana» esistono gradazioni intermedie. Un esempio è il modello «comportamentale» elaborato dal legislatore francese nel 2016. Come accennato, in quest'ultima giurisdizione, il richiedente la rettificazione anagrafica deve dimostrare di vivere il ruolo sociale associato con il sesso in cui si richiede il riconoscimento, e provare di essere socialmente riconosciuto in esso tramite un procedimento giudiziario[215]. Non solo la legge non richiede trasformazioni fisiche, ma anzi fa espresso divieto di rigettare la domanda di rettificazione per la mancanza di trattamenti medici[216]. Come risulta dalla prassi, la transizione comportamentale dell'istante è seriamente esaminata, sicché si può affermare di essere ben distanti da qualsiasi forma di autodeterminazione[217]. Questa forma di riconoscimento fondata sul ruolo sociale è il risultato di un bilanciamento, operato dal legislatore francese, proprio volto a contemperare le istanze delle minoranze sessuali con il principio dell'indisponibilità dello stato civile e la certezza delle relazioni giuridiche. Nuovamente, non c'è spazio in questa sede per

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213 T. Mannella, *op. cit.*, p. 1689.

214 Per esempio, si veda: M. Cartabia, *op. cit.*; contra, S. Rodotà, *Relazione introduttiva,* in *Nuova giurisprudenza civile commentata*, 2016, p. 104 ss.; S. Rodotà, *Diritto d'amore*, Bari, 2015, p. 129 ss.

215 Articoli 61-5, 61-6, 61-7, 61-8, Code Civil.

216 Articolo 61-7, Code Civil.

217 Si vedano, per esempio, Cour d'Appel de Toulouse, 6e ch., 9 février 2022, n. 20/03128; TGI (Tribunal de Grande Instance) de Nanterre, 17 *janvier* 2017, n. 16/09227; Court d'Appel de Montpellier, III *Chambre* B, 15 *mars* 2017; TGI de Paris, *Pole de la famille*, 28 *novembre* 2017, n. 17/07135; TGI de Nanterre, 17 *october* 2017, n. 17/06267; TGI Creteil, I chambre, II secteur, n. 16/09330. Per una critica: M. X. Catto, *op. cit.*, nonché L. Herault (dir), *État civil de demain et transidentité. Rapport final. Mission de recherche Droit et Justice*, Mai 2018.

suggerire l'adozione di una soluzione «alla francese», verso cui comunque non sono mancate le critiche – dal rischio di rinforzare stereotipi di genere[218] (cosa può voler dire «presentarsi pubblicamente» come una donna o un uomo?) alla mancanza di un terzo sesso, nel 2017 anche rigettato dalla *Cour de cassation*[219]. Questo modello, tuttavia, oltre ad avere il pregio di non imporre trattamenti medici a coloro che già si trovano in perfetto benessere con il loro corpo, dimostra che l'alternativa «medicalizzazione-volontarismo» è una semplificazione che meriterebbe un'indagine critica.

Tornando all'evoluzione italiana, e in via di sintesi, da questo complesso di decisioni emerge un quadro giuridico dove le norme che definiscono la rigidità dei generi e il binario sessuale vengono riaffermate. Nonostante l'apertura al pluralismo della sentenza 161 del 1985, le evoluzioni di tre decadi successive sembrano negare cittadinanza a quella molteplicità di corpi differenti che a vario titolo rientra tra le minoranze sessuali. Le persone non binarie o fluide, che vivono la loro identità in relazione al loro corpo in maniera diversa rispetto ai – sovente stereotipati – standard di mascolinità e femminilità, inserendosi negli interstizi di quelle minoranze «anche anomale» che, in linea di principio, sarebbero meritevoli di tutela, non possono ottenere una terza opzione, né ipotesi di registrazione più flessibili—come, per esempio, quella elaborata dalla Corte colombiana.

La *ratio* è da rinvenirsi in parte in questioni di carattere strutturale: l'introduzione di «un tertium genus» comporterebbe «guai di genere» all'interno dell'ordinamento giuridico, e, in particolare, con riferimento al primariamente eterosessuale diritto di famiglia. Nota bene: il diritto di famiglia non è certo l'unico ambito in cui le categorie fondate sulla differenza sessuale abbiano un ruolo, anche fondamentale, né l'unico in cui valga il «principio di certezza delle relazioni giuridiche». Possono ipotizzarsi molti altri ambiti, dallo sport ai trattamenti pensionistici[220]. Tuttavia, pare significativo (giacché corrispondente ad un elemento centrale nelle teorie queer) che il diritto di famiglia sia così fortemente richiamato dalle massime giurisdizioni nazionali.

Al contempo, sembra notarsi anche una comprensione patologica e medicalizzata dell'identità trans. In casi estremi, la Consulta non ha nemmeno questionato paventate minacce a «valori» collegati ad una supposta tradizione binaria secolare. Peraltro, tale tradizione – ammesso che in sé possa essere una giustificazione

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[218] Défenseur des droits, *Decision cadre MLD-MSP-2016-164*, 24 *juin* 2016, 11-13. Cfr. S. Paricard, *Du sexe par possession d'état à la consécration de l'identité du genre?*, in J.J. Lemouland – D. Vigneau (dir.), *Personnes et familles du XXIe siècle. Actes du colloque de Pau du 30 juin 2017*, Pau, 2018, p. 31 ss.

[219] Cass., I Civil Chamber, May 4, 2017, n. 16-17.189. Per una critica: L. Brunet – M.-X. Catto, '*Homme et femme, la Cour créa*'. *Note sous cass. 1er Civ., 4 Mai 2017, n.16-17189*, in M.-X. Catto – J. Mazaleigue-Labaste (dir.), *La bicatégorisation de sexe entre droit, normes sociales et sciences biomédicales*, Paris, 2021, p. 75 ss. La questione è ora sotto giudizio di fronte alla Corte EDU, nel ricorso n. 76888/17, introdotto il 31 ottobre 2017, *Y. c. Francia*.

[220] T. Mauceri, *Identità di genere e differenziazione sessuale. Problemi interpretativi e prospettive normative*, in *Nuove leggi civili commentate*, 2018, p. 1475.

giuridicamente valida per negare il riconoscimento a ipotetiche identità «nuove» – risulta più immaginata che reale, vista la radicata e antica presenza di forme di diversità di genere all'interno dei confini nazionali[221]. Questa comprensione patologizzata delle identità di genere non conformi è stata ovviamente molto «utile» per il bilanciamento del diritto in senso restrittivo per le persone trans. Legittima il coinvolgimento medico, nonché ogni controllo sulla transizione da parte di autorità pubbliche quali il giudice. È poi utile evidenziare che l'applicazione di questa giurisprudenza non va esente da critiche: sia sufficiente menzionare che la trasformazione delle caratteristiche comportamentali, fisiche e psicologiche che il giudice è chiamato a valutare si risolve sovente in un compendio di stereotipi, articolati per il tramite di una procedura piuttosto intrusiva e normalizzante[222].

In conclusione, nonostante l'abbandono del requisito chirurgico, questa giurisprudenza pare avere sancito, in maniera molto netta, l'esclusione della piena autodeterminazione di genere, la costruzione di un diritto medicalizzato e, chiaramente, binario. Riprendendo le osservazioni in materia di diritti intersex, pare ragionevole suggerire che tale insistenza sul binario delle identità sia collegata alla cancellazione non solo giuridica, ma anche fisica, della diversità dei corpi. Molto più incoerente apparirebbe la giurisprudenza sui diritti trans se le persone intersex ottenessero tutela della loro integrità fisica. Se è vero che l'intervento chirurgico non è più necessario, è altrettanto vero che questo superamento è stato accompagnato, nella giurisprudenza costituzionale e di legittimità, dalla esplicita medicalizzazione e dalla irreversibilità della procedura, posta a tutela di interessi di rango costituzionale: medicalizzazione che si presumeva, eppure non era dichiarata necessaria, nella giurisprudenza precedente.

5. *In conclusione: Un racconto di due (o più) Corti*

Il confronto tra l'esperienza colombiana e quella italiana consente di identificare due approcci al riconoscimento dell'identità di genere che appaiono diametralmente opposti. In Colombia, la registrazione anagrafica riflette l'autopercezione del singolo, unico giudice chiamato a decidere sul proprio sesso giuridico. Il ruolo dello stato, in questo senso, è riconoscere e proteggere la proiezione identitaria definita dalla persona stessa. La conseguenza è il diritto all'autodeterminazione del genere che, nella sua forma più estesa, include anche il genere non binario e la protezione delle identità fluide tramite molteplici riconoscimenti successivi. Questo approccio, chiaramente, pone in questione il ruolo delle categorie sessuali nello stato civile, e gli interessi pubblici che su queste categorie poggiano. Di questo è conscia la Corte colombiana, che tuttavia ha

[221] M.C. Vesce, *op. cit.*; M. Mauriello, *op. cit.*
[222] Sia consentito un riferimento a S. Osella, *Reinforcing the binary and disciplining the subject*, cit.

giudicato le limitazioni all'identità della persona come interferenze sproporzionate rispetto alle garanzie costituzionali.

La vicenda italiana procede in senso opposto. La registrazione anagrafica rappresenta sì l'identità della persona, a condizione però che alcune precondizioni siano soddisfatte. Il sentito del singolo è protetto se e solo se accompagnato dall'acquisizione di irreversibili trasformazioni fisiche, comportamentali e psicologiche. La funzione pubblica è sì riconoscere e proteggere, ma anche verificare, in sinergia con esperti non giuridici – principalmente, professionisti medici e psicologici. Le identità non binarie – come quelle fluide che possono richiedere molteplici rettificazioni – sono semplicemente escluse dalla possibilità di riconoscimento. Anche l'esperienza italiana pone al centro della discussione alcuni interessi pubblici, che però, a differenza di quanto avviene nella giurisprudenza colombiana, sono considerati come ragione sufficiente per le limitazioni dell'identità personale.

Un ventaglio di motivi può essere ravvisato alla radice di questa specularità. Il presente contributo si è concentrato su alcuni di essi, senza pretesa di esaustività. Incominciando dal *dato culturale*, la giurisprudenza delle due corti costituzionali dimostra una differente comprensione dell'identità trans nonché del corpo intersex. Nel caso colombiano, il corpo che si differenzia dallo standard maschile e femminile è oggetto di esplicita protezione costituzionale. La corte colombiana rigetta comprensioni patologiche – a nulla rilevando ora se a torto o a ragione – e anzi fa del corpo intersex un fattore di ricchezza e diversità. La corte riduce il binario dei corpi a «un'idea», di cui risalta la matrice culturale. Il fondamento biologico della categorizzazione di genere, in altre parole, viene posto in questione. Nonostante non si possano sovrapporre l'esperienza trans e quella intersex, la diversa concezione del corpo sessuato presente nel diritto colombiano e italiano sembra avere conseguenze rilevanti per la protezione delle identità trans e non binarie, giacché lo stesso fondamento in un «binario biologico» viene percepito diversamente. Al contempo, l'identità trans viene concepita come completamente fisiologica – andando dunque a rendere problematico ogni coinvolgimento medico. In conformità con la critica al binario dei corpi, anche il binario delle identità viene rigettato. Tramite espliciti riferimenti alla Corte e alla Commissione interamericane, tale binario è attribuito ad una specifica cultura (quella colonizzatrice europea), riconoscendo come valide e meritevoli di tutela forme di identità indigene che da tale contesto si distaccano.

La comprensione della diversità sessuale nel contesto italiano appare diversa. Pur in presenza di aperture anche significative, pare incontrovertibile lo scetticismo nei confronti del corpo intersex. Il corpo convenzionale che abita il binario è sinonimo di «armonia», mentre quello intersex di abnormalità, e come tale inadeguato a fondare un'identità. Se passiamo dai corpi ai vissuti, nonostante ribadite dichiarazioni di principio circa la necessità di proteggere le minoranze e le diversità, l'identità trans è costruita secondo la narrativa del «corpo sbagliato», coincidente con la legittima, eppure non esclusiva, identità transessuale. L'identità trans è costruita o in modo

patologizzato (nella sentenza della Cassazione del luglio 2015 si parla di «disforia») o comunque medicalizzato. Come il corpo non binario è negato, così sono negate le identità non binarie – addirittura viste come aliene alla tradizione. Appare chiaro che il controllo delle identità tramite un complesso medico-giudiziario diventi molto più difficilmente giustificabile nel contesto colombiano rispetto a quello italiano.

Il dato culturale, per quanto importante, non è comunque l'unico fattore a determinare le divergenze tra gli ordinamenti. Esso si riflette, in una certa misura, anche nell'elemento *dogmatico*. Nel contesto colombiano, la protezione delle identità trans e non binarie sembra prevalentemente fondarsi su diritti di autonomia. L'identificazione – ma anche la volontà (*vivir como quiera*) – del singolo assume rilevanza e, in ultima analisi, viene salvaguardata. A ogni persona, in questo contesto, viene lasciato spazio per vivere la propria corporalità in modo autonomo e autodeterminato. Il singolo soggetto è libero di interpretare il proprio corpo come crede, senza un necessario collegamento identitario. Nella giurisprudenza delle corti italiane, la salute ha avuto un ruolo, sebbene non esclusivo, certamente centrale. E tuttavia, come abbiamo visto, nonostante alcuni indubbi vantaggi legati al rango di diritto fondamentale, la fondazione nel diritto alla salute può avere in una certa misura favorito la medicalizzazione della procedura di rettificazione, il coinvolgimento di saperi esterni, e i controlli volti alla verifica di una trasformazione complessiva – appunto, *encumbered*.

Il *dato strutturale* – vale a dire la presenza di interessi pubblici pesanti a sufficienza da motivare il controllo sulle categorie sessuate – appare infine rilevante. In entrambe le giurisdizioni, il legame tra paradigma eterosessuale della famiglia e controllo delle identità sessuali è esplicitato[223]. Sia la corte italiana che quella colombiana sono adamantine al riguardo. Tuttavia, la corte colombiana ha enunciato un diritto costituzionale al matrimonio tra persone dello stesso sesso. La corte italiana approccia la vicenda in maniera molto diversa. L'accettabilità della famiglia *same-sex* riduce l'interesse pubblico contrapposto al riconoscimento dell'autodeterminazione di genere in una giurisdizione, e il paradigma eterosessuale lo rinforza nell'altra. Con ciò non si vuole suggerire che il controllo dell'identità di genere sia unicamente motivato dalla necessità di preservare il paradigma eterosessuale del diritto di famiglia. Tuttavia, vista la connessione tracciata dalle teorie queer tra binario sessuale e eterosessualità istituzionalizzata, la differenza relativa al matrimonio egualitario appare significativa.

Infine, non si può che considerare che questo contributo sollevi più questioni di quante ne risolva. In primo luogo, è ancora da chiarire la ragione dell'apertura della corte colombiana ad approcci teorici profondamente diversi rispetto a quella italiana. Premesso che tale apertura è un dato di fatto, la spiegazione del perché essa abbia avuto luogo in un contesto e non abbia avuto luogo nell'altro resta da chiarire. Ancora, occorrerebbe indagare il diverso ruolo della corte nei rispettivi sistemi e la diversità di azioni a disposizione delle persone che vedono minacciati i loro diritti fondamentali. Il

[223] Questo è comunque stato rilevato anche in altre giurisdizioni: cfr. D. Borrillo, *Le sexe et le droit. De la logique binaire des genres et la matrice heterosexuelle de la loi*, in *Meritum*, 2010, p. 257 ss.

rimedio della *tutela* nel diritto costituzionale colombiano, che consente un'azione diretta di fronte alla Corte per la salvaguardia dei diritti appare consentire una più significativa massa critica di decisioni. Ulteriore ricerca sarebbe poi necessaria anche in riferimento alla *desiderabilità* dei due modelli, ossia in quale misura un approccio sia preferibile ad un altro. Se il modello colombiano è evidentemente più desiderabile dalla prospettiva delle persone trans e non binarie, resta però ineludibile una discussione molto rigorosa sull'opportunità generale di tali evoluzioni. Una simile indagine dovrebbe prendere in considerazione non solamente il punto di vista delle persone trans e non binarie, ma anche gli interessi contrapposti. Tutto questo, però, non rappresenta parte del presente, meno ambizioso, lavoro di ricerca. Quello che appare certo è che i diritti d'identità stanno assumendo una sempre maggiore rilevanza e che diversi approcci culturali e strutturali possono spiegare la differenza tra giurisdizioni. E, del resto, comprendere prima di giudicare sostanzia la tradizione del diritto comparato.

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ABSTRACT: This article assesses and compares the evolution of the right to gender recognition in Italy and Colombia, focusing especially on the constitutional jurisprudence. Even though both countries provide protection for fundamental rights and minorities, the regulation of the right to gender recognition differs significantly. Italy imposes a medicalized model, while Colombia embraces self-determination. The article investigates the reasons for this difference using a comparative and socio-legal method, identifying cultural, doctrinal, and structural factors that influence the development of the rights of trans and nonbinary individuals. This analysis shows that a holistic approach, examining the right to gender recognition in all its complexity, is necessary to reimagine and strengthen the protection of the rights of gender minorities.

ABSTRACT: Il contributo intende ricostruire e confrontare l'evoluzione del diritto all'identità di genere nelle giurisdizioni italiana e colombiana, ponendo una particolare attenzione al dato costituzionale. Pur mostrando alcune somiglianze quanto alla generale sensibilità in tema di diritti e attenzione alla protezione delle minoranze, Italia e Colombia offrono due discipline interamente diverse del medesimo diritto: un modello medicalizzato in Italia, e uno basato sull'autodeterminazione in Colombia. L'articolo ha dunque come obiettivo indagare le condizioni e le ragioni di questa divergenza. Tramite un'analisi comparata e socio-giuridica di queste esperienze, l'articolo identifica alcuni elementi in grado di influenzare lo sviluppo dei diritti delle persone trans e non binarie. In particolare, si sostiene che la definizione dei diritti in materia di identità di genere può essere determinata da una serie di fattori culturali, dogmatici, e strutturali. Solo tramite un approccio olistico, che consideri il diritto in

questione nella sua complessità, è dunque possibile ripensare e rafforzare la tutela delle persone trans e non binarie.

KEYWORDS: gender binary – trans and nonbinary rights – nonbinary recognition – comparative constitutional law – socio-legal studies

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RIVISTA DI
DIRITTI COMPARATI

Access to justice between transformation, conservation, and regression: some patterns (and insights)*

Giovanna Spanò

TABLE OF CONTENTS: 1. Introduction and methodology. – 2. Transformative constitutionalism and the rule of comparison. – 3. Conservative constitutionalism and the rule of comparison (in reverse). – 4. Regressive constitutionalism: fundamental rights global descending march? – 5. Some conclusive remarks: convergence or resistance?

1. *Introduction and methodology*

As it is well-known, fundamental rights have been witnessing an «expansive march»[1] often promoted and nurtured by the Courts. In this context, the circulation of *reasonings*, through an integrative or supportive use of comparison, as well as through interpretation, represents a shared approach in the advancement of the so-called global constitutionalism. As a result, substantive convergence may well occur, despite differences among systems and models.

As far as access to justice is concerned, this contribution aims at presenting three different patterns and models concerning constitutional trends, *rectius* potential or actual trends in constitutionalism: the transformative, the conservative and the regressive one.

An example of transformative constitutionalism is provided by India, among other systems. In particular, in the ruling concerning the decriminalization of homosexuality, interesting data are provided by the interaction(s) between categories, definitions and historical-social dynamics and a universalist approach (and discourse). Nonetheless, transformative trends shall be investigated bearing in mind other emerging models: conservative and regressive constitutionalism(s). The former refers to the preservation of the status quo being aware of the need to unveil unbalanced

* The article has been subjected to double blind peer review, as outlined in the journal's guidelines.

[1] On the topic, G. Pino, *Il costituzionalismo dei diritti: aspirazioni e aporie*, Bologna, 2017. The author explains how the recognition of new rights often involves judicial activism and legal interpretation: «una prima aspirazione del costituzionalismo contemporaneo potrebbe essere definita come la marcia espansiva dei diritti, e correlativamente dei loro strumenti e organi di garanzia, innanzitutto di tipo giudiziario», p. 54; R. Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, Cambridge, 2007.

dynamics, asymmetries and inequalities. In this regard, the Namibian High Court of Windhoek judgement can be highlighted. It strongly criticized a precedent established by the Supreme Court addressing same-sex marriages and relationships, boosting the debate about the actual violation of *some* Namibian citizens' rights.

A third strand could then be defined as regressive and (not too much paradoxically) several cases are recorded precisely within the so-called Euro-Western model[2]. As far as the latter is concerned, harsh debates surrounded the latest US Supreme Court ruling concerning the right to abortion. Critics were addressed to the leading case *Roe v Wade* overruling, undermining millions of women's rights and marking a step backwards – a regression – vis-à-vis no (longer) disputed achievements. Also, some premises are due. First, the assessment of the abovementioned trends aims at exploring constitutional paradigms per themselves, throughout the prism of gender rights adjudication. Hence, a broader analysis of the jurisprudence on the topic, as well as the topic in itself is beyond the scope of this investigation. Consequently, the case laws displayed in the following paragraphs are chosen for being best examples (and landmark cases) about how actual constitutional trends and patterns may operate and work at a substantive level. Thus, they are neither deemed as *comparanda* in a technical perspective[3], nor they aim at becoming a source of specific reference in the wider (and multifaceted) spectrum of gender rights litigation[4]. Second, the analysis will focus on the reasoning technique in order to detect what a sort of Rule of Comparison can entail, or to put it differently, to underscore the cross-reference between Courts[5] and

[2] For instance, *inter alia*, in Hungary and in Poland. For an overview on the topic, see G. Delledonne, *Ungheria e Polonia: punte avanzate del dibattito sulle democrazie illiberali all'interno dell'Unione Europea*, in *DPCE Online*, www.dpceonline.it, 2020.

[3] Bearing in mind warnings by R. Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, in *American Journal of Comparative Law*, 2005, p. 125 ff.

[4] For a comprehensive and thorough overview see R. Rubio-Marín, *Global Gender Constitutionalism and Women's Citizenship: A Struggle for Transformative Inclusion*, Cambridge, 2022; B. Baines, R. Rubio-Marín, *The Gender of Constitutional Jurisprudence*, Cambridge, 2010. In addition, see H. Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, in *The University of Chicago Law Review*, 2004, p. 1689 ff.; S. M. Marks, *Global Recognition of Human Rights for Lesbian, Gay, Bisexual, and Transgender People*, in *Health and Human Rights*, 2006, p. 33 ff.; A. Sperti, *Omosessualità e diritti. I percorsi giurisprudenziali ed il dialogo globale delle corti costituzionali*, Pisa, 2014; *Constitutional Courts, Gay Rights and Sexual Orientation Equality*, London, 2017; F. Venter, *Globalization of Constitutional Law through Comparative Constitution-Making*, in *Verfassung Und Recht in Ubersee / Law and Politics in Africa, Asia and Latin America*, 2008, p. 16 ff.; N. Nicol – A. Jjuuko – R. Lusimbo – N. J. Mulé – S. Ursel – A. Wahab – P. Waugh (eds.), *Envisioning Global LGBT Human Rights. (Neo)colonialism, Neoliberalism, Resistance and Hope*, London, 2018.

[5] See M. Siems, *Comparative Law*, Cambridge, 2014, p. 147 ff.

how cross-fertilization[6] can be implemented. Henceforth, an in-depth "immersion"[7] in the systems' framework and background would need and require a diverse and analytical investigation on its own.

In the end, the paper will develop throughout the analysis of the selected case laws as reflecting the abovementioned three models. Interactions between the universalist approach and particularism will be highlighted, as well as the involvement of (the rule of) tradition and (the rule/role of) comparison in shaping the reasonings. The last section will draw some conclusive remarks.

2. *Transformative constitutionalism and the rule of comparison*

«What do we mean when we speak about 'constitutional transformation' or 'transformative constitutionalism'? Is it right to term the Constitution 'transformative'? What does this mean, and what does it require?»[8].

Answering these questions is not an easy task.

Transformative constitutionalism has become a leading theme in different systems and to this extent, circulation of models can prove reductive when dealing with the issue[9]. It rather also embodies an example of circulation of ideas, concepts and, as it will be explained, of reasonings as well. Additionally, every constitutional transformation is strongly intertwined with each legal framework, local and situated

[6] See, E. Örücü, *Law as Transposition*, in *International and Comparative Law Quarterly*, 2002, pp. 203-225. The Author also sparks the diversity of each and every system, at the same time not ignoring similarities that may occur when systems, models, layers communicate in a constant dialogue through horizontal (and/or vertical) transfers. See E. Örücü, *What is a Mixed Legal System: Exclusion or Expansion?*, in *Electronic Journal of Comparative Law*, 2008. See also PG Monateri, *The Weak Law: Contaminations and Legal Cultures,* in *Transnat'l L. & Contemp. Probs*., 2003.

[7] See «Law as requiring immersion», in M. Siems, *op. cit*., p. 101 ff.

[8] M. Pieterse, *What do we mean when we talk about transformative constitutionalism?*, in *SA Public Law*, 2005, p. 155. K. E. Klare defines transformative constitutionalism as a «long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through nonviolent political processes grounded in law», see K. E. Klare, *Legal Culture and Transformative Constitutionalism*, in *South African Journal on Human Rights*, 1998, p. 150. Additionally, according to Justice Pius Langa, transformative constitutionalism at least involves the achievement of «some form of economic transformation and a change in legal culture»; to Justice Laurie Ackermann it means a «substantive constitutional revolution», both quoted and discussed in J. Brickhill – Y. Van Leeve, *Transformative Constitutionalism – Guiding Light or Empty Slogan?*, in *Acta Juridica*, 2015, p. 142 and p. 147.

[9] Transformative constitutionalism was actually born as a constitutional ideal and «one of the fundamental pillars of post-apartheid constitutionalism in South Africa», E. Kibet, C. Fombad, *Transformative constitutionalism and the adjudication of constitutional rights in Africa*, in *African Human Rights Law Journal*, 2017, p. 341.

contexts, definitions and ideals[10]. The latter may recall particularistic claims about how to shape the progression of rights too; transformative constitutionalism is in most cases also a progressive one.

Thus, other questions may arise: is transformative constitutionalism a universal(ist) category? Can there be specific responses to the will – or the need – to transform constitutional frameworks? Some examples can be provided by post-colonial frameworks[11], in which constitutions themselves and constitutional developments per se have witnessed several and different adjustments, accommodations and hybridization with other layers of law, sources of law, let alone concepts about law. Thus, transformation has a lot to explain about (transplantation and/or) hybridization rather than the mere circulation of models, as an outcome, an effect and a cause at the same time. With its «historical self-consciousness»[12] transformation simultaneously bears the seeds of past legacy and desirable goals for the future[13]. This implies that constitutions and constitutionalism «have to do more», rather than just fixing the general rules of the game, especially when confronting and challenging «traumatic pasts characterised by war, deep divisions or political repression»[14].

Furthermore, transformation may occur through several different paradigms. It can become an explicit aim, an announced goal or turn into a pragmatic and substantive process able to change those rules, *inter alia*. In this regard, the South African case – along with its Court's activism – may well fall into the latter. What transformative constitutionalism became was the outcome of a precise substantive perspective fostered by the Constitutional Court about why and how a progression was needed in the promotion of fundamental rights. Moreover, in this regard, as Klare argues, transformative constitutionalism somehow affects (and jeopardize) also a static

[10] As Klare states: «determining what a constitution means can never be *entirely* separated from what one hopes and aspires for it to mean». See, K. E. Klare, *op. cit.*, p. 151. This statement somehow recalls also the Krygier's conception of Rule of Law as a teleological concept in nature. see M. Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in G. Palombella – N. Walker (eds.), *Re-locating The Rule of Law*, Oxford, 2008.

[11] For a comprehensive and a critical overview on the topic, see E. Stradella, *Multiculturalismo e diritti delle donne: una riflessione, nella prospettiva del costituzionalismo*, www.costituzionalismo.it, 2021 (especially, p. 279 ff).

[12] K. E. Klare, *op. cit.*, p. 155, also quoted in M. Pieterse, *op. cit.*, p. 157.

[13] «It typically aims to preserve stability through maintaining legal continuity and simultaneously to facilitate change in the societal fabric […] transformative aspect of transitional constitutionalism (or, as it may be termed, transformative constitutionalism), the specific context of the constitutional transition would logically inform both what transitional/ transformative constitutionalism aspires to transform *from*, and what it seeks to transform *into*. In this sense, transformative constitutionalism departs from the liberal depiction of constitutions as representing a view of state and society that is fixed in time and is to be preserved for future generations, in that it is at once forward- and backward-looking, it is historically self-conscious whilst simultaneously embodying an as yet unrealised future ideal», M. Pieterse, *op. cit.*, p. 157 and p. 158.

[14] E. Kibet, C. Fombad, *op. cit.*, p. 350.

concept of the rule of law and the separation of powers, due to courts' activism which can expand in a field or subject covered by legislative power (and discretion)[15].

In the following selected case law, the constitutional transformative process can be underscored as an explicit commitment, through the Indian Supreme Court *engagement*. Additionally, the rule of tradition, with its historical as well as its legal implication interplays with comparison as a medium to achieve a progression – to say, a transformation – of the status quo. Also, this activity had involved different paths and specific paradigms, thus transformation is here intended as shaped in the *Navtej Singh Johar v. Union of India*[16] case, in which the court recalls the topic in a devoted section[17].

First, the Constitution is overtly defined as an «organic Charter of progressive rights»[18]. Second, the rule of tradition and the rule of comparison are balanced and entangled. Last, the promotion of fundamental rights is granted through a doctrine of their progressive realization and a general principle of non-retrogression. As in other cases, the background was not precisely related to LGBTQI+ issues, but it developed from an application concerning the right to privacy though it became a landmark case vis-à-vis the decriminalization of homosexual intercourses[19]. In fact, the Court took the opportunity to censure Section 377 of the penal code, concerning carnal intercourse against the order of nature, thus addressing «a draconian remnant of India's

[15] «But we balk at the idea of transformative adjudication, because this suggests an invitation to judges, as distinct from legislators, to attempt in their work to accomplish political projects. To the contrary, the rule of law ideal enjoins judges to check their politics at the courthouse door. Judges are appointed neutrally to enforce laws set down by others, not to make politics […] In all traditional accounts, the rule of law ideal is premised on a radical disjunction between law and politics and a sharp role differentiation between what judges do and what politicians and political theorists do. So, the very idea of transformative adjudication seems out of place within liberal legalism» and also «adjudication is, inevitably, a site of law-making activity», K. E. Klare, *op. cit.*, p. 157, p. 147. Consistently it was argued that «the contours of judicial activism that sometimes goes with transformative constitutionalism are undefined or amorphous. This facet of transformative constitutionalism could mean judicial pragmatism in bringing about socio-political change. It could also sound a death knell for the legitimacy of the judiciary since it may bring it into direct collision with political players who feel more entitled to drive the political agenda», E. Kibet, C. Fombad, *op. cit.*, p. 354.

[16] AIR 2018 SC 4321; W. P. (Crl.) No. 76 of 2016 D. No. 14961/2016.

[17] Sec. H, «Transformative constitutionalism and the rights of LGBT community».

[18] Sec, G, p. 57 ff. See D. Amirante, *Post-Modern Constitutionalism in Asia: Perspectives from the Indian Experience*, in *NUJS L. Rev.*, 2013.

[19] This was the outcome of complex judicial steps, see M. Rospi, *La* Supreme Court *indiana 'resuscita' il reato di sodomia*, in *Foro italiano*, 2014; M. Caielli, *La tutela dell'orientamento sessuale in India tra giudici e legislatore: un anomalo* self-restraint *della Corte Suprema*, DPCE online, www.dpceonline.it, 2014 and P. Passaglia, *La depenalizzazione della sodomia tra adulti consenzienti in India: una battaglia ideale combattuta con l'arma della comparazione*, in *Diritto pubblico comparato ed europeo*, 2010. In current days, the Supreme Court is about to rule on same-sex marriages as well in a greatly expected judgment.

colonial past»[20]. At the same time the court bestowed the reasoning with remarkable insights about why and how a transformation was required. The latter will be presented in the following paragraph.

In the first place, the Indian Constitution is plainly pictured as a «living, integrated organism having a soul and consciousness of its own», which physiologically nurtures the progression and the expansion of fundamental rights. Moreover, the «Constitution of India, embodying a distinct constitutional morality, is meant to protect discriminated minorities from majoritarian subjugation»[21].

According to the Indian Supreme Judge, in this regard, constitutional courts have a precise duty, being in charge of detecting – further promoting and granting – social changes. Thus, as a living text, the Constitution «must keep pace with societal evolution which meant that §377 of the IPC and the Victorian prudery from which it emerged, belonged only in the pages of history»[22]. The aim was to «contribute to the progressive realisation of rights, and actively strive to create a more accommodative, and pluralistic society»[23]

Therefore, law shall change, and constitutional horizons expand[24], since «the dynamic concepts inherent in the Constitution […] have the potential to enable and urge the constitutional courts to beam with expansionism, to adapt to the ever-changing circumstances without losing the identity of the Constitution». Also, a purposive[25] approach implies that ideals may and should translate into reality[26]. As explained before, if Constitutions have to do more – instead of being «dead letters»[27]

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[20] See S. Chaudhary, *Navtej Johar v. Union of India: Love in legal reasoning*, in *NUJS Law Review*, 2019, p. 1.

[21] *Ibidem*, *op.cit.*, p. 5. On Constitutional morality, see Sec. I of the judgment, p. 74-81.

[22] *Ibidem*, p. 6.

[23] *Ibidem*, p. 6.

[24] Saurabh Chaudri and others v. Union of India and others, (2003) 11 SCC 146.

[25] Even though this concept is related to a complex paradigm of legal interpretation of and in Islamic law, as far as *maqasid* and the «common good» are concerned, it can become a useful conceptual tool in this topic as well. In order to explain it thoroughly, we here convey March's view about purposivism as a «a flexible, complex form of legal/moral argumentation […] which justifies legal change in reformist discourses», to say «a principled and purposive flexibility in legal reasoning» and «an opportunity for engagement and negotiation». Moreover, it is a «rights-based approach to political morality» and «a potentially rigorous model for how to think about balancing various claims in society». See, A. March, *Theocrats Living under Secular Law: An External Engagement with Islamic Legal Theory*, in *Journal of Political Philosophy*, 2011, p. 31, p. 17, p. 22, p. 33.

[26] Par. 86.

[27] Par. 84. Also in this perspective, the Supreme Court states that: «It is this ability of a constitution to transform which gives it the character of a living and organic document. A Constitution continuously shapes the lives of citizens in particular and societies in general. Its exposition and energetic appreciation by constitutional courts constitute the lifeblood of progressive societies. The Constitution would become a stale and dead testament without dynamic, vibrant and pragmatic interpretation. Constitutional provisions have to be construed and developed in such a manner that their real intent and existence percolates to all segments of the society. That is the raison d'etre for the Constitution», Par. 66.

– courts should do more themselves[28]. Nonetheless, in the *Navtej Singh Johar v. Union of India* case, this ratio is someway reversed. Courts do not only transform the legal framework by themselves, but constitutional principles in the Indian Constitutions are deemed transformative in themselves. This implies that principles first are transformative, then so become Constitution and (a fortiori) constitutionalism[29]. Transformation is neither a result, nor an effect, but it translates ideals inherent in the Indian constitutional principles into reality. Transformation is nothing more than an inevitable[30] and a consequential outcome; like an «organism» transforming over time and with time, Constitution(s) and ideals do follow.

In the Supreme Court's reasoning, fundamental rights – in particular, «rights of liberty and equality» – are deemed dynamic and timeless, confirming the perspective of a future progression, still someway dealing with the past. Additionally, they are transformative in nature, since as the Court clearly states: «it would be against the principles of Constitution to give them a static interpretation without recognizing their transformative and evolving nature». Here too, the logic appears somehow reversed, for «the argument does not lie in the fact that the concepts underlying these rights change with the changing times, but the changing times illustrate and illuminate the concepts underlying the said rights»[31].

Transformative constitutionalism[32], for the Indian Supreme Court, in this case is thus explicit and thoroughly defined. Its foundation can be retrieved via the Court's proper words throughout the whole reasoning. First, it is grounded on a «egalitarian liberalism»[33] and constitutional principles should be scrutinized through reasonableness and a balancing test. In this regard, it is worth noting that this (explicit) methodological premise somehow differs from the South-African transformative constitutionalism which indeed has been pictured as a «post-liberal» one[34]. Second,

[28] «We emphasize on the role of the constitutional courts in realizing the evolving nature of this living instrument. Through its dynamic and *purposive* interpretative approach […] It is the duty of the courts to realize the constitutional vision of equal rights […] The judiciary cannot remain oblivious», Parr. 84-86, italics added.

[29] See D. Amirante, *Nation Building through Constitutionalism: Lessons from the Indian Experience*, 2012, p. 23 ff.

[30] «We are required to keep in view the dynamic concepts inherent in the Constitution», Par. 84. Moreover, «the Constitution has been conceived of and designed in a manner which acknowledges the fact that 'change is inevitable'», Par. 86.

[31] Par. 85.

[32] See also S. Sen, *The Constitution of India: popular sovereignty and democratic transformations*, New Delhi, 2011.

[33] Namely «founded on reasonable principles that can withstand scrutiny», Par. 86, p. 60.

[34] «I have deliberately chosen the ambiguous phrase 'postliberal' rather than, say 'social democratic', because none of the traditional political rubrics quite fit and most carry at least some distracting, sectarian baggage […] The problem is that, within our legal culture, a traditional liberal view carries a presumptive imprimatur of being a 'legal' interpretation, whereas a postliberal reading appears to be a 'political', that is, non-legal interpretation […] The South African Constitution intends a not fully defined but nonetheless unmistakable departure from liberalism (as contemplated in classic documents

transformative constitutionalism[35] seems to be displayed through at least three perspectives: the literal, the substantive and the teleological one. Respectively, it means a) transforming society b) recognizing the reality though a pragmatic lens, sparking the ability of the Constitution to adapt and transform; c) embracing a dynamic, «vibrant» and pragmatic interpretation by constitutional courts, in order to develop the real intent of constitutional provisions. This appears rather consistent and compliant with the doctrines of «progressive realization» and «non retrogression» of rights, as guiding lights chosen by the Supreme Court. In fact, they are also unmistakably defined: the former entails «the dynamic and ever growing nature of the Constitution» and its rationale implies that the «rights under the Constitution are dynamic and progressive»[36]. The doctrine of non retrogression is presented as a natural corollary «as per which there must not be atavism[37] of constitutional rights»[38], since «in a progressive and an ever-improving society, there is no place for retreat»[39].

In such a *particular* scenario[40], two other patterns may also be included: the rule of comparison and the rule/role of tradition. As for comparison, this domestic vision does not turn into a parochial approach; on the contrary, the Indian court is strongly committed to an integrative perspective when dealing with the international arena, a path stemming from years of engagement[41].

As for tradition, the Court had previously promoted a sort of rationalized commitment, in which, on the one hand, it looked at the global panorama, on the other, it remained voluntarily anchored to its own system of norms and values, regulating and mediating the dialogue. This has been defined as a slow and «controlled revolution»[42], since it seemed that the Indian Supreme Court had decided to engage

such as the U.S. Constitution) toward an 'empowered' model of democracy», K. E. Klare, *op. cit.*, p. 151; p.152.

[35] See, Sec. H, «Transformative constitutionalism and the rights of LGBT community».

[36] See, Sec. M.

[37] Crucial for this analysis the definition retrieved in the Cambridge Dictionary about atavism as «a feeling or reaction that comes from long ago, rather than being necessary or appropriate in modern times», https://dictionary.cambridge.org/dictionary/english/atavism#.

[38] Sec. Q, Par. (ix).

[39] See, Par. 189.

[40] On equality and constitutional law in general, see M. C. Nussbaum, *India, Sex Equality, and Constitutional Law*, in B. Baines, R. Rubio-Marin (eds.), *op. cit.*, p. 174 – 204; C. A. Mackinnon, *Sex equality under the Constitution of India: problems, prospects, and "personal laws"*, i·con, 2006, pp. 181–202.

[41] As conceptualized in V. C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, in *Harvard Law Review*, 2005. To this extent, engagement involves «considering foreign and international law within a framework of learning by engagement, assuming neither convergence nor disagreement». It is deemed as «a legitimate interpretive tool that offers modest benefits (and fewer risks) to the processes of constitutional adjudication», p. 111. Additionally, vis-à-vis foreign laws it «requires issue-by-issue analysis and does not necessarily mean adoption, but thoughtful, well- informed consideration», p. 128.

[42] N. Robinson, *Expanding Judiciaries: India and the Rise of the Good Governance Court,* in *Washington University Global Studies Law Review*, 2009, which explains how «in essence, the Indian Constitution—like many constitutions that would follow it, particularly in the developing world—attempted to create an

with a form of «judicial creativity», also promoting a «doctrine of judicial activism but without its nomenclature»[43]. Hence several case laws are mentioned to provide a cross-referenced[44] concept of transformative constitutionalism. In the reasoning particularism thus applies to the concept of transformative constitutionalism – what it means – but not fully to the way it may broadly affect the multi-layered constitutional, legal, social (religious) and political system[45].

As far as comparison is concerned, not surprisingly, the South African Constitutional Court appears as a pioneer model on the topic and its judgments are quoted as best examples about what transformation implies and how it would work in a plural constitutional framework[46]. The Canadian and US Courts follow, with a reference to the Supreme Court of the Philippines too[47]. To this end, comparison is not only a tool able to support the reasoning and the robustness of its ratio[48], but it

ongoing, controlled revolution by laying an architecture in which massive social and economic transformation could take place within the limits of a liberal democracy. It is this vision of a controlled revolution that the Court has since reshaped itself to promote», p. 5. See also V. G. Hegde, *Indian Courts and International Law*, in *Leiden Journal of International Law*, 2010, p. 53 ff.

[43] R. Chowdhury, *Judicial activism and human rights in India: a critical appraisal*, in *The International Journal of Human Rights*, 2011, p.1055 ff. The author underlines how «there is a general belief or understanding that the Supreme Court of India, and the High Courts under its leadership, have been particularly creative and imaginative in the development of the constitutional and common law of this country. And this despite that the Indian Constitution does not afford the same scope of judicial activism/creativity to the courts as does the US Constitution. Further, over the years, the scope of some of the fundamental rights has been curtailed by constitutional amendments, and, thus, the scope of judicial review has been further restricted [...]. In spite of all this, in many cases, the Supreme Court has displayed judicial creativity of a very high order. It must not go unnoticed that the judiciary while giving a soothing decision in the historic case of Mumbai Kamgar Sabha v. Abdul Bhai, introduced the doctrine of judicial activism but without its nomenclature», p. 1060.

[44] Cross-reference is meant as per the definition in M. Siems, *op. cit.*, p. 147 ff.

[45] From different perspectives, in this regard, see P. Viola, *South Asian Constitutionalism? A contemporary pathway towards an authentic constitutional order*, in *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, 2020; C. Correndo, in this Special Issue. See also, D. Francavilla, *Diversity and the Judiciary in India: Supreme Court judges in Indian society*, in www.federalismi.it, 2018; M. Malagodi, *Protection of Religious Rights in India*, in J. Dingemans, C. Yeginsu, T. Cross (eds.), *The Protections for Religious Rights Law and Practice*, Oxford, 2013, p. 177-194.

[46] *Inter alia*, Road Accident Fund and another v. Mdeyide, Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs and Tourism and others.

[47] Roberts v. United States Jaycees 468 U.S. 609 (1984), Price Waterhouse v. Hopkins 490 U.S. 228 (1989), Lawrence v. Texas 539 U.S. 558 (2003), Obergefell, et al. v. Hodges, Director, Ohio Department of Health, et al. 576 US (2015); per il Canada, Delwin Vriend and others v. Her Majesty the Queen in Right of Alberta and others [1998] 1 SCR 493; for South Africa, National Coalition for Gay and Lesbian Equality and another v. Minister of Justice and others 1998 (12) BCLR 1517 (CC v. Unite) for Philippines, Ang Ladlad LGBT Party v. Commission of Elections G. R. No.190582, Supreme Court of Philippines (2010).

[48] See, for instance, M. Caielli, *Attivismo giudiziale e utilizzo della comparazione giuridica in alcuni emblematici* hard cases *indiani e statunitensi*, in M. Cavino – C. Tripodina (cur.), *La tutela dei diritti fondamentali tra diritto politico e diritto giurisprudenziale*: 'casi difficili' alla prova, Milano, 2012.

operates as a weapon[49] to enlarge the scope, the content and the object of the balancing test. It is no coincidence that proportionality balancing has been defined as «one of the most successful legal transplants and a key feature of global constitutionalism»[50] and that there has been a change in perspective from the age of rights[51] towards an «age of balancing»[52].

In a broader sense, this also applies to the rule/role of tradition, which does not stand in the shadow of the (international[53] and) global panorama but engages with its discourse[54]. The latter does not sound like assimilation[55], but rather as an ongoing choice to be always discussed and redefined. The rights expansive march is not only endorsed, but it is also triumphant[56] and «the society has to march ahead»[57].

3. *Conservative constitutionalism and the rule of comparison (in reverse)*

In this section, we will outline another paradigm in accessing (and attaining) justice. In particular, the following analysis will address conservative trends in the recognition – or, actually, in the *quasi-justiciability* – of LGBTQI+ rights. Also in this case, however, some premises are essential. First, what do we mean when we speak about conservative constitutionalism? Does it require something specific about how the reasoning is drafted? Second, is conservative a political-oriented concept or is it

[49] This expression refers to, P. Passaglia, *La depenalizzazione della sodomia*, cit.

[50] As argued by E. Kibet, C. Fombad, *op. cit.*, p. 362, quoting CB Pulido, *The migration of proportionality across Europe*, in *New Zealand Journal of Public and International Law*, 2013.

[51] Clearly, this definition is referred to N. Bobbio, *L'età dei diritti*, Torino, 1965.

[52] G. Pino, *op. cit.*, p. 144.

[53] Mention is made to the Yogyakarta Principles.

[54] On the topic, D. Amirante, *Al di là dell'Occidente. Sfide epistemologiche e spunti euristici nella comparazione 'verso Oriente'*, in *Diritto Pubblico Comparato ed Europeo*, 2015. See also, S. Khilnani – V. Raghavan – A. Thiruvengadam (eds), *Comparative constitutional traditions of South Asia*, Oxford, 2010.

[55] On the topic, see L. Pegoraro, Blows Against the Empire. *Contro la Iper-Costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale condiviso*, in *Annuario di Diritto Comparato e di Studi Legislativi*, Napoli, 2020, p. 447 ff. See also, L. Baccelli, *Il particolarismo dei diritti. Poteri degli individui e paradossi dell'universalismo*, Roma, 2000; M. Riegner, *How Universal Are International Law and Development? Engaging with Postcolonial and Third World Scholarship from the Perspective of Its Other*, in *Verfassung Und Recht in Ubersee / Law and Politics in Africa, Asia and Latin America*, 2012, p. 232-248; J. Donnelly, *The Relative Universality of Human Rights*, in *Human Rights Quarterly*, 2007, p. 281-306; *Universal Human Rights in Theory and in practice*, Ithaca and London, 1989; M. Goodhart, *Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization*, in *Human Rights Quarterly*, 2003, p. 935-964; L. L. Adams, *Globalization, Universalism, and Cultural Form*, in *Comparative Studies in Society and History*, 2008, p. 614-664; F. Tedesco, *Diritti umani e relativismo*, Bari, 2009.

[56] «When we talk about the rights guaranteed under the Constitution and the protection of these rights, we observe and comprehend a manifest ascendance and triumphant march of such rights», Par. 178.

[57] Par. 188.

applied in a literal sense? Third, is conservation a static category, as the opposite of progression?[58]

As far as the first question is concerned, conservative constitutionalism here conveys a judicial approach in which adjudication aims at protecting the status quo. This does not automatically imply that transformation is unable to breed, as it will be explained later on, or that there can be a clear-cut model of how (and why) conservation may happen. As for the second assumption, here *conservative* is meant in a literal sense, i.e. the choice to *non quieta movere* and not (only) in a political-oriented perspective[59]. Naturally, the two semantic options may well overlap, so conservation may well occur *because of* a conservative standpoint on the topic, though this is not a perfect equation. Approaching the last methodological issue, conservation *and* preservation are not expected to last endlessly since they may well foster a step backwards – leading to regression – or forwards – nurturing progression. As long as this may appear tautological, we intend to rather underline how this category (too) bears the seed of dynamism, since it may well evolve or downgrade according to times and places, in the same way transformation may widely operate. Thus, it does not necessarily encompass a static process or inertia.

In the following section a case law ruled by the Namibian High Court of Windhoek[60], concerning the recognition of same sex relationships will be analysed. In particular, in January 2022, the *Digashu and Seiler-Lilles v Government of the Republic of Namibia* cases, concerning two Namibian citizens in a same-sex marriage with non-citizens, became a leverage to dispute the overall LGBTQI+ rights status in Namibia[61].

This judgement is remarkable due to its Janus-faced nature, where past and present confront each other as competing paradigms in the justiciability of LGBTQI+

[58] For instance, as for the US Supreme Court see R. West, *Progressive and Conservative Constitutionalism*, in *Michigan Law Review*, 1990, p. 641 ff. Indeed, as a paradigm different from transformation, «preservative» constitutionalism «aims to preserve stability through maintaining legal continuity and simultaneously to facilitate change in the societal fabric through transforming the legal, political and economic tenets of society», M. Pieterse, *op. cit.*, p. 157.

[59] See, for instance, the Oxford Dictionary defines *conservative* something or somebody «opposed to great or sudden social change», https://www.oxfordlearnersdictionaries.com. Indeed, this does not mean opposed to social change per se or in general, but to *great* or *sudden* changes.

[60] Digashu v Government of the Republic of Namibia (HC-MD-CIV-MOT-REV-2017/00447) and Seiler- Lilles v Government of the Republic of Namibia (HC-MD-CIV-MOT-GEN-2018/00427) [2022].

[61] The applicants claimed they were discriminated against as «spouses» by the domestic immigration authorities. They had to apply for a visa in order to reside in Namibia, whereas for heterosexual couples the no-national spouse does not need to apply for any residence permit. The applicants claimed they were discriminated also from a *procedural* point of view, due to bias and prejudice. For a comment, please see G. Spanò, *What went wrong? Una (ri)discussione sulla garanzia dei matrimoni same-sex nel contesto costituzionale namibiano*, in *Federalismi, Focus – Africa*, www.federalismi.it, 2022.

rights[62]. In fact, a transformative aim is manifest in the reasoning shaped by the High Court, but at the same time, past seems not to fully pass.

As it will be highlighted, the reasoning conservative outcome appears unescapable, even though this was not the court's final goal or its genuine choice. In this scenario, indeed, the challenge between competing «legal cultures» is crucial. As Klares establishes, legal culture can also be conceived as a «stripped down, barebones definition», beyond «complexities of popular and professional attitudes and beliefs, or the sociology of the bench and bar»[63]. By legal culture he hence implies «professional sensibilities, habits of mind, and intellectual reflexes»[64]. In the *Digashu and Seiler-Lilles v Government of the Republic of Namibia* case all the abovementioned feature interplays through a rather noteworthy technique, which combines legal technicalities[65], *boni mores* and a sort of rule/role of comparison in reverse. To this extent, in the global expansive march, the diversity of the Namibian socio-cultural background and its specificities somehow justify an independent pathway on the topic. Remarkably, this does not reflect the High Court's current view, but it echoes an authoritative past – through the leading case ruled by the Supreme Court – and a conservative present – preserved by the respondents, i.e. Namibian institutions[66].

Despite in other contexts comparison represented a *medium*, and a tool to progressively transform the constitutional framework, in the Namibian case, legal (local) culture, hierarchies and particularistic principles – including axiological ones – promote a monistic idea(l) of the legal system as a whole. This clearly stems from the respondents' reply, since «the applicants' reliance on the jurisprudence of other jurisdictions, in support of their principal and constitutional claim was of very little

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[62] For a contextualization of the issue, see G. Bauer, *Namibia in the First Decade of Independence: How Democratic?*, in *Journal of Southern African Studies*, 2001, p. 33 ff.; C. Szasz, *Creating the Namibian Constitution*, in *Verfassung Und Recht in Ubersee / Law and Politics in Africa, Asia and Latin America*, 1994, p. 346 ff.; J. N. Horn, *Interpreting the Interpreters: a Critical Analysis of the Interaction Between Formalism and Transformative Adjudication in Namibian Constitutional Jurisprudence 1990 – 2004*, Windhoek, 2016; A. Currier, *Political Homophobia in Postcolonial Namibia*, in *Gender and Society*, 2010, p. 110 ff.; *The Aftermath of Decolonization: Gender and Sexual Dissidence in Postindependence Namibia*, in *Signs*, 2012, p. 441 ff.; V. Reddy, *Homophobia, Human Rights and Gay and Lesbian Equality in Africa*, in *Agenda: Empowering Women for Gender Equity*, in *African Feminisms*, *2001*, p. 83 ff.

[63] K. E. Klare, *op. cit.*, p. 166. Moreover, he underlines how «a defining property of legal cultures, particularly relatively homogeneous and stable legal cultures, is that its participants tend to accept its intellectual sensibilities as normal. That is, participants often do not perceive the cultural specificity of their ideas about legal argument», p. 167. See also, V. Federico – C. Fusaro, (eds.), *Constitutionalism and Democratic Transitions. Lessons from South Africa*, Firenze, 2006.

[64] K. E. Klare, *op. cit.*, p. 166.

[65] Precisely, what constitutes obiter or ratio decidendi in *Frank* is at the core of the dispute between applicants and respondents. This is not a simplistic debate, but it well marks the boundary not to be crossed, or otherwise to be re-discussed, for the High Court itself. Also, according to the applicants the *Digashu* case was also evidently distinguishable from *Frank*.

[66] *Inter alia*, the Government of The Republic of Namibia, Minister of Home Affairs and Immigration, Chief of Immigration.

assistance to them and the court, as the views on homosexuality worldwide is quite *divergent*»[67]. This statement is of utmost importance for several insights: a) the reference to foreign jurisprudence is deemed supportive, but basically *useless*; b) the Court *should* not be assisted by jurisprudence *other* than Namibian case laws; c) convergence in transformation is replaced by *resistance* in divergence, i.e. a «differentiation *from* foreign law or practices»[68]. The abovementioned points all together suggest that there would be no room for *exotic* references, since the Namibian social, legal, and cultural context is sufficient in itself and does not need (or would not tolerate) integrations (or intromissions)[69]. This kind of judicial nationalism is further proved by the detail that respondents «urge the court to only consider existing Namibian jurisprudence and to adjudicate the matter with regards to the prevailing *boni mores* of the Namibian society»[70]. And, as far as Namibian jurisprudence is concerned, a leading case ruled by the Supreme Court (*Chairperson of the Immigration Selection Board v Frank and Another*, *Frank*) is the main barrier that prevents from a constitutional transformation and fundamental rights progression – naturally in a rather authoritative fashion.

In this logic, a sort of *clash of legal cultures* occurs: from the one hand, applicants' claim and the transformative vision of the Constitution may well foster (or underpin social) transformation; from the other hand, the State conservative vision, in all its semantic implications, aims at preserving Namibian *mores*. Right in-between lays the Court's convincement. The landmark case *Frank*, ruled in 2001 by the Supreme Court, established that Namibian constitutional provisions did not envisage any specific *favor* towards plural sexual orientations, despite the broader pluralist scope of the Namibian Constitution. Also, the Supreme Court referred to international law and regional charters. For instance, in the Supreme Court's view, according to the African Charter on Human and Peoples' Rights, the Universal Declaration of Human Rights and the International Covenant on civil and political rights, «family» would have only implied a heterosexual paradigm, that is, an «element of continuity for the human race and its survival». Furthermore, as declared in *Frank*, the International Covenant on Civil and Political Rights itself, with which the Namibian Constitution seemed to comply, considered the prohibition of discrimination in a restrictive sense, i.e. on the basis of sex *tout court*. On the contrary, in the High Court's view – as well as in the applicants' petition – the overall essence of the constitutional framework had been mistaken, in addition to a wrong interpretation of the domestic (and the international) legislation

[67] p. 51, italics added.

[68] Italics added. «Resistance» as conceptualized by V. C. Jackson, *op. cit.*, p. 113.

[69] It should be noticed that the same Indian Supreme Court held a similar approach in Shayara Bano v Union of India, when it declared that «there is no reason or necessity while examining the issue of '*talaq-e-biddat*', to fall back upon international conventions and declarations. The Indian Constitution itself provides for the same», Par. 186.

[70] p. 51.

on the topic. Quite consistently, as it has been argued, one of the proper pitfalls of «resistance» is that «it provides less room for revealing or correcting errors»[71].

From the Namibian State perspective, preserving the status quo also means diverging from solutions circulating throughout the comparative panorama; but this does not automatically mean, however, that *comparison* is absent or neglected. Indeed, if transformation often – though not always – relies on comparison to support convergence, on the contrary, resistance (and divergence) takes advantage of comparative tools and methodology through a *reversed* technique. This essentially means that references to foreign case laws are simply made *in peius*, in order to demonstrate what went wrong in *those* systems. And not surprisingly, *those* case laws can be mentioned elsewhere as examples *in melius*, to say, as best solutions worthy of circulation and dissemination. This is the case for the South African Constitutional Court, which was quoted as a judicial and constitutional adjudication model to take in high consideration when dealing with fundamental rights in the previous case law. Quite plainly, in the Namibian case, South African progressive adjudications are in turn mentioned as what Namibia *should* not become. In this regard, respondents (i.e., State institutions) clearly assert their difference and their local particularism. The latter is also merged with a legalist approach in constitutional interpretation, since the South African Constitution *explicitly* established a specific prohibition of discrimination on the ground of sexual orientation, whereas the Namibian Constitution *evidently* chose not to.

With a «case selection» to attain a comparison *in reverse*, the Supreme Court of Zimbabwe[72] is indeed recalled as a contending model against the South African transformative (and progressive) trend. In respondents' view, Zimbabwe is similar to Namibia's social, political, cultural opinions, norms and values and it may well be mentioned as a successful model instead. This kind of cross-reference *in reverse* thus turns a «negative» example into a «positive» term of comparison[73].

This approach was strictly resisted by the High Court's reasoning, which thoroughly investigated *what went wrong* in *Frank* Supreme Court's ruling. Its criticism was built upon three main points.

First, the High Court disputed the restrictive method chosen by the Supreme Court, and its «tabulated legalism», also taking into account that Namibia is a Country *constitutionally* «founded on democratic values, social justice and fundamental human

[71] And also, «although […] important concerns about democratic legitimacy and judicial discretion, these involve larger questions about constitutional interpretation and should not prevent cautious use of comparative material», V. J. Jackson, *op. cit.*, p. 120.

[72] In particular, *S v Banana*, 2000 (2) SACR 1 (ZS).

[73] This is somehow censored by the High Court when it declares that «in a functioning democracy, founded on a history such as our own, coming from a system of unreasonable and irrational discrimination, to obtain freedom and independence, and then to continue to irrationally and unjustifiably take away human rights of another segment of Namibian citizenry, simply because of their orientation - amounted to *cherry-picking of human rights*, and deciding whose rights are more human, and to be protected, more than others», Par. 117, italics added.

rights» and its society was born plural in its very nature[74]. To this extent, the High Court deemed the Supreme Court's constitutional interpretation as «mechanistic, rigid, austere and artificial»[75].

Second, the object of the discrimination would not have been properly examined in the light of the *overall* spirit of the Namibian Constitution, which is indeed imbued with the values of anti-discrimination as well as anti-racism and anti-colonialism. Hence, in a sort of counter-legalist argumentation, the High Court underscored how the essence of the constitutional framework *per se* and the literal meaning of constitutional provisions would have been enough to transform the status quo. Third, the rule of law itself requires a progressive interpretation of the fundamental principles provided for in the Constitution. Through the High Court's proper words this implies that: «it is also a constitutional direction to respect the rule of law, which promotes certainty, and a judicious, pragmatic, and properly conceived *development* of our law»[76]. And also, from the High Court's standpoint, the rule of law and the rule of the stare decisis – which urges the Court to comply with the binding precedent expressed in *Frank* by the Supreme Court – are two sides of the same coin. Henceforth, this implies that: «to [the Court's components] minds, and upon a consideration of the relevant authorities, a Supreme Court decision must be followed by the High Court, even if that decision is wrong. We hold the view, that the Supreme Court is the constitutionally appointed final arbiter»[77]. Though aligning to *Frank* decision would amount to a violation of their «constitutional mandate and oath»[78], a conservative outcome was unquestioned.

In this regard, quite interestingly, the High Court's words resound the Indian Supreme Court's metaphor of the Constitution as a living, organic and progressive document, recalling *Republic of Namibia and Another v Cultura 2000 and Another* which encouraged a broad and non-textual argumentation in constitutional interpretation (and adjudication), marking the inadequacy of a rigid and mechanistic approach towards constitutional provisions[79].

The High Court could not overrule the Supreme Court's decision, but with «courtesy and respect» explicitly invited the Supreme Court to review its judgement in

[74] Par. 121

[75] Par. 122.

[76] Italics added, Par. 103.

[77] Par. 103.

[78] Par. 110.

[79] «A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is sui generis. It must broadly, liberally and purposively be interpreted so as to avoid the 'austerity of tabulated legalism' and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government», Par. 125.

Frank[80]. The aim was convergence within an international arena, rather than a bitter fruit of (legal) assimilation[81].

4. *Regressive constitutionalism: fundamental rights global descending march?*

As it has been argued, until the 90's constitutionalism had witnessed a golden age, in which human rights «culture» and a global convergence on the topic seemed long-lasting achievements[82]. Nevertheless, resistance towards global constitutional trends had been growing since then, in an increasingly dramatic way. Countertrends are emerging and developing towards regression and democracy degradation in the overall comparative panorama. To this extent, for instance, the crucial impact of the topic is testified by the several terms and definitions created to conceptualize it. As it has been noticed, among the many others, one can find at least: «constitutional retrogression», «constitutional capture», «constitutional rot», «abusive constitutionalism», «constitutional crisis», «democratic decay», «democratic recession», «democratic degradation», «democratic erosion», «democratic backsliding», «democratic deconsolidation», «democratic disconnect», «democratic crisis», «democracy in retreat»[83]. What all these different expressions share is a negative semantic value surrounding them. The common idea, in fact, is to convey that something *went wrong*, either taking for granted constitutional advancements, achievements and transformations, or wishfully thinking that there could not be a step backwards. In the previous sections, we have dealt with transformation in a *positive* sense, assuming it is « an ongoing process with value in itself, quite apart from the ends that it produces»[84] but transformation, as well as the conservative approach, are dynamic and ever-changing processes, implying degradation as a potential outcome as well. Especially, as far as fundamental rights are concerned, and whether their protection and promotion are taken for granted: a constitutional retrogression is generally affected by rights degradation as a side-effect. Also, it is clear how

[80] Perhaps it was no coincidence that in March 2022, the Supreme Court ruled in favor of a same-sex couple's (a Namibian citizen and a Mexican national) appeal for a residence permit; a case quite similar to the Digashu case. The Ministry of Home Affair was urged to reconsider the residence application. On the contrary, the Supreme Court in March 2023 refused to grant Namibian citizenship to a child born through surrogacy in South Africa from a same-sex couple.

[81] Assuming also, in a broader sense, the «dual qualities» of international law with «both an imperial and a counter-imperial dimension», see S. Pahuja, *Decolonising International Law: Development, Economic Growth and The Politics of Universality*, New York, 2011, p. 10 ff. See also C. M. Fombad, *Internationalization of Constitutional Law and Constitutionalism in Africa*, in *The American Journal of Comparative Law*, 2012, p. 439 ff.

[82] T. Groppi, *Dal costituzionalismo globale ai nuovi autoritarismi. Sfide per il diritto comparato*, in *Rivista AIC*, 2022, p. 65. See also, T. Groppi – V. Carlino – G. Milani (eds.), *Framing and Diagnosing Constitutional Degradation. A Comparative Perspective*, Genova, 2022.

[83] As thorougly explained in T. Groppi, *Dal costituzionalismo globale*, cit., p. 66.

[84] J. Brickhill, Y. Van Leeve, *op. cit.*, quoting Justice Langa's speech, p. 152.

constitutional degradation processes are intertwined with retrogressive dynamics in gender rights and issues, throughout «institutional discrimination and equality downgrading»[85]. As Elettra Stradella effectively (and critically) argues, in fact: «interventions on women's bodies and self-determination represent one of the main – though not the sole – expression of such a downgrade, further strongly linked to the crisis of the rule of law in those systems experiencing populist management of the power. In the latter, reinforced patriarchy and weakened fundamental constitutional principles seem to support and endorse each other»[86].

To this end, a brief overview of the *Dobbs v. Jackson Women's Health Organization* case, ruled by the US Supreme Court, will be presented. As it is well known, this judgement overruled *Roe v. Wade*, the landmark case concerning the right to abortion. Naturally, disputes and criticism were overwhelming. It has been selected – also as a conclusion to the previous sections – since it effectively illustrates how constitutional interpretation (on the very same provision) may change over time and lead to opposite views (on the very same topic). *Roe v. Wade* was an historical ruling which massively relied on a transformative (say progressive) approach, and the circulation of the reasoning made it a positive model worthy of (indirect) dissemination[87]. In this retrogressive process, as it has been discussed, a major role has been played precisely by «tradition»[88], resorting to different perspectives about *why* and *when* it was misunderstood (and underestimated). In particular, the tradition whose interpretation

[85] For a thorough analysis on «ideological faults», new US Supreme Court's trends and democratic retrogression, see E. Stradella, *La decostituzionalizzazione del diritto all'aborto negli Stati Uniti: riflessioni a partire da Dobbs v. Jackson Women's Health Organization*, in *Forum di Quaderni Costituzionali*, 2022, p. 223. See also L. Fabiano, *Tanto tuonò che piovve: l'aborto, la polarizzazione politica e la crisi democratica nell'esperienza federale statunitense*, in *BioLaw Journal*, 2022, p. 5-66; P. Veronesi, *'Un affare non solo di donne': la sentenza Dobbs v.Jackson (2022) e la Costituzione "pietrificata"*, in *GenIUS*, 2023, p. 1-19; A. Di Martino, *Donne, aborto e costituzione negli Stati Uniti d'America: sviluppi dell'ultimo triennio*, in *Nomos*, 2022; L. Busatta, *Quanto vincola un precedente? La Corte Suprema degli Stati Uniti torna sull'aborto*, in *DPCE online*, www.dpceonline.it, 2020, p. 4453-4466.

[86] E. Stradella, *La decostituzionalizzazione*, cit., p. 221, my translation from the Italian version «Gli interventi sul corpo delle donne e sull'autodeterminazione rappresentano una delle principali, sebbene non l'unica, manifestazione di questo arretramento, fortemente legata, peraltro, alla crisi dello stato di diritto che caratterizza gli ordinamenti segnati da gestioni populiste del potere, in cui rinvigorimento del patriarcato e indebolimento dei principi cardine del costituzionalismo sembrano sempre più integrarsi e confermarsi reciprocamente. In Europa, l'esperienza polacca offre un esempio lampante di come *constitutional retrogression*, attacco alla *rule of law* e patriarcato istituzionale si pongano in stretta relazione tra loro». For instance, the author underlines how in Europe, the Polish case embodies a typical example about how «constitutional retrogression, attacks on the rule of law and institutional patriarchy» are all strongly entrenched, p. 221. For a comprehensive overview on populism see, G. Martinico, *Filtering Populist Claims to Fight Populism. The Italian Case in a Comparative Perspective*, Cambridge, 2021.

[87] Angioletta Sperti underlines how the *Roe*'s actual impact went well beyond US borders, fostering several judgements on the topic also in Europe. For instance, she mentions the Italian Constitutional Court, the Bundesverfassungsgericht, the Conseil constitutionnel decisions in 1975 and the Verfassungsgerichtshof ruling in 1974. A, Sperti, *Il diritto all'aborto*, cit., p. 24.

[88] *Ivi*, p. 25 ff.

was considered wrong in *Roe*, is now presented in *Dobbs* as something undisputable, unquestioned and clearly settled, whereas at least four trends can be detected about *what* it entailed throughout the Supreme Court's judgements[89]. Between the poles of a «radical»[90] conceptualization of tradition as a tool to enforce new rights, and its rejection as an anachronistic legacy of the past, two intermediate perspectives can be tackled[91]. On the one hand, tradition has embodied a «flexible»[92] source of and for the development (to say transformation) of the constitutional framework; on the other, it sometimes became a «restrictive»[93] parameter and an exclusive category.

In *Dobbs*, indeed, Tradition seems like a sort of «retrospective utopia»[94], rather than *pastness*[95] looking back to all the U.S. (constitutional) history as a monolithic parameter (and model), whereas *originalism* in constitutional interpretation sounds more like *traditionalism tout court*[96].

In equating the Court's error in *Roe* with the «infamous decision in *Plessy v. Ferguson*», the Opinion of the Court defines the interpretation of tradition as «egregiously wrong» – maybe the most commented and circulated statement throughout the whole judgement. Nevertheless, in the Court's majority view the tradition as displayed in *Roe* is way more than that: *inter alia*, it appears, as an «unfocused analysis»[97], «outside the bounds of any reasonable interpretation»[98], «improvident and extravagant exercise of the power of judicial review»[99], «a textbook illustration of the perils of judgements» – just to name a few.

Moreover, in *Dobbs*, the rule of stare decisis becomes someway elusive as well. Notwithstanding its mandatory binding nature, it cannot become – according to the Supreme Court's latest attitude – an inexorable command, but yet just «the norm» able

[89] *Ivi*, p. 28.
[90] *Ivi*, p. 29.
[91] *Ivi*, p. 29.
[92] *Ivi*, p. 29.
[93] *Ivi*, p.29.
[94] For instance, when the Court declares: «Americans who believe that abortion should be restricted press countervailing arguments about *modern* developments. They note that attitudes about the pregnancy of unmarried women have changed drastically», p. 41, italics added.
[95] Or *changing presence of the past*, H. P. Glenn, *Legal Traditions of the World. Sustainable Diversity in Law*, Oxford, 2014; *A Concept of Legal Tradition*, in *Queen's L.J.*, 2008.
[96] As assessed by Elettra Stradella, in fact, «Tra gli interrogativi che si pongono, leggendo la sentenza, uno riguarda proprio 'l'originalità dell'originalismo' di *Dobbs*: ci si chiede cioè se questa maggioranza di sei giudici, questo blocco che così attivamente sta spingendo la Corte attraverso una vera e propria politica giudiziaria ideologicamente connotata, possa essere identificata attraverso l'approccio *tout court* originalista, oppure se vada aggiunto altro. Sono interessanti le riflessioni di Balkin, che sembrano collocare *Dobbs* più nell'alveo del *traditionalism* che dell'*originalism*», E. Stradella, *La decostituzionalizzazione*, cit., p. 207.
[97] p. 18.
[98] *Ivi*.
[99] p. 130, *concurring opinion*, Justice Kavanaugh.

to «restrain judicial hubris»[100]. Interestingly enough, one of the features highlighted by Klare about transformative constitutionalism – a challenge to a fix relationship between legislative and judicial powers – is here indirectly invalidated. The US Supreme Court's self-restraint (due to *political* assumptions and/or to the results of case-selection[101]) in *Dobbs* turns into the promotion of a sort of courts' *passivism*, since the Supreme Court *could have not* violated a field reserved to legislation. More clearly, according to the Supreme Court: «the scheme *Roe* produced *looked* like legislation, and the Court provided the sort of explanation that might be expected from a legislative body»[102]. This approach is not peculiar to the US Supreme Court, but it can be retrieved in several different legal systems and contexts. Suffice it to recall the very same restraint the Indian Supreme Court showed about the triple *talaq* concerning Muslim personal laws[103]. And this parameter may also change in time and topics, according to contingencies and the issues before the courts. As brilliantly argued, in fact, the same US Supreme Court considered tradition, history and their role vis-à-vis promotion of fundamental rights in a quite different way in *Obergefell v Hodges*[104]– thus confirming that there is no *one* established (concept of) tradition – whereas the *conservative* vision displayed in *Dobbs* provides a *regressive* outcome and rights' degradation. This also validates the view that conservation is not a static concept at all.

Furthermore, one crucial point pertains to the ways the Court vehiculates its reasoning, as if there were actually two Courts in one: the majority (of the) Court and the Dissenters' Court – not just a Dissenting (part of the) Court, or purely Dissenters.

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[100] p. 4 and p. 39.

[101] See, P. Bianchi, *La creazione giurisprudenziale delle tecniche di selezione dei casi*, Torino, 2001.

[102] p. 49.

[103] *Shayara Bano v Union of India*, AIR 2017 9 SCC 1 (SC). Notwithstanding unconstitutionality, the Supreme Court could not prospect any substantive solution on the topic and declared to be not sufficiently «equipped» to provide a structural intervention on the matter, since it would in any case require a legislative examination. Indeed: «Keeping in mind, that this opportunity had presented itself, so to say, to assuage the cause of Muslim women, it was felt, that the opportunity should not be lost. [...]. Interference in matters of 'personal law' is clearly beyond judicial examination. The judiciary must, therefore, always exercise absolute restraint, no matter how compelling and attractive the opportunity to do societal good may seem», Par. 196, p. 266 ff. On the topic, see D. Scolart, *Diritto Personale v. Diritto Statale. Riflessioni a partire dalla Corte Suprema indiana del 22 agosto 2017 sul triplice ripudio*, in *Diritto, Immigrazione e Cittadinanza*, 2017, who argues how: «cosa sia o non sia conforme a *šarī'a* non è però facile da dire, a tanta maggior ragione per chi, come la Corte Suprema indiana, può non avere tutte le competenze tecniche e linguistiche necessarie a districarsi nel complesso mondo delle sue fonti e dei suoi contenuti. La Corte ha potuto bocciare il *talaq-e-biddat* perché, al di là di ogni altra considerazione, vi era convergenza sul fatto che non fosse un istituto coranico», p. 16; C. Correndo, *La Corte Suprema indiana tra istanze religiose, conflitti intercomunitari e questioni di genere*, in *DPCE online*, www.dpceonline.it, 2017 and, in particular: «i giudici della Corte, pur consapevoli del fatto che la maggior parte dell'opinione pubblica si aspettasse un segnale di cambiamento più forte, hanno cercato di mediare tra le diverse istanze in gioco, evitando interventi eccessivamente muscolari proprio per non alterare significativamente i rapporti già precari tra Unione, maggioranza hindu e minoranza musulmana», p. 1008.

[104] A, Sperti, *Il diritto all'aborto*, cit., p. 29 ff.

As Penasa eloquently explain, in fact, *Dobbs* «expresses in a paradigmatic way the growing tension between the different poles of contemporary constitutionalism. Both the opinion of the Court and the dissenting opinion […] offer irreducibly opposite and irreconcilable interpretations»[105].

Undeniably, there are complex issues at stake: 1) competing ideas, also about the ultimate *ideal* embedded in the Constitution, as well as, again, 2) competing legal cultures. As far as the first point is concerned, the Majority speaks as one voice, the Dissenters as the Court's other voice(s)[106], through rather conflictual standpoints. In fact, the Opinion of the Court conveys the idea that there existed an America before *Roe*, then altered in the post- *Roe*; a transformation able to change the Court, its role and the Nation as a whole[107]. Additionally, before *Roe* there was an *overwhelming consensus* in considering abortion a crime and the Constitution did not prevent each State from regulating or prohibiting abortion, whereas *Roe* «arrogated that authority»[108]. Thus, not only it created «bad jurisprudence with harmful consequences» – 63 million abortions[109] – but it altered the proper perception of the Court at the public opinion level as well, damaging the institution more generally[110]. Not surprisingly the idea(l) delivered by the Dissenters is rather opposite. The overruling of *Roe* is perceived as a flaw in the very same democratic system, with a Supreme Court *degradating* fundamental rights, instead of granting them. To this extent, *Dobbs* would further undermine the

[105] S. Penasa, *People have the power! E i corpi e le biografie delle donne? I diversi livelli di rilievo della sentenza Dobbs della Corte Suprema USA*, in *DPCE online*, www.dpceonline.it, 2022, p. 1609. The Author underlines among the macro-topics «la contrapposizione tra *judicial modesty* e *judicial activism*; la titolarità della funzione di bilanciamento tra interessi (tra Corte Suprema e legislatore); l'interpretazione costituzionale tra *originalism* ed *evolutionism*; la natura e la funzione della dottrina dello stare decisis; la selezione degli standard di valutazione delle scelte legislative (*rationality test* o *undue burden test*); in termini complessivi, la natura e la funzione della Costituzione e dell'organo giurisdizionale deputato a garantirne la supremazia», p. 1610.

[106] On the topic in general, see P. Pannia, *L'"altra Corte". Giustizia costituzionale e dissenso in prospettiva comparata: il caso sudafricano*, in *Politica del diritto*, 2022, p. 399-418.

[107] «Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*», p. 23. The right to abortion was recognized in «no state constitutional provision, no statute, no judicial decision, no learned treatise. The earliest sources called to our attention are a few district court and state court decisions decided shortly before *Roe* and a small number of law review articles from the same time period», p. 34.

[108] p. 8.

[109] *Concurring opinion*, Justice Thomas: «Now today, the Court rightly overrules Roe and Casey […] after more than 63 million abortions have been performed», p. 122. And also, «The harm caused by this Court's forays into substantive due process remains immeasurable. Substantive due process conflicts with that textual command and has harmed our country in many ways. Accordingly, we should eliminate it from our jurisprudence at the earliest opportunity», p. 123.

[110] p. 134.

Supreme Court's reliability and *public* image with a Majority of the Court which «is happy to pick and choose in accord with individual preferences»[111], rather than performing some sort of self-restraint. In addition, the wide discretion left to each State vis-à-vis abortion legislations would indeed cause additional discrimination(s) and exacerbate differences, along with «interjurisdictional abortion wars»[112].

Addressing the second point, competing legal cultures in *Dobbs* render categories somehow fuzzier: Dissenters' progressive vision of rights equates with the conservative one: *quieta non movere*, namely, preserving the right to abortion *as it stands*, whereas transformation of the «system», achieved through the (majority's) judgement equates with a conservative perspective (in a *political* sense): no right to abortion shall be *constitutionally* granted. Perspectives as well seem to differ: the Dissenters' reasoning is focused also on social and economic consequences for women, while the Majority's reasoning is focused on Country's (historical) legacy[113], viz. Tradition and common law on the matter. Thus, in Dissenters' opinion, abortion is an indisputable fundamental right and shall remain as such; in the Opinion of the Court abortion represents nothing more than «a policy goal in desperate search of a constitutional justification»[114].

And also, bearing in mind the judicial passivism the Court appears to endorse, the overall picture conceals a strong political activism in turn, as a precise political perspective of *that* majority[115]. In fact, the statement about a «neutral» constitutional interpretation[116] – neither ruling for the *non-existence* of the right to abortion, nor preventing from being regulated in a more «suitable» way – is strongly resisted by Dissenters which underscore how: «eliminating that right […] is not taking a neutral position. When it comes to rights, the Court does not act neutrally when it leaves everything up to the States. Rather, the Court acts neutrally when it protects the right against all comers»[117].

Hence, in this case, neutral *is* political.

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[111] p. 64.

[112] p. 184.

[113] Though regarding a different (yet equally debated) ruling, Paolo Passaglia explains this clash of perspectives as if «l'Opinion of the Court ragioni in termini storici, la minoranza dissenziente in termini sociologici», see P. Passaglia, *Tra passatismo, incomunicabilità ed estremismo, la Corte suprema statunitense sacralizza il diritto a portare armi*, in *Forum di Quaderni Costituzionali*, 2022, p. 153.

[114] p. 12, p. 122.

[115] *Inter* alia, see P. Passaglia, *President Trump's Appointments in Four Keywords*, in G. F. Ferrari (ed.), *The American Presidency Under Trump. The First Two Years*, The Hague, 2020.

[116] «Because the Constitution is neutral on the issue of abortion, this Court also must be scrupulously neutral. The nine unelected Members of this Court do not possess the constitutional authority to override the democratic process and to decree either a pro-life or a pro-choice abortion policy for all 330 million people in the United States», p. 125, p. 126.

[117] p. 160.

Indeed, the ruling may well «deepen cracks in America»[118], polarizing the public debate and further heightening differences and conflictual views on abortion among American themselves[119].

In the end, considering the rule of comparison, the U.S. jurisprudence had a strong impact worldwide, regarding the *Roe*'s *effects* and the right to abortion. *Dobbs* may foster a domino *reversed* effect, which can mark an «opposite» circulation of the model as occurred to *Roe*. If there was an America *before Roe*, as stated by the Opinion of the Court, there could be a post *Dobbs* impact[120]?

5. *Some conclusive remarks: convergence or resistance?*

Trying to summarize all the points upheld in the present analysis, transformative constitutionalism is a general category but not a universal(ist) achievement, since each framework may well shape a particular interpretation and conceptualization about what rights progression means, and how it can be accomplished. Also, why a constitutional framework shall be transformed relies on ever-changing (and political) aims, expectations and ideals. In this regard, macro-comparison is oftentimes informed by some biases. First, addressing the concept of rule of law as an unquestioned (and universalist) concept. Second, thinking about the rule (and role) of tradition as a monolithic category (frequently conflating exclusively with religion too). Additionally, the first category would always pertain to the so-called euro-western legal model, whereas the second is mostly detectable in other legal models or systems.

Second, notwithstanding the global «expansive march», other paradigms can jeopardize this optimistic scenario, due to thrusts towards preservation of the status quo, or to formal or substantive democratic degradations. Furthermore, the abovementioned paradigms are neither static, nor permanent, since they can evolve in multiple different directions. In the Indian case, for instance, transformation meant a progressive realization as the oxymoron of retrogressive dynamics, but as the US case testifies, this is not always the case. In here, comparison bears a difficult task and as it has been shown, cross-reference – as well as circulation of reasonings – may also occur in a pathological way, in order to achieve results *in peius*. What can be considered a

[118] The Economist, *The Supreme Court's judicial activism will deepen cracks in America*, June 2022.

[119] «which one side believes to be murder and the other a fundamental right for women. A polarised country seems poorly prepared for the sort of debate this requires», *Ivi* p. 4.

[120] See, among the other news this interesting insight «It's a post-Roe world, and Kenya is already feeling the shockwaves», https://www.ipas.org/news/its-a-post-roe-world-and-kenya-is-already-feeling-the-shockwaves/. Also, with a reversed perspective: «Sierra Leone is moving toward liberalizing abortion. President Julius Maada Bio announced on July 6 that he supports a bill now before parliament to decriminalize abortion—and he pointedly called out that while the U.S. is reversing abortion rights, his country is proudly moving forward», *ivi.*

successful solution may well turn into something to avoid, in order not to achieve that kind of transformation, according to times and places.

And here, the rule of tradition can become a particularistic tool for transformation, a fortress for conservation, or an instrument of regression. Indeed, a global converge may also occur towards retrogression, instead of a (progressive) transformation. If transformation somehow deals with the past – as a sort of restorative process – and conservation safeguards the same past – preserving the status quo – regression retreats and denies that very same past.

Thus, transformation «can mean anything and therefore means nothing»[121].

The latter is quite a provocative standpoint which criticizes the extreme (to say excessive) fluidity of what transformation may entail. However, an interesting counterargument tries to reformulate the issue as such: «transformative constitutionalism: guiding light or empty slogan?»[122]. This is not a simplistic question, but it rather fosters (and requests) more in-depth analysis. Perhaps, one should also ask whether conservative and regressive trends may just embody empty slogans for resistance.

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ABSTRACT: Nella marcia espansiva dei diritti, le Corti rivestono un ruolo cruciale, al pari della circolazione dei *reasonings* mediante un uso sapiente e integrativo della comparazione, nonché tramite l'interpretazione, quale strumento privilegiato del costituzionalismo trasformativo; come piano di effettiva convergenza, nonostante le differenze tra sistemi e modelli.

Nondimeno, si possono individuare altre tendenze nel panorama comparatistico: il costituzionalismo conservativo e quello regressivo. Il contributo mira a indagare prospettive attuali e scenari futuri dei diritti fondamentali in generale attraverso il prisma dei diritti di genere, in particolare.

ABSTRACT: Courts play a crucial role in the rights' expansive march, through the circulation of reasonings and an integrative support from comparison. Also, interpretation is deemed a privileged tool for transformative constitutionalism, as well as a means for convergence, despite differences among systems and models.

Nonetheless, other trends can be detected in the comparative panorama: conservative and regressive constitutionalisms. The contribution aims at investigating

[121] J. Brickhill, Y. Van Leeve, *op. cit.*, p. 142. Precisely, the authors' aim is to «respond to the charge that 'transformative constitutionalism' is an empty slogan which can mean anything and therefore means nothing».

[122] *Ibidem*.

current perspectives and future scenarios about fundamental rights in general through the prism of gender rights, in particular.

KEYWORDS: transformative constitutionalism - conservative constitutionalism - regressive constitutionalism - rule of law - rule of tradition

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RIVISTA DI
DIRITTI COMPARATI

Adivasi women's rights to land: cultural patterns and new emancipatory discourses*

Chiara Correndo

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1. *Setting the context: indigenous feminism and women's rights to land*

According to the Annual Report of the Un Special Rapporteur on the Rights of Indigenous Peoples, indigenous women experience a complex spectrum of human rights abuses but their specific situation has been neglected in policy and on the ground[1]. The report underlines the multiple forms of vulnerability indigenous women experience, mentioning among them barriers to accessing resources which intersect with gender, class, ethnic origin and right to self-determination.

Nonetheless, the unequal, gendered access to natural resources and economic violence does not feature prominently in current indigenous literature and very few studies on indigenous peoples and self-determination include a gendered perspective on patriarchal structures and the power imbalances within indigenous communities[2].

In this context, one of the main challenges of Aboriginal feminism today is to articulate indigenous women's claims at the interface between their individual and collective identity, taking into account the manifold axes of discrimination they experience as both indigenous people and indigenous women. According to Joyce Green, Aboriginal feminism is an emerging terrain of study and debate which critically engages with the analysis of colonialism, decolonization as well as gendered and raced

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[1] Human Rights Council, Thirtieth Session, *Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz*, A/HRC/30/41, 6 August 2015, point no. 5. Also K. Sharma, *Mapping Violence in the Lives of Adivasi Women- A Study from Jharkhand*, in *Economic and Political Weekly*, 2018, p. 44.

[2] R. Kuokkanen, *Self-Determination and Indigenous Women's Rights at the Intersection of International Human Rights*, in *Human Rights Quarterly*, 2012, p. 226.

power relations in both settler and indigenous communities[3]. From this definition, it is possible to infer three key points that constitute the backbone of indigenous feminism, namely, an analysis of social, economic and political condition of women's lives vis-à-vis, first, the mainstream society and, secondly, their own communities, interrogating power structures and patriarchal settings in these milieux. Thirdly, indigenous feminists engage with colonialism and coloniality, not only to examine historically the effect of colonial policies on indigenous women but how colonial oppressive practices were incorporated and replicated by indigenous communities themselves as well as the structures of power, control, and hegemony shaped during the modernist era of colonialism which stretch to the present[4]. Feminist indigenous scholars therefore address violations of human rights linked to their indigenous status (marginalization, dispossession, forced assimilation, erasure of indigenous knowledge) as well as gender-specific violations perpetrated outside and within the community, «in a way that does not disregard the continued practices and effects of colonialism»[5].

Within this theoretical framework, the analysis of women's oppression is manifold, as it takes diachronically into account colonial discriminatory practices and, synchronically, those perpetrated by both the society at large and, internally, the indigenous male leaders and kins[6]. Even so, this latter aspect is particularly controversial: the discourse about indigenous societies of an intrinsically egalitarian nature is recursive even among women activists and this argumentation is developed by making reference to a «separate but equal» theory of complementary roles within those societies, skewed by a subsequent contact with patriarchal colonial settings. In contrast with this, indigenous feminist scholars have underlined the fact that «contemporary Aboriginal women are subjected to patriarchal and colonial oppression

[3] J. Green, *Taking Account of Aboriginal Feminism*, in J. Green (ed.), *Making Space for Indigenous Feminism*, Black Point and London, 2007, p. 21.

[4] On the concept of coloniality of power, see A. Quijano, *Coloniality of Power, Eurocentrism and Latin America*, in *Nepantla: Views from South*, 2000, p. 533-580. For further insights in the concepts of modernity/coloniality and decolonial feminism, see also W. Mignolo, *The Conceptual Triad: Modernity/Coloniality/Decoloniality*, in W. D. Mignolo – C. E. Walsh (eds.), *On Decoloniality: Concepts, Analytics, Praxis*, Durham, 2018, p. 135 ff.; R. Borghi, *Decolonialità e privilegio: pratiche femministe e critica al sistema mondo*, Milano, 2020; A. Escobar, *Beyond the Third World: Imperial Globality, Global Coloniality, and Anti-Globalization Social Movements*, in *Third World Quarterly*, 2004, p. 207 ff.; R. Grosfoguel, *The Epistemic Decolonial Turn*, in *Cultural Studies*, 2007, p. 211 ff.; M. Lugones, *Toward a Decolonial Feminism*, in *Hypatia*, 2010, p. 742 ff.; F. Vergès, *Un femminismo decoloniale*, Verona, 2019.

[5] R. Kuokkanen, *op. cit.*, p. 226.

[6] E. Luther, *Whose 'Distinctive Culture'? Aboriginal Feminism and R. v. Van Der Peet*, in *Indigenous Law Journal*, 2010, p. 42; in a similar vein also J. Green, *op. cit.*, p. 22 whose analysis sharply contrasts with more «romanticizing» narratives such as United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues, *Gender and Indigenous Peoples' Human Rights*, Briefing Note No. 6, New York, 2010, p. 2 whereby the «separate but equal» theory mentioned below is clearly set out. For a critical analysis on the romanticized conceptualization of tribal life, see also A. Prasad, *Against Ecological Romanticism: Verrier Elwin and the Making of an Anti-Modern Tribal Identity*, New Delhi, 2003.

within settler society and, in some contexts, in Aboriginal communities. Some Aboriginal cultures and communities are patriarchal, either in cultural origin or because of incorporation of colonizer patriarchy»[7]. According to Joyce, several indigenous movements have framed their liberation discourses as drawing from traditional cultural and political mechanisms, presented as being women-friendly in their gendered and acculturated contexts. Indigenous feminist scholars stress the inherent potentially discriminatory nature of some indigenous practices (be them precolonial or incorporated), questioning the «veneration of tradition» which is no longer seen as monolithic[8]. Being perfectly aware of the importance of sustaining culture as a strategy against assimilation[9], several indigenous feminists push for a revival only of those practices which are egalitarian in nature, selecting those that could be empowering for women[10] and problematizing the impact of other practices in creating gendered roles as well as the power structures embedded in these practices. Failing to recognize this aspect, «we run the risk of universalising our own experiences similar to what mainstream feminism has been accused of doing (…) At times, due to the fact that we (as Aboriginal people) are protecting family and culture in the face of ongoing colonialism, we lose the ability to critically examine our own practices because we are worried that anything perceived as negative will be used to further discredit us as peoples»[11].

In the framework of the indigenous struggle for self-determination, indigenous feminists' claims have been often considered divisive and disruptive and women have been accused of being disloyal to their community, inauthentic (given their critique of a flattened, monolithic, supposedly egalitarian tradition) and of introducing alien

[7] J. Green, *op. cit.*, p. 22.

[8] J. Green, *op. cit.*, p. 23: «for Aboriginal people subjected to colonial forces that have included public policy attacks on Aboriginal cultures and social practices, tradition has come to represent a pre-colonial time when Indigenous peoples exercised self-determination. For the most part, this is assumed, and rightly so, to have been a good and appropriate path. But tradition is neither a monolith, nor is it axiomatically good, and the notions of what practices were and are essential, how they should be practiced, who may be involved and who is an authority are open to interpretation. Women around the world have found themselves oppressed through a variety of social, religious, political and cultural practices. Feminism is foundationally about the importance of considering women's experiences, especially through social and cultural practices. Feminism has provided tools to critique oppressive traditions – and to claim and practice meaningful non-oppressive traditions» (*ivi*, p. 25). In the same vein, also E. LaRocque cit. in V. St. Denis, *Feminism is For Everybody: Aboriginal Women, Feminism, Diversity*, in J. Green (ed.), *op. cit.*, p. 45, «we cannot assume that all Aboriginal traditions universally respected and honored women (…) there are indications of male violence and sexism in some Aboriginal societies prior to European contact and certainly after contact».

[9] F. Blaney, *Aboriginal Women's Action Network*, in K. Anderson – B. Lawrence (eds.), *Strong Women Stories: Native Vision and Community Survival*, Toronto, 2003, p. 167.

[10] E. Luther, *op. cit.*, p. 44.

[11] C. Liddle, *Intersectionality and Indigenous Feminism: An Aboriginal Woman's Perspective*, in *The Postcolonialist*, 25 June 2014, available at http://postcolonialist.com/civil-discourse/intersectionality-indigenous-feminism-aboriginal-womans-perspective/ (last access: 16 June 2021).

concepts to indigenous practices[12]. This is one of the reasons why indigenous feminist literature and politics have been facing significant challenges in gaining momentum and support, even among indigenous women themselves.

As pointed out by Kuokkanen[13], «if not entirely disregarded, women's rights, concerns and priorities are commonly put on the back burner to be addressed 'later', once collective self-determination has been achieved. Indigenous women have increasingly confronted these views by contending that securing indigenous women's rights is inextricable from securing the rights of their peoples as a whole».

In light of this framework, following Prem Chowdhry's definition of «empowerment» as «gaining control over sources of power like material assets and self-assertion, and ability to take part in the making of decisions that affect their lives»[14], this analysis intends to investigate the barriers Adivasi women have to face in accessing and controlling a key resource such as land. Underlining how women have to come to terms with patriarchal local arrangements which often mediate entitlement to land, I will, first, conduct a gendered analysis of the state legal framework vis-à-vis the customary legal one in the field of inheritance of landed property. Secondly, I will investigate how women often resort to state institutions and state norms in order to advance their claims, activating processes of interplay and hybridization between customary and state legal sphere. In particular, working on the Indian case law related to Adivasi land tenure, I will try to unpack the role of judicial forums as sites of contestation as well as Adivasi women's engagement with their own communities and state institutions through the judiciary.

2. *The «spectre» of the propertied woman*

I had the chance to experience first-hand the divergencies among indigenous movements and activists, especially as regards women's rights. From the interviews that I conducted in Jharkhand in 2017, it clearly emerged a varied attitude towards

[12] J. Green, *op. cit.,* p. 25; also S. Das Gupta, *Gender and 'Tribe' in eastern India: Custom and movements for rights in the 19th and 20th centuries*, webinar held at the University of Turin on 5 May 2022.

[13] R. Kuokkanen, *op. cit.*, p. 236.

[14] P. Chowdhry, *Persisting Gender Discrimination in Land Rights*, in P. Chowdhry (ed.), *Understanding Women's Land Rights: Gender Discrimination in Ownership*, New Delhi, 2017, p. 1.

Adivasi[15] women's rights among the very same women activists. According to A. K.[16], a society such as the Adivasi one, whose livelihood is also based on the collection of forest produce, cannot survive without the participation of women to economic and decision-making processes: their role is therefore crucial for the well-functioning of the community. In addition to this, according to the activist, movable and immovable properties are managed in common within Adivasi families by men and women and the latter enjoy significant economic rights. On the contrary, according to the activists of Aali (Association for Advocacy and Legal Initiatives), women's rights, especially those related to access to land, are hampered by some discriminatory and patriarchal practices still followed by some communities[17]. Prof. Das Gupta argued that, according to the politics and rhetoric of indigeneity, the indigenous Adivasi legal system already has enough protective measures in place for women, and any discourse of women's land rights is considered corrosive as this kind of argument is seen as alien to the Adivasi society[18]. Even the question of patriarchy or paternal property is considered by several indigenous movements as being alien to the world of Adivasi. Nonetheless, according to the Adivasi feminist approach, the gendered paternal connotation of land hampers women's status within their community and the discourse on women's rights to land has been significantly restricted due to a progressive fundamentalisation of politics, both right-wing and indigenous. Paradoxically enough, both politics have been played on the bodies and rights of women, who have been first victimized and infantilized and then accused of being disruptive of the traditional Hindu family or the indigenous Adivasi community by claiming their rights. In this regard, particularly telling is the case of the Jharkhand Mukti Morcha, the major political party representing

[15] On the complexities of the label «Adivasi» and its political bearing see C. Correndo, *Razionalizzazione del pluralismo giuridico e Panchayati Raj in India*, Napoli, 2020; W. Fernandes, *Tribal or Indigenous? The Indian Dilemma*, in *The Round Table*, 2013; N. Sundar (ed.), *The Scheduled Tribes and Their India- Politics, Identities, Policies and Work*, New Delhi, 2016; N. Sundar, *Adivasi Politics and State Responses: Historical Processes and Contemporary Concerns*, in S. Das Gupta – R. S. Basu (eds.), *Narratives from the Margins: Aspects of Adivasi History in India*, Delhi, 2012; W. Van Schendel, *The dangers of belonging- Tribes, indigenous peoples and homelands in South Asia*, in D. J. Rycroft – S. Das Gupta S. (eds.), *The Politics of Belonging- Becoming Adivasi*, London and New York, 2011.

[16] I collected this information during the period of fieldwork that I undertook in 2017 in New Delhi and in Jharkhand, India, on the issue of the Panchayati Raj system and its implementing policies. The fieldwork developed over February, March and April and I worked in two districts (Ranchi and West Singhbhum). I managed to collect 40 interviews (among which journalists, activists, lawyers, social workers and local chiefs): all the interviews were recorded but, despite having received explicit consent from some of the people interviewed as regards the publication of their names, I have decided to anonymize them completely, in order to protect their identity and their activity. I interviewed A. K. in Ranchi on 14 March 2017: she is a social activist working for a non-profit organization engaged in development issues and advocacy of Adivasi rights. Previously, she was a member of the Jharkhand State Commission for Women.

[17] Interviewed in Ranchi on 15 March 2017.

[18] S. Das Gupta, *Gender and 'Tribe' in eastern India*, webinar.

Adivasis in Jharkhand. Nitya Rao[19] stresses the fact that, within the very same movement, women's rights have been restricted over time, in favor of a supposedly communal identity, built over masculine solidarity bonds. According to the author, the party offered women inheritance rights in marital rather than natal property, on condition of monogamy, restricted access to divorce and tribal endogamy. This framework is built over the infantilizing assumption that women can get easily manipulated by non-Adivasis and lured into marriages of convenience resulting in the alienation of Adivasi land to non-Adivasis.

Far from being just a commodity, land (and property patterns) define(s) social status and political power in the villages, structuring relationships within and outside the household, and yet, for many women, «effective rights in land remain elusive»[20]. Unpacking the concept of «household» and refuting its conceptualization as a unit of congruent interests «among whose members the benefits of available resources are shared equitably»[21] are critical steps towards acknowledging the fact that women's economic rights need a specific focus.

At a global level, women's land and housing rights have been a major concern for women's movements globally, which underlined the importance of carrying out a broader, intersecting discourse on discriminatory inheritance patterns, gendered control over economic resources and the appropriation of indigenous lands[22]. Indigenous women may be indeed doubly vulnerable, as their access to land is mediated through customary law and their community retaining control over traditional territories and resources[23]. Women's rights interact with violations of collective land rights and when these communities are forcibly displaced and dispossessed of their territory women may be more affected due to their traditional role in collecting fuel and water[24] and their vulnerable position within customary land

[19] N. Rao, *Kinship Matters: Women's Land Claims in The Santal Parganas, Jharkhand*, in *Journal of the Royal Anthropological Institute*, 2005, p. 728.

[20] B. Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia*, Cambridge, 1994, p. 2.

[21] *Ivi*, p. 3.

[22] V. Patel – R. Khajuria, *Political Feminism in India- An Analysis of Actors, Debates and Strategies*, Friedrich-Ebert-Stiftung India Office, New Delhi, 2016, p. 14. Also, «the ownership or non-ownership of means of production expressed in amounts of land, is a determinant for access to employment and to the monetary yield that it offers in other sectors of the economy» (I. Breman in N. Rao, *Good Women Do Not Inherit Land: Politics of Land and Gender in India*, London and New York, 2018, p. 147).

[23] E. Scalise, *Indigenous women's land rights: case studies from Africa*, in *State of the World's Minorities and Indigenous Peoples*, 2012, p. 53.

[24] Mentioning the displacement of Batwa communities in Uganda to make way for a national park, Scalise stresses the fact that women had to travel more than half a day to look for a suitable alternative water source and that many women and girls were assaulted during the eviction procedures or in internally displaced people's camps (E. Scalise, *op. cit.,* p. 53). Also, «the gendered effects of those violations become manifest in situations where indigenous women lose their traditional livelihoods, such as food gathering, agricultural production, herding, among others, while compensation and jobs

tenure arrangements, which are often tethered to kinship relationship and social power structures. As a matter of fact, the gendered position of women within social networks deeply affects their ability to claim land rights as well as their chances to access formal and informal political forums; in turn, wielding political weight at the local level may influence their ability to control resources and land[25]. In some areas, local state governance institutions may co-exist with customary institutions: the control of male leaders on the latter may have an impact also on the effective participation of women in state institutions, regardless of any guaranteed quotas, as formal forums may end up replicating discriminatory power dynamics unfolding in customary institutions[26].

With regard to the Indian context, Nitya Rao underlines the fact that the Indian state does not have adequate resources to provide social security to its citizens[27]: in light of this, social groups such as families and castes, as well as local institutions of governance intervene as a backup means for daily support and allocation of benefits.

This echoes the analysis of Sareen[28] on the construction of authority through mediating access to services at the local level, whereby «access» means, in a broader sense, the «ability to derive benefits from things»[29]. He underlines how, in unstable state-building contexts, mediating access to resources is the battlefield where governmental and non-governmental institutions compete over the authority. These continuous negotiations and reconfigurations of power may lead to what has been defined as «governing without government», that is hybrid state configurations whereby non-governmental groups exercise political and economic regulation gaining their legitimation through regulating access to resources[30]. Defining authority as «successfully legitimized power» emerging from a process of subjection which is grounded in a particular cultural frame[31] helps understand how mediating and negotiating access to land can contribute to both crystallize patterns of power and facilitate the accumulation of resources in the hand of few to the detriment of more vulnerable groups.

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following land seizure tend to benefit male members of indigenous communities. The loss of land and exclusion of women can create vulnerability to abuse and violence, such as sexual violence, exploitation and trafficking. Additionally, the secondary effects of violations of land rights, such as loss of livelihood and ill health, often disproportionally impact women in their roles of caregivers and guardians of the local environment» (*Report of the Special Rapporteur,* point no. 16).

[25] A. Griffiths, *Delivering Justice: The Changing Gendered Dynamics of Land Tenure in Botswana*, in *The Journal of Legal Pluralism and Unofficial Law*, 2011, p. 236.

[26] C. Johnson – P. Deshingkar – D. Start, *Grounding the State: Devolution and Development in India's Panchayats*, in *The Journal of Development Studies*, 2007, p. 943.

[27] N. Rao, *Women's Rights to Land and Assets Experience of Mainstreaming Gender in Development Projects*, in *Economic and Political Weekly*, 2005, p. 4701.

[28] S. Sareen, *Who Governs Local Access in Jharkhand? Mechanisms of Access to Government Services*, *in Forum for Development Studies,* 2016.

[29] *Ivi*, p. 5.

[30] *Ivi*, p. 4.

[31] *Ibid.*

Among the Santal Adivasi communities, for example, patrilineal ties have become mediators of entitlements and access to key resources[32]. Kinship relationships are therefore crucial at the local level and women often have to come to terms with this, negotiating their rights to land[33].

As a matter of fact, women appropriate terms, constructs and procedures of law in formulating opposition to patriarchal structures; in particular, on the one hand, law is regarded as a force for status quo and a hegemonic tool elitist in nature, but on the other hand the legal instrument is often mobilized in that it can offer the language and the locale for resistance[34].

This kind of interaction can be aptly illustrated through the conceptual paradigms of *living customary law* and *interlegality* which, by highlighting the porous nature of the living customary law, can in fact explain the overturned role of state law and institutions as a site and tool of resistance.

Diala[35] questions the stereotype of an insulated customary sphere and the horizontal definitions of living customary law, confined to individuals' interactions in communities: drawing from Moore's definition of social fields and semi-autonomous social fields[36], he provides a new theorization of this paradigm arguing that «in this competitive, normative interaction, people adapt customs to socioeconomic changes, especially state law. This interaction, competition, and adaptation to socio-economic changes in social fields produce living customary law». The members of a single social field, not being immune to the influences and norms of «other forces» from outside the field, may end up adopting hybrid forms of state law, religion, and values occasioned by globalization[37]. What remain stable are the foundational values that inform customary norms and their process of adaptation to modernity[38].

In line with this, Hoekema argues that «national law and local law do not exist the one next to the other as self-contained entities» but there is constant bilateral interpenetration between them[39]. Even if it «often seems to be a one-way penetration only, from the powerful top to the bottom», «the minorities are not just helpless victims. They appropriate majority concepts and build these actively into their own

[32] N. Rao, *Kinship Matters*, cit., p. 729.

[33] *Ivi*, p. 728.

[34] See S. E. Merry, *Resistance and the Cultural Power of Law*, in *Law & Society Review*, 1995, p. 14; B. Rajagopal, *The Role of Law in Counter-hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India*, in *Leiden Journal of International Law*, 2005, p. 348; R. Kapur – B. Cossman, *Subversive Sites – Feminist Engagements with Law in India*, New Delhi, 1996.

[35] A. Diala, *The concept of living customary law: a critique*, in *The Journal of Legal Pluralism and Unofficial Law*, 2017, p. 157.

[36] S. F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, in *Law & Society Review*, 1973.

[37] A. Diala, *op. cit.*, p. 157.

[38] *Ivi*, p. 158.

[39] A. Hoekema, *European Legal Encounters between Minority and Majority Cultures: Cases of Interlegality*, in *The Journal of Legal Pluralism and Unofficial Law*, 2005, p. 6.

legal outlook»[40]. This process of dynamic mutual adaptation and hybridization of legal orders is called «interlegality», meant as a «social factual process of mutual adaptation and learning by both sides from the other system of doing justice and in the course of that learning process taking over some elements from the other»[41]. The concept, as coined by Boaventura de Sousa Santos, moves from the understanding of different legal orders as separate entities, introducing the idea of intersecting legal spaces[42].

In light of this, the appropriation by indigenous communities and indigenous women of some aspects of state law as well as the deployment of forum shopping strategies does not automatically imply the abdication of indigenous jurisdiction, but rather a strategic use of state legal tools to advance specific claims[43]. Having multiple identities and perceiving different legal systems, subjects of law therefore become main actors in the construction of legal knowledge, transforming the meaning of law through emancipatory practice[44]. Along the lines of a critical postmodern approach

(l)egal subjects (…) possess a transformative capacity that enables them to produce legal knowledge and to fashion the very structures of law that contribute to constituting their legal subjectivity. This transformative capacity is directly connected to their substantive particularity. It endows legal subjects with a responsibility to participate in the multiple normative communities by which they recognize and create their own legal subjectivity[45].

This transformative capacity can be also linked to the concept of relational rights as put forward by Nedelsky: a nuanced conception of rights[46] which stresses the

[40] *Ibid.*

[41] A. Hoekema, *Taking the Challenge of Legal Pluralism for Human Rights Seriously*, in G. Corradi – E. Brems – M. Goodale (eds.), *Human Rights Encounter Legal Pluralism-Normative and Empirical Approaches*, Oxford and Portland, Oregon, 2017, p. 86; for a comment see also I. Hadiprayitno, *Who owns the right to food? Interlegality and competing interests in agricultural modernization in Papua, Indonesia*, in *Third World Quarterly*, 2017.

[42] B. De Sousa Santos, *Toward a New Legal Common Sense*, London, Butterworths, 2002, p. 437.

[43] Also K. Inksater, *Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and International Human Rights*, in *The Journal of Legal Pluralism and Unofficial Law*, 2010, p. 115. In a similar vein, when describing Adivasi women's assertion for autonomy in Kashipur, Sahu reports that the women interviewed did not want to act independently from the state but, rather, they expected that the state should respect and protect Adivasi notion of freedom, fostering their own conception of development without displacing indigenous communities from the region (S. Sahu, *The Rhetoric of Development and Resistance by Tribal Women in Kashipur*, in *Social Change*, 2019, p. 72).

[44] *Ivi*, p. 110.

[45] M. Kleinhans – R. A. Macdonald, *What is a Critical Legal Pluralism?*, in *CJLS/RCDS*, 1997, p. 38.

[46] «So rights are not about protecting individuals or enabling their autonomy from one another, but instead facilitate an autonomy enabled and supported by the relationships on which individuals depend, through their connectedness and mutual reliance» (S. Mnisi, *Reconciling Living Customary Law and*

process by which they come into being, the terms of the struggles conducted by women within their communities and their complex interweaving with customs. The traditional polarity between customs and rights (and also between customs and state law) should be therefore overcome, considering change and empowerment as possible also within the confines of living customary law[47]. The dynamism of customary law has been underlined also by other writers, who stressed its responsive potential to change and its flexible character[48], in contrast with a more classical scholarship which sees customary law as crystallized[49].

3. *Land policies in India between agrarian reforms and personal laws*

The discussion on article 19 (the fundamental right to property) within the Constituent Assembly was mostly focused on its ability to protect against forcible confiscation of land without adequate compensation, hence restricting the property question mainly to its landed form and addressing almost exclusively land reform and land redistribution[50]. The legal strategy behind this was to provide a backup to the proposed abolition of *zamindari* (the feudal system of agrarian land relations) and directing the redistribution of the surplus to the landless. This massive reform quickly became one of the most significant banners of the newborn state, with a view to counteract the land revenue regimes introduced by the colonial state and the resulting landlordism which caused much rural indebtedness. Nonetheless, the right to property, as conceived in the constitutional framework, was built on the individual rather than on the group, in that «any prior claim to title could not and did not find room in either the Constituent Assembly debates or afterwards in the public debate»[51]. Accordingly, the redistributive function of article 19 became limited only to a tort or compensatory logic.

The constitutional fabric as regards landed property is further complexified by other aspects, first of them being the fact that agriculture and land-related legislation have both been included under the State List (Schedule VII, List II.14 and List II.18) whereas laws related to property and succession are encapsulated within the Concurrent List (List III.5 and List III.6). Not only has this setting created several legal glitches and mismatches, but while several states have taken important measures as regards agricultural labor, land ceilings and allocation of surplus land, many have left

Democratic Decentralisation to Ensure Women's Land Rights Security, Policy Brief- Institute for Poverty, Land and Agrarian Studies, 2010, p. 2).

[47] *Ibid.*

[48] J. C. Scott as well as C. Toulmin and J. Quan, mentioned by N. Rao, cit., *Good Women Do Not Inherit Land,* p. 202.

[49] B. Agarwal, *op. cit.*, p. 291.

[50] K. Kapila, *Nullius: An Anthropology of Ownership, Sovereignty and the Law in India*, Chicago, 2022, p. 15.

[51] *Ivi*, p. 16

women's rights to land behind[52]. This was done in spite of the fact that 70% of farming is done by women in the face of a significant percentage of men migrating for seasonal work, which testifies to a progressive feminization of agriculture[53]. This is why, for instance, the gender dimension was included in the Ninth Five Year Plan (1997-2002), which features a section on the removal of gender discrimination in accessibility and ownership of resources such as land. The centrality of the problem is well illustrated, for instance, by the fact that many Dalit women are engaged in the cultivation of land, but only an abysmal 1.5% owns the land: in addition to not being able to purchase it due to low financial resources or culturally constrained gender roles, they cannot have access to redistributive land operations, managing to enter at best a collective land leasing on the part of the state[54].

Another factor of complexification as regards land is closely linked to the legal framework of personal laws in India, under which the regime of succession falls. In light of the system of personal laws, religious communities (Hindus, Muslims, Parsis,

[52] P. Chowdhry, *op. cit.,* p. 4.

[53] A. Khadse, *Environmental Justice and the Caste Question*, webinar hosted by the School of Global Affairs, King's College London, 5 November 2021, available here https://www.youtube.com/watch?v=HrsacpK-y4Y.

[54] In the framework of the massive reforms to land law adopted in the period after independence, state governments decided to restrict or ban agricultural land leasing with a view to protect tenant farmers from being exploited by wealthy landlords. The outcome of this reform was mixed as these restrictions made it more difficult for landless and land-poor marginal farmers to access land, spurring informal leases that heightened their land insecurity. Entering an informal leasing prevents them from accessing credit and financing, as well as exposes them to arbitrary eviction. In 2016, the national policy-making body, NITI Aayog, issued a *Model Land Leasing Act* with a view to facilitate leasing of agricultural land and the recognition of farmers cultivating on leased land to enable them to access institutional credit. Even if the Commission circulated the model law among the states pushing for adoption, very few of them actually moved towards the Act (C. S. Rao, *Tenancy Transition and the Effect of Liberalisation on Agricultural Land Leasing*, in *Social Change*, 2019, p. 434–452; Expert Committee on Agricultural Land Leasing, *Report of the Expert Committee and Model Law on Agricultural Land Leasing*, NITI Aayog, 2016; IANS, *A few states move towards model agricultural land leasing Act: Official*, in *The Business Standard*, 23 November 2018, https://www.business-standard.com/article/news-ians/a-few-states-move-towards-model-agricultural-land-leasing-act-official-118112301020_1.html; Land Portal, *Millions of Indian farmers benefit from formalized land leasing law*, 24 October 2019, https://landportal.org/news/2019/10/opinion-millions-indian-farmers-benefit-formalized-land-leasing-law). In 2004, the extant poverty eradication program of the Government of Kerala (the Kudumbashree Mission) added a new component to its backbone, envisaging collective farming by Joint Liability Groups. The amended program was then able to help poor women to lease land in a group, «promoting lease farming as an important livelihood activity of neighborhood groups of women that are comprised of small and marginal women farmers and landless agricultural laborers. Joint Liability Groups (JLGs) of women farmers are formed under the collective farming initiative to help women cultivators access agricultural credit from the banking system» (T. Haque – J. L. Nair, *Ensuring and Protecting the Land Leasing Right of Poor Women in India*, Landesa Rural Development Institute, 2014, p. 5).

Christians and Jews) are granted the right to govern family and property matters of their community members according their religious-based personal laws[55].

In the field of Hindu succession laws, the amendment to the *Hindu Succession Act* (HSA) enacted in 2005[56] brought in unprecedented changes to the joint Hindu family scheme. Before the major reform of Hindu personal law occurred in the years 1955-1956, the position of widows and daughters under *Mitākṣarā* was governed by, respectively, the Hindu Women's Right to Property Act[57] and the Hindu Law of Inheritance (Amendment) Act, 1927[58] according to which daughters were only entitled to a share in separate property on intestacy (s. 2). Following the enactment of the Hindu Succession Act (Hsa) in 1956, daughters had equal rights in the separate or self-acquired property of the father, but they were denied any right in the ancestral properties[59].

In 2005, in order to bring uniformity of succession and equal treatment among the heirs, s. 6 of the amending Act stipulated that the daughter of a coparcener would by birth become a coparcener in her own right in the same manner as the son and that she is to be considered as the full owner of the properties so inherited.

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[55] T. Herklotz, *Walking a Tightrope: Balancing Law, Religion and Gender Equality in the Aftermath of the Indian Supreme Court's Triple Talaq Ban*, in *Journal for Law and Islam*, 2017, p. 180. For an analysis of the system of personal laws in India and its peculiar constitutional arrangement, see, among others, F. Ahmed, *Religious Freedom Under the Personal Law System*, New Delhi, 2016; D. Amirante, *La democrazia dei superlativi. Il sistema costituzionale dell'India contemporanea*, Napoli, 2019; D. Francavilla, *Il diritto nell'India contemporanea- Sistemi tradizionali, modelli occidentali e globalizzazione*, Torino, 2010; P. S. Ghosh, *The Politics of Personal Laws in South Asia: Identity, Nationalism and the Uniform Civil Code*, London and New York, 2018; W. Menski, *Comparative law in a global context: the legal systems of Asia and Africa*, London, 2000; W. Menski, *The multiple roles of customary law in the shaping of the intercultural state in India*, in *Revista general de derecho público comparado*, 2019 with respect to the role of Hindu customary norms in the Indian legal system; W. Menski, *Uniform Civil Code Debate in Indian Law: New Developments and Changing Agenda*, in *German Law Journal*, 2008; G. Solanki, *Beyond the Limitations of the Impasse: Feminism, Multiculturalism, and Legal Reforms in Religious Family Laws in India*, in *Politikon*, 2013; Y. Sezgin, *Human Rights Under State-Enforced Religious Family Laws in Israel, Egypt and India*, Cambridge, 2013; Rina Verma-Williams, *Postcolonial Politics and Personal Laws: Colonial Legacies and the Indian State*, New Delhi, 2006; P. Viola, *Costituzionalismo autoctono: Pluralismo culturale e trapianti giuridici nel subcontinente indiano*, Bologna, 2020. In a critical vein, see also A. Parashar, *Women and Family Law Reform in India*, New Delhi, 1992.

[56] The Hindu Succession (Amendment) Act, 2005 (39 of 2005).

[57] The Hindu Women's Right to Property Act, XVIII of 1937.

[58] The Hindu Law of Inheritance (Amendment) Act, India Act II 1929.

[59] For a diachronic and synchronic analysis of Hindu laws of succession see B. Agarwal, *Gender and Command Over Property: A Critical Gap in Economic Analysis and Policy in South Asia*, in *World Development*, 1994; F. Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India*, in F. Agnes (ed.), *Women and Law in India- An Omnibus Comprising*, New Delhi, 2004, p. 82; S. Basu, *She Comes to Take Her Rights: Indian Women, Property, and Propriety*, Albany, 1999; J. D. M. Derrett, *Hindu Law Past and Present*, Kolkata, 1957; D. F. Mulla, *Principles of Hindu Law*, revised by S. A. Desai, Delhi, 2017; J. Mayne, *Treatise on Hindu Law and Usage*, revised by R. Misra, New Delhi, 2005.

It is interesting to note that the Indian Supreme Court[60] clarified its interpretation of s. 4.2 of the Hsa[61] maintaining that «the word 'property' in Sections 6 to 8, 14 and 15 and other sections in that Act would include agricultural land», therefore, ex s. 4.1[62], this has «an overriding effect for Hindu female claiming parity with Hindu male for succession to the agricultural lands held by the father, mother, etc. and sub- s.(2) does not stand an impediment for such a right of devolution».

As regards the excerpt about tenancy rights in s. 4.2, it should be read in conjunction with the several state laws regulating rents and land leasing. For example, the tenancy laws of Andhra Pradesh, Madhya Pradesh, Odisha and Tripura specifically point out that land lease right shall be heritable, but not transferable except to banks, government, co-operatives, or financial institutions by way of mortgage for loan[63], while succession to tenancy rights in Maharashtra is regulated by the Maharashtra Rent Control Act, 1999 repealing the Bombay Rents, Hotel and Lodging Houses Rates Control Act, 1947[64]. This Act is significantly different from the general rules of succession laws, as those who may normally qualify as heirs under the succession laws may not be qualified as successors to the tenancy rights under the 1999 Act, which provides for a minimum period of cohabitation with the deceased as a basis to qualify[65].

4. *Land policies in Jharkhand: a closer look at the Chotanagpur Tenancy Act*

As it has been previously underlined, this legal framework is further complexified when it comes to tribal laws and, especially, the provisions related to land and succession among tribal communities. It is important to note that Adivasi law is not personal law: the Indian Constitution makes room for the recognition, protection

[60] *Madhu Kishwar & Ors. Etc vs State of Bihar & Ors*, 1996 SCC (5) 125.

[61] «For the removal of doubts it is hereby declared that nothing contained in this Act shall be deemed to affect the provisions of any law for the time being in force providing for the prevention of fragmentation of agricultural holdings or for the fixation of ceilings or for the devolution of tenancy rights in respect of such holdings».

[62] «Save as otherwise expressly provided in this Act, (a) any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of this Act shall cease to have effect with respect to any matter for which provision is made in this Act; (b) any other law in force immediately before the commencement of this Act shall cease to apply to Hindus in so far as it is inconsistent with any of the provisions contained in this Act».

[63] Expert Committee on Agricultural Land Leasing, *Report*, p. 41.

[64] Maharashtra Rent Control Act, 1999 (Mah. Act NO. 18 of 2000); The Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act No. 57 of 1947).

[65] *Ganpat Ladha v. Sashikant Vishnu Shinde* 1978 AIR 955; *Parubai Manilal Brahmin and Ors. v. Zaverbhai Tapodhan* (1964) 5 GLR 563; *Jaysen Jayant Rele & Ors v Shantaram Ganpat Gujar & Ors* AIR 2002 Bom 462; *Dharamvir Joshi v Jayant Patwardhan* Civil Revision Application No. 225 of 2015 and Civil Application No. 349 of 2015; *Vasant Pratap Pandit v Anant Trimbak Sabnis* 1994 SCC (3) 481.

and application of customary norms[66], in particular Scheduled Tribes norms, but it is undebatable that the primary site of difference within the constitutional fabric is religion [67], on which basis the several personal laws are recognized.

The fact that there is no explicit recognition of tribal laws as a self-standing category is indeed problematic, especially if combined with the explicit exclusion of the members of the Scheduled Tribes from the purview of personal laws[68]. On one hand, from some interviews that I conducted among Adivasi activists, it emerged that judges often consider Adivasi litigants as Hindu[69] therefore applying Hindu personal law to the case despite explicit provisions to the contrary. According to M. N. Karna, on several occasions, if there is proof of a sufficient «Hinduisation» of an Adivasi (for example on the basis of him/her practicing cremation instead of burial, or living by Hindu religious practices) the judges usually apply the Hindu personal law to the case at stake[70].

Some authors contend that Hindu personal law could actually turn out to be more favorable, especially to women, as against discriminatory Adivasi customary law[71]. Nonetheless, the activists that I interviewed fear that extending the scope of Hindu personal law to Adivasis may result in a process of legal colonization, progressively erasing the legal specificities of Adivasis and eventually leading to their assimilation into the mainstream (i.e. Hindu) society[72].

On the other hand, the fact that Adivasi communities are still ruled by local customs which remain largely uncodified paves the way to arbitrary interpretations and sometimes abuses. As stated by Upadhya, «procedurally, customary law is supposed to be proved in the courts through evidence of existing practices, statements of local people, or recorded evidence, but in arguing and deciding cases related to inheritance, succession, marriage, and other such matters of personal law, lawyers and the courts usually rely on (…) old ethnographic sources, as well as previous judgments, as

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[66] In addition to art. 13.1, see also article 341 read with article 366(24) and article 342(i) read with article 366 (25).

[67] K. Kapila, *op. cit.*, p. 37.

[68] P. Chowdhry, *op. cit.*, p. 5. As regards the ST exclusion, section 2.2 of the Hindu Marriage Act (Act no. 25 of 1955) and section 2.2 of the Hindu Succession Act provide that «Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of clause (25) of article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs».

[69] See for example *Ganesh Matho v. Shib Charan and Doman Sahu v. Buka* AIR 1931 Patna 305.

[70] M. N. Karna, *Understanding Women and Land Rights in Jharkhand*, in P. Chowdhry, *op. cit.*, p. 188.

[71] See M. Kishwar, *Toiling Without Rights: Ho Women of Singhbhum*, in *Economic and Political Weekly*, 1987, p. 95-101 and also *Madhu Kishwar & Ors. Etc vs State of Bihar & Ors* (1996 AIR 1864), *Dr. Surajmani Stella Kujur vs Durga Charan Hansdah & Anr* Appeal (crl.) 186 of 2001 and *Rajendra Kumar Singh Munda vs Mamta Devi* F.A. No. 186 of 2008.

[72] As explicitly envisaged in *Narmada Bachao Andolan vs Union of India and Others* W.P. (C) No. 319 of 1994: «The gradual assimilation in the main stream of the society will lead to betterment and progress».

authentic proof of tribal practices. As a result, the 'customs' recorded in these colonial-era texts have been affirmed as legal and valid, 'fixing' them and creating rigidity where the law was supposed to allow for flexibility»[73]. As a result, «particular 'customs' connected with the received model of tribal social organization have become symbolic of tribal identity itself»[74].

The convoluted legislative and political history of Jharkhand and its Adivasi communities further complexifies this situation. From the late eighteenth century until the end of the nineteenth, the Chotanagpur area is marked by a series of agrarian uprisings or «tribal rebellions», against the entry of landlords (*zamindars*) and moneylenders in the region as a direct consequence of the British Permanent Settlement[75]. The grant of absolute proprietary rights to the landlords spurred the birth of landlordism in India, against the prevailing Adivasi custom of communal ownership. This caused much indebtedness among Adivasi communities, linked to a sharp rise in rent demands on the part of the landlords, loss of control over land and increasing insecurity of peasant tenancies[76]. The colonial state then adopted a series of tenancy laws, culminating in the Chotanagpur Tenancy Act 1908 (Cnta), with a view to quash these revolts, confirm the rights of the «original settlers» and regulate the activities of these new economic actors operating in the area. The Cnta is currently in force in Jharkhand and is applied in the divisions of Palamau, North and South Chotanagpur and the Kolhan, while the Santal Pargana division is disciplined by the Santhal Parganas Tenancy Act, 1949[77] (Spta), which is the other pillar tenure law in force in Jharkhand.

[73] C. Upadhya, *Colonial Anthropology, Law, and Adivasi Struggles: The Case of Jharkhand*, in S. Patel (ed.), *Doing Sociology in India: Genealogies, Locations and Practices*, New Delhi, 2011, p. 274.

[74] *Ibid.*

[75] Following the Permanent Settlement of 1793, the present landholders were declared to be permanent, on condition of their paying a fixed amount of rent to the British administration. The *zamindars* were therefore empowered to collect rent from the tenants (*raiyats*) in their respective estates and to transfer the amount to the Government (S. S. Sinha, *Restless Mothers and Turbulent Daughters: Situating Tribes in Gender Studies*, Kolkata, 2005, p. 101 and Authority of the Accountant General (Audit), *Revenue Audit Manual of Land Revenue*, Ranchi, p. 2).

[76] C. Upadhya, cit., *Colonial Anthropology, Law, and Adivasi Struggles*, p. 270; also M. Carrin, *Jharkhand: Alternative Citizenship in an «Adivasi» State*, in P. Berger – F. Heidemann (eds.), *Modern Anthropology of India: Ethnography, Themes and Theory*, New York, 2013, p. 110; S. Das Gupta, *Agrarian Expansion Under Colonial Rule and Its Impact on a Tribal Economy*, in E. Basile – I. Mukhopadhyay (eds.), *The Changing Identity of Rural India: A Socio-Historic Analysis*, New Delhi, 2008, p. 248; D. Schewerin, *Control of Land and Labour in Chota Nagpur*, in D. Rothermund – D. C. Wadhwa (eds.), *Zamindars, Mines and Paesants*, New Delhi, 1978, p. 35.

[77] Santhal Parganas Tenancy (Supplementary Provisions) Act, 1949 (Bihar Act XIV of 1949).

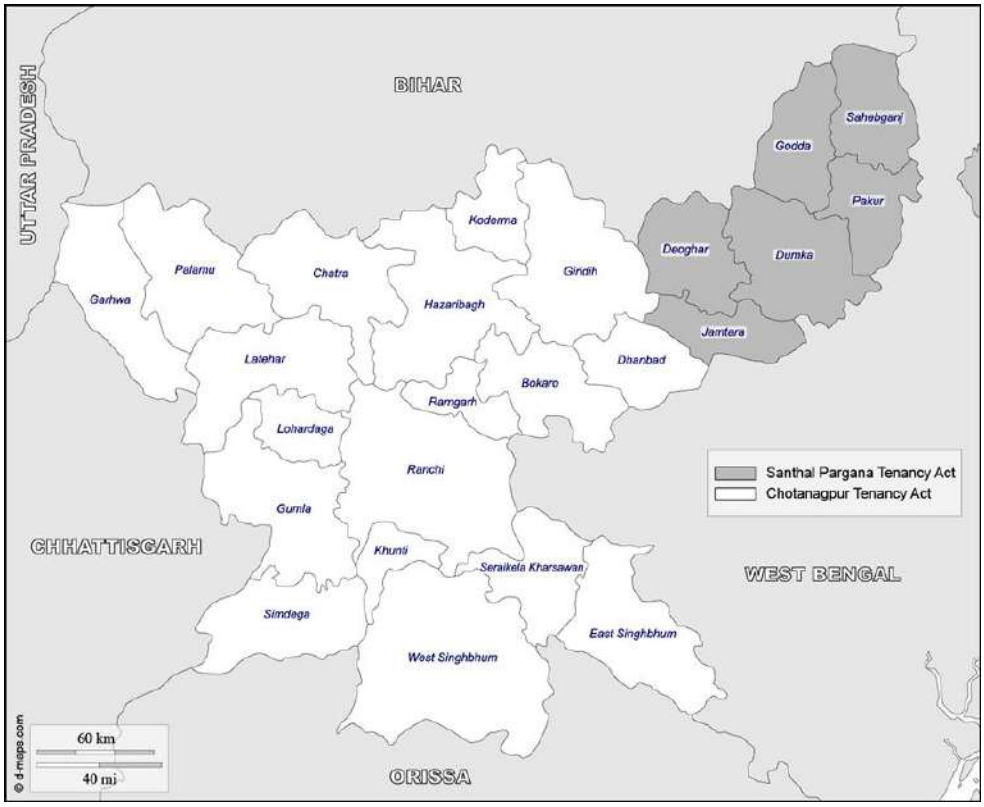

Table 1: district-wise application of the two tenure laws in Jharkhand

The Cnta created the special tenure category of *Mundari khuntkattidars*, considered the original settlers of the land: their legislative understanding is rooted in a multiplicity of colonial and missionary ethnographic works, among which stands the analysis of the German Jesuit missionary Father John Hoffmann, who worked in Chotanagpur from 1893 to 1915. His famous *Encyclopaedia Mundarica* served as a starting point for the drafting of the Act, being an extensive collection of linguistic and ethnological material on the Munda tribe, along with a *Special Memorandum on the Land System of Munda Country*, prepared by Hoffmann upon government's request to frame the new tenurial law[78]. Along with official ethnographic collections, the genealogies and oral speeches of the village families collected by colonial revenue officers during the long agrarian disputes over land in Chotanagpur served as the primary material for the framing of indigenous land rights in the Cnta. As reported by Das Gupta, colonial officers collected innumerable oral testimonies supporting cases filed by tenants of Kolhan and Porahat estates, with a view to arrive at an «authentic» version of Adivasi

[78] C. Upadhya, *Colonial Anthropology, Law, and Adivasi Struggles*, cit., p. 271.

custom, and in particular *khuntkatti* right-holders[79]. As underlined by Upadhya, it is nonetheless difficult to ascertain to what extent these representations of «traditional» customs and usages reflect the reality of that time[80].

According to these anthropological accounts, Adivasi social and cultural identity was built around membership to a village, which determined also the relationships within and outside the community[81]. In the Munda *khuntkatti* villages, the land was collectively controlled by the founding lineage (*khunt*) and there were no individual rights in land, which could not be alienated to outsiders. The original clearers of jungle who set up the village and their male descendants (among the Mundas: *khuntkattidars*, also known as *bhuinhars*) formed the dominant group, who could claim special privileges within the village[82]. The lineages who had settled later, the *parjas*, had to pay rent to the former[83]. Among the Mundas, the superior status of the original settling group in the village as well as their dominance in socio-economic and political matters was also marked by the fact that the key posts of headman (*munda*) and priest (*pahan*) were held by members of such group. Only the founding clan was entitled to build its own graveyard, or *sasan*, which marked the transition of the land from the wild forest (*bir*) to the «tamed» village land (*hatu*), and erect their own memorial stones (*sasandiris*). It is interesting to note that, when the British colonial revenue officers tried to map indigenous land rights in the 19th century, Mundas presented their *sasandiris* as their title-deed to land. These stones were seen as a proof confirming «a claimant's membership of the original clan which founded the village»[84] and the historical relationship of the clan with that land[85].

After a series of experiments in tenure legislations (such as the Chotanagpur Tenancy Act of 1869), the Cnta 1908 was adopted, in order to protect *khuntkatti* tenures «against the encroachment of landlords, by fixing their rents in perpetuity and

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[79] S. Das Gupta, *History or Tradition? Exploring Adivasi Pasts in the 19th Century Jharkhand*, in *Rivista degli Studi Orientali*, 2018, p. 103.

[80] C. Upadhya, *Negotiating Policy Research, Academic Knowledge, and Political Movements: One Researcher's Experience*, in *Review of Development and Change*, 2008, p. 16.

[81] *Ivi*, p. 101.

[82] S. Das Gupta, *From Rebellion to Litigation: Chotanagpur Tenancy Act (1908) and the Hos of Kolhan Government Estate*, in *Irish Journal of Anthropology*, 2016, p. 35.

[83] M. Carrin, *op. cit.,* p. 111 and C. Upadhya, *Law, Custom and Adivasi Identity: Politics of Land Rights in Chotanagpur,* in N. Sundar (ed.*), Legal Grounds: Natural Resources, Identity and the Law in Jharkhand*, New Delhi, 2009, p. 35.

[84] S. Das Gupta, cit., *History or Tradition?,* p. 103. For further insights and a comparison with other Adivasi communities, see L.N. Bhagat, *Supply Responses in Backward Agriculture- An Economic Study of Chotanagpur Region*, New Delhi, 1989; C. Correndo, *op. cit.*, p. 179 ff.; S. Das Gupta, *Adivasis and the Raj: Socio-economic Transition of the Hos 1820-1932*, Hyderabad, 2011; A. K. Sen, *From Village Elder to British Judge: Custom, Customary Law and Tribal Society*, Hyderabad, 2021; N. Sundar, *'Custom' and 'Democracy' in Jharkhand*, in *Economic and Political Weekly*, 2005, p. 4430-4434; M.P. Yorke, *Decisions and Analogy: Political Structure and Discourse among the Ho Tribals in India*, London, 1976.

[85] C. Correndo, *op. cit.,* p. 203; see also B, Verardo, *Rebels and devotees of Jharkhand: Social Religious and Political Transformations Among the Adivasis of Northern India*, London, p. 50 ff.

making the sale of these lands illegal for any purpose other than arrears of rent»[86]. The Act also gave statutory recognition to existing customs regarding the use of forest, the status of village headmen, the rights of cultivators to reclaim cultivable wasteland and succession, as well as restricted the transfer of tribal lands to non-tribals and disciplined the issue of *hukuknamas* (or record of rights which functioned as settlement deeds as well as records of rights and obligations for headmen as per s. 127, chapter XV Cnta). Despite recognizing the high variability of customs in the region, the British felt the need to record customary tenurial arrangements followed (according to their analysis) in the area of the Chotanagpur and encapsulate them in a legible model[87]. Nonetheless, in the process of codifying «customs», the British redefined and reinvented them along Western lines, subjecting customs to imperialistic needs. On the basis of anthropological, colonial and missionary accounts, the colonial administrators objectified and ossified the traditional Munda social system and used it as a model to frame the customary provisions existing in the area, glossing over regional variations in the land system[88] and applying its norms to all the inhabitants of Chotanagpur rather than only to Mundas living in traditional *khuntkattidar* villages[89]. As a result of this «inscription of 'customary law' in formal law, what was presumably a variable and flexible system of social organization and land use came to be identified as the singular 'aboriginal' system of the region. Moreover, what was probably a highly adaptable kinship-based system of control over land and resources was reinterpreted through the language of property rights»[90]. For instance, even if at the time of the drafting of the Cnta, the system of the unbroken *khuntkatti* village was barely surviving, its basic land tenure concepts and rules were applied to all villages and tribes in the region[91].

[86] S. Das Gupta, *From Rebellion to Litigation,* cit., p. 36.

[87] S. B. C. Devalle, *Discourses of Ethnicity: Culture and Protest in Jharkhand*, New Delhi, 1992; N. Sundar, *'Custom' and 'Democracy' in Jharkhand*, cit., p. 4431; C. Upadhya, *Community Rights in Land in Jharkhand*, in *Economic and Political Weekly*, 2005, p. 4435.

[88] K. S. Singh, as cited in J. P. Gupta, *The Customary Laws of the Munda and the Oraon*, Ranchi, 2002, p. 118; C. Correndo, *op. cit*., p. 175 ff.; A. K. Sen, *From Village Elder to British Judge*, cit., p. 10.

[89] C. Upadhya, *Negotiating Policy Research,* cit., p. 16.

[90] C. Upadhya, *Law, Custom and Adivasi Identity*, cit., p. 35.

[91] C. Upadhya, *Colonial Anthropology, Law, and Adivasi Struggles*, cit., p. 271. Usually, a *khuntkatti* village becomes «broken» when it is sold by the headman to a moneylender or a *zamindar* to pay his debts, thus the new owner of the village starts to collect revenues from the *khuntkattidars* and the *raiyats*. According to the Revenue Department, this is actually the main difference between a pure and a broken setting, that is, in this latter arrangement the *khuntkattidars* pay the rent directly to the superior tenure holder (the *zamindar* or the Bihar government, after the Independence), while in the former the *chanda* is collected by the headman and then transferred to the government (C. Upadhya, *Law, Custom and Adivasi Identity*, cit., p. 38; S. C. Roy, *The Mundas and their Country*, Bombay, 1970, p. 242). Since the *chanda* was not considered as a proper rent in itself (unlike the one paid to the zamindar), but a sort of tribute paid to the British administration for the occupation of the land, the Mundari *khuntkattidars* were believed to hold the land not under the state, but in their own right (*ivi*, p. 37).

From the existing anthropological records, it appears that the Adivasi communities of Chotanagpur are generally patrilineal, patronymic, patriarchal, patrilocal and monogamous in nature[92]. According to the classical colonial writings of S. C. Roy and Hoffmann, the members of an undivided Munda family share in common all they have until the death of the father. During his lifetime, sons do not generally separate and they bring their separate earnings to the common family fund. Even if the sons cannot claim a partition of this fund during their father's lifetime, he may nonetheless decide to make a partition of family property, out of which the eldest son gets a slightly higher share than his brothers. Apart from this, the sons get shares of movable and immovable property, and a similar share of personal and real property is taken by the father. In addition to this share, an unmarried son will get some cash or cattle as a basis for his marriage. Females are not entitled to inherit but the father may decide to give them cash or movables, but not land. If he effects a partition, usually the unmarried daughter gets a share of land by way of maintenance till her marriage, but since she is expected to live under the control of either the father or one of the brothers until she gets married, the actual control of this land is exerted by her guardian. Likewise, the guardian will take the goods she received as brideprice as a compensation for the marriage expenses he had. After her marriage, the land she has been given by way of maintenance (*khorposh*) are redistributed among her brothers[93].

Upon the death of the father, the panchayat is convened and the properties are divided. The widow with sons gets a small portion of land by way of maintenance and some cash for her subsistence; she only has a life-interest in this land and if she decides to live separately from her sons, this portion of land will be divided among them upon her death, but if she decides to live with one of the sons, the land will be cultivated and practically enjoyed by that son. If he pays for all the funeral expenses, he becomes then entitled to that land. If the widow has no sons or only daughters, then she is allowed a life-interest in the properties left, she can dispose of movable goods for her subsistence but cannot sell any real property without the consent of her husband's agnates. If she decides to leave the village, she loses any usufructuary right on the land which then goes to the said agnates, and if she remarries, she forfeits any right on movable and immovable properties.

As regards the couple's children, the sons get an equal share in the properties (with the exception of the eldest son getting some surplus land). If the father effected a partition in his lifetime and since then other sons were born, the panchayat makes a re-partition of the property. The father's share as well, identified after the partition, is divided among the sons.

Daughters do not inherit, but their brothers are compelled to support unmarried sisters till their marriage. If the unmarried sister chooses to live with one of the brothers, he receives some additional land from the panchayat, which will be then

[92] S. S. Sinha, *Restless Mothers and Turbulent Daughters*, cit., p. 34.
[93] Also confirmed by Aali in the interview I had in Ranchi on 15 March 2017.

repartitioned among the brothers upon her marriage. If the deceased father leaves only a daughter with no widow or sons, the daughter will be entitled to his personal property and will remain in possession of the lands until her marriage[94]. It is important to note that a daughter's husband and sons are not entitled to inherit, apart from the case of *gharjamai*, that is, a man who marries into a family with no sons in order to help his father-in-law with the cultivation and is then entitled to a share of the land, as per the panchayat's decision. He remains in possession of the land until his wife's death, upon which the land returns to his father-in-law's agnates. In the absence of any agnate, the full possession of the land goes to the *gharjamai*[95].

This customary framework was illustrated into the early anthropological accounts and since these texts were considered to be the most authentic sources on Munda tribes they served as a basis not only for the drafting of the Cnt and Spt Acts but also for the construction of the Adivasi identity[96]. As stressed by Upadhya, «Roy's books are still frequently referred to by the courts and are quoted in judicial decisions and legislative documents dealing with questions of tribal custom. Although a number of ethnographic studies have been carried out since these works were published, the accounts of tribal kinship systems presented in these early works tend to be reiterated in subsequent writing»[97]. However, the inclusion of the customary practices, so interpreted, within the abovementioned Acts and their interpretation on the part of the judiciary has raised several issues. As a matter of fact, the inscription of this patriarchal model of Adivasi customs in the Cnta determined the exclusion of Adivasi women and their rights from positive law and, despite the several amendments undergone by the two Acts, as of today women's rights in land still do not feature prominently in the legislation[98].

5. *Progressive trends in recent case law*

Disputants living in legally plural arenas often find themselves navigating between several judicial options, following strategies of forum shopping and choosing between co-existing normative orders and institutions, on the basis of the expected outcome and the constraints faced in the different fields. The choice is informed not only by a preference for the legal principles involved in the fora, but also on the basis

[94] S. C. Roy, *op. cit.*, p. 245. See also S.S. Sinha, *Adivasis, Gender and Migration: Re-situating Women of Jharkhand*, in S. Arya – A. Roy (eds.), *Poverty, Gender and Migration*, New Delhi, 2006, p. 168; S. Das Gupta, *Adivasis and the Raj*, cit., p. 44 and P. R. N. Roy, *Handbook on Chota Nagpur Tenancy Laws*, Allahabad, 2015, p. 413 ff.

[95] M. N. Karna, *op. cit.*, p. 192 ff.

[96] C. Upadhya, *Colonial Anthropology, Law, and Adivasi Struggles*, cit., p. 274.

[97] *Ibid.*

[98] M. N. Karna, *op. cit.,* p. 188.

of non-legal criteria such as physical and financial accessibility as well as cultural preferences[99]. Nonetheless, forum shopping has often been considered as being non-women-friendly, reflecting dynamics of power usually playing out against women whereby men tend to choose the most favorable forum at the expense of women who may not be able to access this forum due to financial or cultural restraints. This is the reason why, as a first step, many women approach more accessible and less costly community fora, getting to formal courts only if they fail to get a satisfactory outcome. Nonetheless, «they can also iterate between fora by moving from community forum to court and back again to the community, or by making claims in several fora simultaneously in order to increase their bargaining power»[100]. Women therefore may frame their claims by resorting to a mix of statutory, cultural and religious norms, strategically using the different legal fora available. Thus, «the coexistence of formal law side-by-side with customary law can contribute to improving women's situations, even though women rely mainly on informal institutions to solve their disputes»[101].

From the interviews that I collected, it emerged that women victims of violence very rarely activate the state machinery or call the police to report the facts, preferring the more flexible and quicker jurisdiction of the village panchayat.

The *gram pradhan* that I interviewed in an Adivasi village in the Ranchi district reported that in case any family issue arises (mostly, domestic violence) women usually meet in a *mahila sabha* and try to solve the dispute by facilitating a mediation between the litigants. If they cannot find a solution, the issue usually goes to the *gram sabha* of the village[102].

It may also happen that a single woman or a woman victim of violence approaches the panchayat and gets some land for her maintenance, but most of the time the solutions shaped by the panchayat are compromising, patriarchal and non-women-friendly[103]. Fines are usually pecuniary and of a modest entity and sometimes they may also impose the marriage between the perpetrator and the abused victim. In contrast, other activists argue that the more egalitarian nature of the Adivasi society determines a less oppressive customary justice dispensed by the *munda* in the village panchayat and a related less strong need to create the so-called *jani panchayats* or *mahila sabhas* to address women's issues[104]. Nonetheless, from my experience, women's participation in village panchayats is scanty, and this is one of the reasons why the

[99] I. W. Anying – Q. Gausset, *Gender and forum shopping in land conflict resolution in Northern Uganda*, in *The Journal of Legal Pluralism and Unofficial Law*, 2017, p. 354.

[100] I. W. Anying – Q. Gausset, *op. cit.*, p. 355.

[101] *Ivi*, p. 356.

[102] Interview with S. S., 17 March 2017, Ranchi district.

[103] Interviews to Aali, Ranchi, 15 March 2017 and Adivasi Women's Network, Ranchi, 17 March 2017.

[104] Interview with N., 27 March 2017, village of Bara Guira; interviews with V. K., 14 March 2017, Ranchi.

reforms introduced by the Panchayat (Extension to Scheduled Areas) Act, 1996[105], providing reserved quotas for women in elective panchayats, were warmly welcomed by Adivasi women[106].

Given this complex background, despite recognizing the difficulties women meet in accessing formal courts and the preference usually granted to local councils or Adr bodies, the role of the formal courts as sites of contestation as well as a tool of *empoderamento*[107] for women is fundamental: judicial fora stand as a site where Adivasi women can engage with their own communities and state institutions at the same time, reshaping their identity as indigenous women and their legal subjectivity. According to Merry, Hirsch and Lazarus-Black[108], courts are crucial places where the culture of the dominant group is not only performed but at times also shaped. Legal procedures and trials are, in Merry's view, «cultural performances, events that produce transformations in sociocultural practices and in consciousness»[109] and, along the theoretical lines developed by Mather and Yngvesson, places where people and events are defined and specific meanings are attributed to them within a ritualized context[110]. In the same vein, also Hirsch and Lazarus-Black argue that legal procedures contribute to the making of hegemony (and, I would add, counter-hegemony), regulating relationships and language in a way that may contrast with the norms of interaction in other places[111].

The inclusion of the Mundari *khuntkatti* system in the Cnta determines a specific exclusion of women's land and inheritance rights from the purview of the Act, which according to an inflexible, ossified reading of Munda customs, considers the patrilineage to be the «owner» of the land, thereby excluding women from land rights on ancestral properties. Furthermore, the Cnta leaves an open, flexible cross-reference

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[105] The Provisions of The Panchayats (Extension to the Scheduled Areas) Act, 1996, Act no. 40 of 1996.

[106] On this point see C. Correndo, *op. cit.*; N. Gopal Jayal, *Engendering local democracy: The impact of quotas for women in India's panchayats*, in *Democratization*, 2006; N. Gopal Jayal, *Left Behind? Women, Politics, and Development in India*, in *The Brown Journal of World Affairs*, 2008. Also, N. Rao, *Custom and the Courts: Ensuring Women's Rights to Land, Jharkhand, India*, in *Development and Change*, 2007, p. 307: «Women are not represented in the village council, nor are they present in the courts at the district level as officials, lawyers or judges. Legally they have equal access to the state institutions, but their participation in village meetings is restricted».

[107] Rachele Borghi borrows this word from transfeminist, post-porn activism as it was coined in the context of grassroots, collective struggles and is less linked to neoliberal feminism and Western-driven development policies (*op. cit.*, p. 13).

[108] S. E. Merry, *Law and Colonialism*, in *Law & Society Review*, 1991, p. 889-922; S. F. Hirsch – M. Lazarus-Black, *Contested States: Law, Hegemony, and Resistance*, New York, 1994.

[109] S. E. Merry, *Law and Colonialism,* cit., p. 892.

[110] Cit. in S. E. Merry, *Law and Colonialism*, cit., p. 892. This is particularly evident in colonial times «when ordinary people's problems are handled in courts which embody laws or procedures of the metropolitan country, their problems are reinterpreted in the language of these new institutions, judgments are rendered in these terms, and penalties are imposed or withheld» (*ibid.*).

[111] S. F. Hirsch – M. Lazarus-Black, *op. cit.,* p. 11.

to customs in s. 76, whereby it states that «Nothing in this Act shall affect any custom, usage or customary right not inconsistent with, or not expressly or by necessary implication modified or abolished by its provisions». Given this context, judges have generally kept a conservative approach towards customary norms, upholding this exclusion of female Adivasis, as they very rarely do fresh enquiries into existing practices or community interviews about costumes[112].

Indigenous inheritance law was challenged before the Indian Supreme Court in 1982 and 1986 by two Public Interest Litigations which still represent a milestone in the use of strategic litigation to advance women's rights in India. These cases are particularly interesting in order to demonstrate first how women manage to navigate in a plurilegal context to better advance their claims and, secondly, how blurred the boundaries of state and customary law are.

In 1982, the activist Madhu Kishwar, along with two women from a Ho Adivasi community in Bihar, challenged Sections 7, 8 and 76 of the Cnta as being violative of the right to equality and the right to life[113]. The same was done in 1986 by an Oraon woman, Juliana Lakra, who filed a petition in the Supreme Court. The two petitions were heard together by a three-member bench as they were both focused on the issue of equality between female and male tribal members in the matter of intestate succession[114].

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[112] C. Upadhya, *Negotiating Policy Research,* cit., p. 18.

[113] It is interesting to note that the Ninth Schedule of the Constitution contains a list of central and state laws which cannot be challenged in court. This was done with a view to shield from judicial scrutiny mostly those laws related to agrarian reform and abolition of *zamindari* system, which were heavily challenged before the courts after the independence. Fearing that this plethora of cases could endanger the whole agrarian reform, the legislator inserted art. 31-B by the First Constitutional (Amendment) Act 1951 which states that «without prejudice to the generality of the provisions contained in Article 31-A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provisions is inconsistent with, or takes away or abridges any of the rights conferred by , any provisions of this part». The shield provided by this article was abused by central and state governments, which used it to exclude from the purview of the judicial review several laws not concerned with property rights, devoiding the article of its original socioeconomic purpose. As far as the Cnta is concerned, the legislator provided a constitutional shield to it, limited to Chapter VIII—sections 46, 47, 48, 48A and 49 as well as Chapter X—sections 71, 71A and 71B and Chapter XVIII—sections 240, 241 and 242. In *I.R. Coelho (Dead) By Lrs vs State Of Tamil Nadu & Ors* (Appeal (civil) 1344-45 of 1976), the Supreme Court held that «all amendments to the Constitution made on or after 24th April 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principle underlying them. To put it differently even though an Act is put in the Ninth Schedule by a Constitutional Amendment, its provision would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights is/are taken away or abrogated pertains or pertain to the basic structure».

[114] R. Shukla, *Succession, gender equality and customary tribal laws*, in *Info Change News and Features*, 2005, available at https://groups.google.com/g/glrf-tribal/c/ij37ybPF0Cw?pli=1 (last access: 18 June 2018).

According to the provisions challenged in court, the only people that can be considered *raiyats with khuntkatti rights* (*raiyats* in occupation or having title to the land) are the descendants in the male line of the original founders of the village. Furthermore, according to section 8, a Mundari *khuntkattidar* is a Mundari who has acquired a right to hold jungle land for the purpose of bringing portions of it under cultivation by himself or by male members of his family (male heirs in the male line). Finally, *ex* section 76, the Act will not affect custom, usage or customary right not inconsistent with its provisions.

The state government constituted a Tribal Advisory Board to assess the desirability of an amendment to the Act. According to the committee, «though tribal society was dominated by males, female members were not neglected. A female member has the right of usufruct in the property owned by her father till she is married, and in the property of her husband after marriage. However, she does not have any right to transfer her share to anybody. In case a widow dies issueless, the property will revert to the legal heirs of her late husband». The board reiterated patriarchal arguments according to which granting inheritance rights to female descendants would result in the fragmentation of property as well as its alienation to non-tribals and that a potential amendment to the law would cause great unrest[115].

The Supreme Court judgement went finally in favor of the customary system: the Court refused to strike down the provisions of the Cnta arguing that this «elitist approach» would lead to a plethora of similar claims, asking to bring customary norms under the legal umbrella of the Hindu personal law. The Court further held that under art. 32 of the Constitution the law debarring women belonging to the ST communities is valid and not *ultra vires* of the constitutional guarantee to equality and constitutional protection[116]. Nonetheless, the Court observed that the right to livelihood is integral to the right to life[117] and that widows would become destitute after the death of their husbands and lose their livelihood, if the land reverts to the male descendants. Since this would be violative of art. 21 of the Indian Constitution, the court declared that female relatives of the last male tenant could hold the land as long as they remain dependent on it for their livelihood. The exclusive right of male succession in Sections 6 and 7 of the Act was held to remain in suspended animation so long as the right to livelihood of female descendants remains valid. The Court therefore carved out an «intervening right of female dependents/descendants under section 7 and 8 of the Act (…) by suspending the exclusive right of the male succession till the female dependent/descendant chooses other means of livelihood manifested by abandonment or release of the holding kept for the purpose».

In this context, even more interesting is the minority opinion of the Court, issued by J Ramaswamy: he replied to the point raised by the Bihar Tribal Advisory Board

[115] C. Upadhya, *Negotiating Policy Research*, cit., p. 19.
[116] *Ivi*, p. 20.
[117] N. Rao, *Good Women Do Not Inherit Land,* cit., p. 261.

according to which female inheritance would lead to the fragmentation of landed properties, arguing that «when a male member has the right to seek partition at his behest, fragmentation of family holding is effected, why not the right to inheritance/succession be given to a female?». He therefore proposed to read down sections 7 and 8 with a view to preserve their constitutionality by including female descendants in the term «male descendants» on the principle of equality. Also, he tried to harmonize the interpretation of the Hindu Succession Act and the Indian Succession Act, maintaining that «the general principles contained therein, being consistent with justice, equity, fairness, justness and good conscience, would apply to them» and that ST women would succeed to the estate of their parents, brothers, husbands, as heirs by intestate succession and inherit the property with a share equal to that of a male heir with absolute rights[118]. If women wanted to alienate the land, their brother or any male lineal descendant would enjoy a pre-emption right over it. Given their unwillingness to purchase the land, the woman is then entitled to alienate it to a non-tribal, subject to the permissions and provisions of the law applicable in the area.

Despite the quite conservative nature of the judgement, the limited acknowledgement in the majority opinion of the fact that the right to livelihood is integral to the right to life, the progressive minority opinion and the invitation addressed to the Bihar government to amend the law with a view to protect women's inheritance rights mobilized the public opinion and shed new light on women's rights to land. Male Adivasi leaders welcomed the judgement with agitation, as they thought that any potential change to the Cnta would result in the disruption of indigenous culture.

If we take into consideration more recent judgements, a more progressive and bolder attitude on the part of the courts will emerge. *Babulal S/O Bapurao Kodape and ... vs Sau. Reshmabai Narayanrao*[119] issued by the Bombay High Court in 2019 is far more innovative and is indicative of a progressive trend in judicial decisions on women's rights and customary norms, especially at apex levels. In this judgement, the Court argued that gender inequality is violative of the constitutional morality and that any custom should pass the equality test posed by art. 14, 15 and 21 of the Constitution, as per art. 13 according to which any pre-constitutional law shall be void, if inconsistent with the Fundamental Rights part. The Court clarified that «law includes custom or usage having the force of law», adding also that it is the burden of the person who

[118] *Ibid.*

[119] *Babulal S/O Bapurao Kodape and ... vs Sau. Reshmabai Narayanrao* on 4 January 2019, Bombay HC, Second Appeal 388 of 2016. The Supreme Court clarified on several occasions that the burden of proving a custom in derogation of the general law lies on the party who sets it up (*Mohammad Baqar and Ors. v. Naimun Nisha Bibi & Ors.* AIR 1956 SC 548; *Saraswathi Ammal v. Jagadambal and another* AIR 1953 SC201).

asserts women's exclusion from inheritance under the customary law to prove it, and not the opposite.

In *Joseph Munda vs Most. Fudi & Ors*[120] the Jharkhand High Court maintained that the customary provisions excluding women from inheritance cannot be applied to those female heirs whose name has been entered into record of rights. The court further noted that this custom can significantly impair the right to livelihood of a female, whose right had been by all means recognized and she had already acquired the status of tenant (*raiyat*).

In another famous case related to the inheritance claim of a woman belonging to the Gaddi tribe of Himachal Pradesh[121], the one-member bench, first, noted that the material presented by the plaintiff did not prove with enough clarity that Gaddi customary law explicitly excluded women from inheritance. The judge further added that, if such custom ever existed, it would be in overt violation of the constitutional philosophy, as it violates fundamental rights. The Court eventually concluded that daughters in tribal areas of Himachal Pradesh should inherit properties as per the Hindu Succession Act, which is more protective than tribal customs as regards female properties and inheritance.

The application of the Hindu personal law is recursive in this kind of cases: in *Labishwar Manjhi vs Pran Manjhi and Ors*[122] the Supreme Court held that if there was enough evidence that the parties belonging to a Santhal Tribe were following Hindu customs and not Santhals', then the Hindu Succession Act would apply to matters of inheritance. In the case of *Budhu Majhi and Anr. vs. Dukhan Majhi and Ors.*[123], the court observed that even a partial Hinduisation of the parties was enough to trigger the application of the Hindu personal law in the matter of succession.

The constitutional shield was used by the Indian Supreme Court also in *Indian Young Lawyers Association & Ors. vs. The State of Kerala & Ors*, whereby the Court observed that immunizing customs from constitutional scrutiny amount to denying the primacy of the Constitution itself, which is not acceptable[124]. It further notes that «our Constitution marks a vision of social transformation. It marks a break from the past – one characterized by a deeply divided society resting on social prejudices, stereotypes, subordination and discrimination destructive of the dignity of the individual. It speaks to the future of a vision which is truly emancipatory in nature».

On the overall, from an analysis of more recent judgements it can be inferred that courts try to overcome the customary law *impasse* by:

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[120] *Joseph Munda vs Most. Fudi & Ors* on 17 March 2009, Jharkhand HC, Second Appeal No. 132 of 1988.

[121] *Bahadur vs Bratiya and Others* AIR 2016 H.P. 58. See also *Mirza Raja Shri Pushavathi ... vs Shri Pushavathi Viswesvar* 1964 2 SCR 403.

[122] 2000 8 SCC 587.

[123] AIR 1956 Pat 123.

[124] *Indian Young Lawyers Association & Ors. vs. The State of Kerala & Ors* on 28 September 2018, Supreme Court of India, Writ Petition (Civil) no. 373 of 2006.

a. assessing the cases against the constitution (constitutional test), leaning mostly on art. 14, 15 and 21 to quash discriminatory provisions
b. reversing the burden of proof, so that women are no longer required to refute the existence of discriminatory customary provisions but those who claim that such norms exist have to submit in courts valid proof of it.

6. *Conclusions*

The picture presented in the paragraphs above prompts some further reflections. First, there has not been so far any significant reform in the field of land tenure and inheritance for Adivasis. As underlined by prof. Nongbri[125] in a lecture on gender, customary law and women's representation among tribal communities in North East India, the sanctity in which Adivasi customary law is cloaked should be dismantled, in favor of the enactment of women-friendly legislative reforms which could spur women's participation in politics and an effective control of resources and assets, protecting at the same time the virtuous aspects of customary law itself.

Secondly, the strategies adopted by the courts are not homogenous nor consistent, and mostly hinge upon the legal sensitivity of the single judge. This lack of consistency emerges, for example, from the elusive tactics often adopted by the lawyers, who have to plead in court that their clients (mostly, urban middle-class Adivasi women) are Hindus in order to circumvent the application of discriminatory customary norms. If, on the one hand, this can be a quick shortcut to get more egalitarian outcomes, on the other hand, in the long term, may bring about the erasure of Adivasi legal specificities. Furthermore, not being comprehensive as a strategy, it leaves completely out rural women and women who cannot access legal assistance and formal courts.

Nonetheless, what has been presented in the previous paragraphs provide the framework and a starting point for new emancipatory discourses. Adivasi women navigate between plural legal arrangements in order to advance their claims, exploiting this intersecting space and the counter-hegemonic potential of state law and institutions to reshape their legal subjectivity.

The cases presented above are particularly telling in their highlighting new emancipatory strategies followed by women's groups in order to create awareness, challenge the traditional meanings of state law and the genuine character of a supposedly indigenous culture.

[125] Tiplut Nongbri, *Gender, Customary Law & Women's Representation in Politics*, 3rd Gangmumei Kamei Memorial Lecture, 21 October 2022.

This particularly virtuous cycle of challenging and resignifying customary norms in formal courts could potentially end up not only in substantial reforms, providing the bases for legislative amendments, but also in triggering debates at the local level on what is customary law and who makes it. In light of the mechanisms of interlegality highlighted above, feminist strategic litigation could become a quick instrument to accelerate social acceptance of women's claims at the local level and to renegotiate and rearticulate their roles within and outside the family.

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ABSTRACT: The present article investigates how Adivasi women often resort to state institutions and state norms in order to advance their claims, activating processes of interplay and hybridization between customary and state legal sphere.

In particular, working on the Indian legislation and case law related to Adivasi land tenure and inheritance, the paper unpacks the role of judicial forums as sites of contestation and identity resignification as well as Adivasi women's engagement with their own communities and state institutions through the judiciary.

ABSTRACT: Il presente contributo intende investigare come le donne adivasi spesso ricorrano a istituzioni e norme statali per portare avanti le loro istanze, attivando in questo modo processi di interazione e ibridazione tra la sfera statale e quella consuetudinaria.

In particolare, partendo dalla legislazione indiana e dalla giurisprudenza in materia di diritti fondiari adivasi e successione, l'articolo sviluppa un'analisi sul ruolo delle corti come luoghi di contestazione e risignificazione identitaria, che consentono di rimodellare anche il ruolo delle donne adivasi all'interno delle comunità di provenienza e nei confronti delle istituzioni statali.

KEYWORDS: indigenous feminism – land rights – interlegality – inheritance – India.

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RIVISTA DI
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Interlegality, Agency and Empowerment. A Different Take on the Feminism *v.* Multiculturalism Conundrum*

Paola Parolari

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1. *Interlegal dimensions of the feminism v. multiculturalism conundrum: introductory remarks*

In the lively – and sometimes stormy – feminism *v.* multiculturalism debate, attention to the issue of legal pluralism has grown over time. In particular, a specific reflection focusing on the presence of non-state[1] mechanisms and institutions (customary, religious, or other types[2]) for the resolution of disputes and discussing the impact of such mechanisms and institutions on women's rights has gradually carved out its own space. The gender perspective has thus made its way into a field of study that had previously been mostly devoted to examining the coexistence and conflicts between Indigenous and colonial law outside the so-called Western world. In the field of political and legal philosophy, an analysis of these issues usually develops from a

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[1] Of course, the relevance of non-state mechanisms and institutions for dispute resolution is not limited to the forms of legal pluralism linked to multiculturalism. Many types of these mechanisms and institutions – with very different origins, functions and characteristics – operate within the general framework of so-called global legal pluralism (for instance, within the realm of the so-called new *lex mercatoria*). For obvious reasons, I will focus my attention here only on those mechanisms and institutions that are tied to cultural or religious groups.

[2] As has been correctly pointed out, «although the term 'customary law' remains very present in the vocabulary of the communities concerned and among researchers» and «such law is no doubt still vibrant, particularly in those communities where no individual or institution possesses the authority to declare or proclaim a legally enforceable commandment», nonetheless «the arsenal of non-State normative technology is varied, as can be seen in the current proliferation of Indigenous 'codes', protocols and 'charters'». See G. Otis, *The Management of Legal Pluralism. Processes, Parameters for Action and Effect*, in G. Otis – J. Leclair - S. Thériault, *Applied Legal Pluralism. Processes, Driving Forces and Effects*, Abingdon-New York, 2023, p. 16-17.

normative perspective that tries to determine the solutions more suited to grant the protection of women's rights in multicultural contexts. From this perspective, the fundamental question is: How could or should we grant the coexistence of different legal norms, customs, traditions and institutions without challenging women's rights? The more-or-less implicit premise of this question is the assumption that non-Western cultures are mostly illiberal and oppressive towards women.

However, while the debate on the tensions between feminism and multiculturalism has often remained anchored in the categories of the opposition between liberalism and communitarianism – thus falling into the same pitfalls – the entry of legal pluralism on the scene has not changed the perspective much; in many cases, it has simply shifted from the question «Is multiculturalism bad for women?»[3] to the question *Is customary/religious law/justice bad for women?* With few significant exceptions[4], the tendency towards a certain degree of cultural essentialism and ethnocentric paternalism has remained almost unchanged[5]. On the one hand, the mechanisms and institutions of non-state justice have been seen as means for the self-preservation of communities that are supposed to be characterised by static and homogeneous traits: that is, means through which cultural groups seek to protect their identity and live by their own rules, keeping themselves separate from the rest of society and isolated in cultural and legal enclaves. On the other hand, women from other cultures have mainly been seen as passive victims essentially devoid of agency and in need of protection.

In contrast to this approach, the present article aims to overcome the perpetuation of both cultural and gender stereotypes that fuel the feminism *v.* multiculturalism opposition (§ 4) by looking at the possible tensions between legal pluralism and women's rights in a different way. To this purpose, it abandons the static perspective of a certain way of thinking about legal pluralism – that is, as the coexistence of distinct (closed and independent) legal systems within the same social field – to embrace the dynamic perspective of interlegality that focuses on the interactions between different legal spheres (§ 2). Moreover, it does not look at women simply as vulnerable subjects to be protected but rather calls attention to the strategies of agency and empowerment that they enact in contexts of interlegality (§ 3).

[3] S.M. Okin (1997), *Is Multiculturalism Bad for Women?*, in *Boston Review*, 1997. See also S.M. Okin, *Feminism and Multiculturalism: Some Tensions*, in *Ethics*, 1998, p. 661 ff.

[4] For instance, think of A. Shachar, *Multicultural Jurisdictions. Cultural Differences and Women's Rights*, Cambridge, 2001; S. Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton, 2002; A. Phillips, *Multiculturalism without Culture*, Princeton, 2007.

[5] On the debate generated by Okin's theses, see, among many others, J. Cohen – M. Howard – M.C. Nussbaum (eds.), *Is Multiculturalism Bad for Women?*, Princeton, 1999.

2. *On interlegality: some (conceptual) clarifications*

In general, the concept of interlegality refers to situations in which different legal *spheres* intersect and interact[6]. It rests on two main premises. The first is that state law coexists with various other types of law, such as international, supranational, transnational, customary and religious law. The second is that different legal spheres are not discrete and separate but instead overlap, intertwine and compete in many ways in the regulation of social facts and conflicts. Beyond this common core, however, the term interlegality covers heterogeneous studies that may adopt an empirical, theoretical or normative perspective to investigate diverse issues ranging from the endless debate about the concept of law (what law is and how it works) to the analysis of how people (social actors and/or legal professionals, primarily judges) use or should use legal norms in the contemporary world[7]. At the same time, these issues have been studied under different labels[8]. Therefore, it seems appropriate to clarify how the concept of interlegality is understood in this article and why this term was chosen over others.

I adopt an empirical perspective focused on social actors. More specifically, I refer to the concept of interlegality in its original meaning proposed by Boaventura de Sousa Santos, who first introduced this term. Through it, Santos aimed to call attention to what he considered the «phenomenological counterpart» of legal pluralism, focusing on the condition of social actors, which – living in the «network of legal orders» that characterises the contemporary globalised world – are «forced to constant transitions and trespassings» from one «legal order» to another[9]. In this sense, the concept of interlegality takes on a «subjective perspective that foregrounds the social actor and the norms of different origins that influence his or her actions and choices»[10]. This allows attention to be paid to *how people use the law* with reference not only to forum

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[6] By 'legal sphere', I mean the ambit of influence of a given set of legal rules. In its vagueness, this term makes it possible to include legal regimes that do not fall under the notion of a legal order in the technical sense (i.e., a closed set of hierarchically ordered rules that is intended to be characterised by unity, coherence and completeness). Moreover, compared to the term 'legal space' – increasingly used in the literature, including by me in previous articles – it has a less direct connection to the idea of a spatial and/or territorial dimension, opening up functional and personal dimensions.

[7] For an in-depth analysis, see P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli* sharī'ah councils *in Inghilterra*, Torino, 2020, ch. 2.

[8] Many analyses continue to use the term legal pluralism. See, for instance, P.S. Berman, *Global Legal Pluralism. A Jurisprudence of Law Beyond Borders*, Cambridge, 2012. See also, with specific reference to cultural minorities within the state, P. Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law*, London, 2005. Nonetheless, new expressions have recently been proposed, such as «entangled legalities» or «intertwinement of legal spaces». See, respectively, N. Krisch, *Entangled Legalities in the Postnational Space*, in *I•CON*, 2022, p. 476 ff.; D. Burchardt, *The Concept of Legal Space: A Topological Approach to Addressing Multiple Legalities*, in *Global Constitutionalism*, 2022, 1 ff.

[9] B. de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, in *Journal of Law and Society*, 1987, p. 279 ff.

[10] L. Mancini, *Introduzione all'antropologia giuridica*, Torino, 2015, p. 41 (my translation).

shopping strategies but also to what has been named «discourse shopping»; that is, the practices through which social actors move among different «legal repertoires», renegotiating their meanings and determining their hybridisation[11].

To be sure, such an actor-oriented approach is common to several studies that have investigated the interactions between different legal spheres within the same social context, regardless of whether they refer to Santos or specifically use the notion of interlegality[12]. In particular, since at least the 1980s, many anthropological and socio-legal analyses have applied a similar approach to the analysis of legal pluralism in both Western immigration countries and postcolonial ones. These studies are central in understanding how legal norms of different natures and origins mutually condition and influence each other in multicultural societies. Indeed, they have shown that – far from being parallel legal enclaves that simply reproduce legal traditions transplanted from their place of origin – «minority legal orders»[13] are actually hybrid laws. Similarly, they have shown that the community-based bodies that are supposed to enforce such «minority legal orders» are neither closed realities nor reproductions of traditional bodies for the resolution of disputes but are innovative solutions, adapted to the context in which they are conceived and implemented.

Therefore, anthropological and socio-legal literature on legal pluralism offers plenty of empirical and theoretical investigations that radically challenge a culturally essentialist conception of «minority legal orders». Such literature undoubtedly underlies the reflection proposed here. Nonetheless, Santos' approach to interlegality adds something important to the analysis of women's agency and empowerment, because he specifically focuses on the role of social actors in unleashing the empowerment potential of intersecting and interacting legalities, especially when these social actors are marginalised people. Indeed, in his search for «a new legal common sense»[14], Santos

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[11] A.J. Hoekema, *Multicultural Conflicts and National Judges: A General Approach*, in *Law, Social Justice & Global Development*, 2008, p. 4. This approach distinguishes Santos' use of the term interlegality from other uses of the same term. For instance, Jan Klabbers and Gianluigi Palombella have recently proposed an «objective legal notion» of interlegality as opposed to the «subjective sociological» notion introduced by Santos, aiming to shift the «epistemic perspective» of lawyers and legal scholars from the idea of law as a system to the idea of law as a comprehensive and composite reality, the texture of which is given by the interplay between a plurality of different legalities. In this case, interlegality is not defined as the «phenomenological counterpart» of legal pluralism, as it is by Santos, but it indicates the opposite of legal pluralism, which is understood as a theory according to which different legal orders are assumed to coexist as discrete and separate systems. Within this paradigm of interlegality, the attention is focused on judges, who are called upon to consider all norms relevant to the solution of the case, whatever legal system they belong to. From this perspective, forum shopping becomes an unnecessary practice. See J. Klabbers – G. Palombella, *Introduction. Situating Inter- Legality*, in J. Klabbers – G. Palombella, *The Challenge of Inter-Legality*, Cambridge, 2019, p. 1 ff.

[12] See above, fn. 8.

[13] M. Malik, *Minority Legal Orders in the UK. Minorities, Pluralism and the Law*, London, 2012.

[14] B. de Sousa Santos, *Toward a New Legal Common Sense. Law, Globalization, and Emancipation*, Cambridge, 2002.

was mainly interested in those subjects on the margins of society and the way in which they make use of the tools offered by different legal spheres[15], combining them in creative ways in their own struggles for emancipation. This is exactly the case with women belonging to cultural groups who, as a paradigmatic example of «minorities within minorities»[16], are particularly disempowered subjects, both as women *and* as part of a cultural minority. For this reason, in the next section (§ 3) I will focus precisely on the dynamic relation between interlegality, agency and empowerment, arguing that interlegality can create spaces for the exercise of women's agency and, at the same time, this exercise of agency allows interlegality to release its potential for empowerment.

3. *Women's agency and empowerment strategies*

3.1. *Autonomous agency in interlegal contexts*

An important issue within the feminism v. multiculturalism debate concerns the dispute over the ability of women from cultural minorities to express autonomous agency, that is, to act on the basis of autonomous choices. Indeed, Western (liberal) feminists tend to think of women from other cultures as lacking autonomy due to the patriarchal and oppressive social contexts in which they live. Therefore, any choice that appears to be at odds with (supposed) Western values is discredited as the result of false consciousness or an expression of «adaptive preferences»[17]. For this reason, postcolonial feminists have charged Western (liberal) feminists with paternalism, ethnocentrism and gender essentialism, calling attention to the differences that may distinguish women from different cultural or religious backgrounds.

Underneath this contention somehow lies the old question of the definition of the very concept of autonomy.

Attention to the social context in which individuals are embedded is central to the criticisms that some feminists – as well as communitarians, although from a different perspective – have addressed to the traditional liberal concept of autonomy and, more generally, to the abstract, rationalist and atomistic conception of the self that this concept of autonomy presupposes. These criticisms argue that there is no metaphysic, pre-existent and self-sufficient individual that can be separated from its (widely understood) social relations. Nonetheless, postcolonial feminists accuse Western (liberal) feminism of adopting a mistaken «methodological universalism» that

[15] I use 'sphere' for the reasons explained in fn. 6, although Santos would have probably said «order» or «space».

[16] A. Eisenberg – J. Spinner-Halev (eds.), *Minorities Within Minorities. Equality, Rights and Diversity*, Cambridge, 2005. Of course, in the case of women, being a minority should not be understood in terms of numbers but in terms of power.

[17] On the concept of «adaptive preferences», see J. Elster, *Sour Grapes. Studies in the Subversion of Rationality*, Cambridge, 1985.

moves from the characterisation of women «as a singular group on the basis of a shared oppression»[18] (within the men/women dichotomy) and arrives at «the construction of 'Third World Women' as a homogeneous 'powerless' group that is often located as implicit victims of particular socio-economic systems»[19]. In this way, as clearly stated in the seminal article *Under Western Eyes* by Chandra Mohanty, Western (liberal) feminists end up neglecting the fact that «the specific meaning attached to [a] practice varies according to the cultural and ideological context»[20], so that «superficially similar situations may have radically different, historically specific explanations, and cannot be treated as identical»[21].

To be sure, feminist studies on relational autonomy have tried to pay attention to how «agents' identities are formed within the context of social relationships and shaped by a complex of intersecting social determinants, such as race, class, gender, and ethnicity»[22]. They have tried to do so without giving up the concept of autonomy, understood as an important tool for «feminist attempts to understand oppression, subjection, and agency»[23]. According to these studies, attention must be paid to how social (but also legal) norms, institutions, practices and relationships may affect «the range of *significant* options» available to the agent[24]. However, the argument of postcolonial feminists is even more radical, as Mohanty's statements paradigmatically exemplify[25]. She claims, first, that women are not «already constituted as sexual-political subjects prior to their entry into the arena of social relations», but rather, they «are produced through these very relations as well as being implicated in forming these relations»[26]; second, that «the category of women is constructed in a variety of political contexts that often exist simultaneously and overlaid on the top of one another»[27]; and, third, that «it is only by understanding the contradictions inherent in women's location within various structures that effective political action and challenges can be devised»[28].

Therefore, the question is how the concept of autonomy must be «refigured»[29] to account for the social embeddedness of individuals without falling into the pitfalls denounced by postcolonial feminists.

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[18] C.T. Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, in *boundary 2*, 1984, p. 337.

[19] Ivi, p. 339.

[20] Ivi, p. 346.

[21] Ivi, p. 348.

[22] C. Mackenzie – N. Stoljar, *Introduction: Autonomy Refigured*, in *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self*, Oxford, 2000, p. 3-4.

[23] Ibidem.

[24] Ivi, p. 22.

[25] C.T. Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, cit.

[26] Ivi, p. 340.

[27] Ivi, p. 345.

[28] Ivi, p. 346.

[29] C. Mackenzie- N. Stoljar, *op. cit.*, p. 3 ff.

I think that the first step in this direction should be to not only consider, on the negative side, «the specific ways in which oppressive socialization and oppressive social relationships can *impede* autonomous agency»[30], as the theorists of relational autonomy mostly stress, but also, on the positive side, what *creates* significant options for the agent in the specific context in which she is embedded, including interlegality. Indeed, socialisation in interlegal contexts inevitably influences both the «formation of an agent's desires, beliefs, and emotional attitudes» and the «development of the competencies and capacities necessary for autonomy», thus contributing to shape the agent's «ability to act on autonomous desires or to make autonomous choices»[31]. This is confirmed by the growing number of investigations – especially, but not only, within socio-anthropological studies devoted to the relationship between culture and human rights[32] – that demonstrate that women are able to choose their battles and to find their own ways to struggle for spaces of choice and liberty in virtually any social, political, cultural and religious context[33]. These studies also show that, as I will discuss in the next section (§ 3.2), navigating interlegality may often be part of women's strategies for empowerment[34]. Indeed, people who need to come to terms with different and intersecting sets of social, cultural, religious and legal rules learn to deal with them in new and unexpected ways.

3.2. Empowerment strategies: the case of Muslim women's access to justice in Europe

Since the way women deal with interlegality may vary depending on many factors, this section will specifically focus on Muslim women in European countries.

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[30] Ivi, p. 22 (emphasis added).

[31] These are the three levels in relation to which relational autonomy must be investigated according to C. Mackenzie – N. Stoljar, *op. cit.*, p. 22.

[32] For an analysis of the relationship between culture and human rights, see, among others, E. Messer, *Anthropology and Human Rights*, in *Annual Review of Anthropology*, 1993, p. 221 ff.; A.B.S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, in *Human Rights Quarterly*, 1996, p. 286 ff.; R.A. Wilson, *Human Rights, Culture and Context: An Introduction*, in Id. (ed.), *Human Rights, Culture and Context. Anthropological Perspectives*, London, 1997, p. 1 ff.; J.K. Cowan – M.-B. Dembour – R.A. Wilson, *Introduction*, in Id. (eds.), *Culture and Rights. Anthropological Perspectives*, Cambridge, 2001, p. 1 ff.; J.K. Cowan, *Culture and Rights After* Culture and Rights, in *American Anthropologist*, 2006, p. 9 ff.; S.E. Merry, *Transnational Human Rights and Local Activism: Mapping the Middle*, in *American Anthropologist*, 2006, p. 38 ff.; M. Goodale, *Introduction: Human Rights and Anthropology*, in Id. (ed.), *Human Rights: An Anthropological Reader*, Oxford, 2009. p. 1 ff.

[33] At the time of writing this article, for example, a peaceful but tough and firm protest is underway in Iran against the oppression of women imposed by the theocratic regime. As is well known, this protest exploded when Mahsa Amini was killed by the moral police after being arrested for not wearing her headscarf in the correct way. It began as a feminist protest, but it soon turned into a fight for democracy and human rights for all the Iranian people.

[34] For another significant example, see the article by Chiara Correndo in this Special Issue.

Several studies have shown that these women often move back and forth between the different but overlapping legal spheres defined by state and Islamic law. In several circumstances, they also prove to be prone to navigate the sea of international human rights law to challenge one or the other of these legal spheres. For instance, Muslim women who have turned to the European Court of Human Rights have sometimes done it to challenge rules of state law and at other times, to challenge the application of Islamic law. Examples of the first hypothesis are the applications against the prohibition of wearing of the Islamic veil, either the headscarf or the full veil, introduced in several European countries[35]. A significant example of the second hypothesis is the case of *Molla Sali v. Greece*[36].

Therefore, an investigation of the issue of Muslim women's access to justice in Europe requires an examination (without prejudice and preconceptions) of how these women exercise their agency in deciding whether to turn to community-based bodies, state courts or even international human rights courts. In particular, the alternatives of community-based and state-based justice should not be interpreted as an opposition between identity and rights, respectively. On the contrary, identity reasons and strategic considerations often represent the two poles of an ambivalent relationship within which different combinations and points of balance are possible. Indeed, as Pascale Fournier pointed out, «the religious and secular spheres are *not* experienced by [...] Muslim women as two mutually exclusive domains, but rather as one highly complex battlefield that distributes differentiated costs and benefits»[37]. Therefore, Muslim

[35] An overview of the most relevant judgements of the European Court of Human Rights on the issue of Islamic veil can be found in the factsheet on religious symbols and clothing, at https://www.echr.coe.int/Documents/FS_Religious_Symbols_ENG.pdf. Add to this the cases brought before the Court of Justice of the European Union challenging the violation of European anti-discrimination rules in the workplace. See, for instance, ECJ, 14 March 2017, C-175/15, *Achbita*; ECJ, 14 March 2017, C-188/15, *Bougnaoui.*

[36] The case arose out of an inheritance matter. The applicant Chatitze Molla Sali was the sole beneficiary of her husband's will, drawn up before a notary according to the rules of the Greek civil code. However, the deceased's sisters contested the will and argued that since their brother (as well as his wife and themselves) belonged to the Thracian Islamic minority, the applicable law was the sharia and not Greek civil law. At the end of a long and complex court case, the Greek judges ruled in favour of the deceased's sisters and declared the applicability of Islamic succession rules. Deprived of three-quarters of the estate that her husband had bequeathed to her in his will, the widow then turned to the European Court of Human Rights claiming the violation of her rights under Article 14 of the ECHR (principle of non-discrimination) in conjunction with Article 1 of Protocol No. 1 of the ECHR (right to property). For a commentary on this judgement, see, for example, M.C. Locchi, *La minoranza musulmana di Tracia tra protezione dell'identità religiosa, divieto di discriminazioni e diritto all'auto-determinazione*, in *DPCE on line*, 2019, p. 909 ff, www.dpceonline.it. On the legal status of the Thracian Islamic minority in Greece, see Y. Sezgin, *Muslim Family Laws in Israel and Greece: Can Non-Muslim Courts Bring About Legal Change in Shari'a?*, in *Islamic Law and Society*, 2018, p. 235 ff.

[37] P. Fournier, *Please Divorce Me! Subversive Agency, Resistance and Gendered Religious Scripts*, in E. Giunchi (ed.), *Muslim Family Law in Western Courts*, London, 2014, p. 32.

women choose between different venues for dispute resolution by balancing the advantages they feel they can gain in one or the other.

Think of the issue of Islamic divorce. On the one hand, it has been argued that «the outcome of divorce is often perceived and played out [by Muslim women] as a conflict over the economic distribution» of resources between the parties[38]. On the other hand, it must be considered that turning to a sharia-based body to obtain an Islamic divorce that state courts cannot grant may be quite a meaningful and rational option for a Muslim woman in Europe. Indeed, according to Islamic law, while Muslim men can repudiate their wives, Muslim women cannot divorce without either their husband's consent or the intervention of an Islamic judge (*qadi*). However, there are no Islamic judges in European countries and state judges do not have jurisdiction and authority to dissolve Islamic marriages. Therefore, should their husbands deny them Islamic divorce, Muslim women in European countries would not be able to go on with their lives, enter into new relationships or eventually remarry without violating Islamic law. They would be «chained wives»[39]. Even if their civil marriage were dissolved, they would still be trapped in a limping marriage[40]. In this scenario, sharia-based bodies may be a way to fill the denounced gap in the protection of Muslim women's freedom of choice as to how and with whom they spend their lives.

This does not exclude the possibility that Muslim women may choose to turn to state courts in other circumstances or in relation to other issues (for example, economic claims connected to the Islamic divorce). There have been cases in which aspects of the same Islamic divorce have been brought before sharia councils, while other aspects have been brought before state courts[41]. This might not sound new to

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[38] Ivi, p. 39.

[39] On the issue of «marital captivity», understood as «a situation wherein someone is unable to terminate his or her religious marriage, i.e., keeping a spouse 'trapped' in a marriage against his or her will», see S. Rutten - B. Deogratias – P. Kruiniger (eds.), *Marital Captivity: Divorce, Religion and Human Rights*, The Hague, 2019. The notion of marital captivity is not limited to religious marriages but may, in fact, include any situation in which one or both spouses cannot end their marriage, either because the law (including sometimes state law) does not allow it or because factual conditions prevent it or make it extremely difficult.

[40] 'Limping marriage' is an expression borrowed from the doctrine of private international law, which is used to indicate marriages that are dissolved according to one legal system but still valid according to another.

[41] For example, in *Uddin v. Choudhury*, an English judge was called upon to resolve property disputes related to an Islamic divorce pronounced by a sharia council. The first instance judgement has not been published, but the salient aspects of the case are reconstructed in the decree that rejected the request for permission to appeal. This decree is available at http://www.casas.org.uk/papers/pdfpapers/uddinvchoudhury.pdf. For an analysis of this case, see J.R. Bowen, *How Could English Courts Recognize Shariah?*, in *University of St. Thomas Law Journal*, 2010, p. 411 ff. Also interesting is the case of *Akhter v. Khan* in which an English judge who was called upon to dissolve a religious-only Islamic marriage argued against the appropriateness of defining Islamic marriages as «non-marriages». The text of the judgement is available at http://www.bailii.org/ew/cases/EWFC/HCJ/2018/54.html. For an analysis of this case, see P.

those familiar with the idea of «transformative accommodations» proposed by Ayelet Shachar in her analysis of «multicultural jurisdictions»[42]. Her aim is precisely to stimulate positive changes in the living conditions of women belonging to cultural or religious minorities through the provision of institutional mechanisms based on structural competition between state courts and community-based bodies. Her model of transformative accommodation is based on identifying for each legal issue: a) a division of competences between state courts and community-based bodies and b) reversal points that allow people to switch from one justice system to the other if they feel their rights are not adequately protected. The main difference seems to be that in Shachar's proposal, the system of transformative accommodation is conceived as a complex institutionalised mechanism, predetermined and regulated in detail, whereas in interlegal practices, everything happens on the unpredictable initiative of individuals or groups according to changing dynamics and balances.

The issues linked to Muslim women's access to divorce have been much discussed in the United Kingdom (UK) in connection with the spread of several sharia councils issuing Islamic divorces. Many scholars and women's rights activists have argued that sharia councils should not be tolerated because, by applying sharia law, they do not respect women's rights and gender equality. Moreover, critics of sharia councils think that women who seek their intervention instead of going to a state court do so only because of pressures from their families and communities. However, these arguments seem to ignore two main findings of the numerous empirical studies conducted on the legal practices of Muslims in the UK and, specifically, on the activities of the sharia councils.

The first finding concerns the hybrid nature of what has been named «angrezi shariat» (that is, «the emerging Muslim law applied by the Muslim communities living in the United Kingdom» that may be defined as an «expedient combination of Muslim and English law»)[43]. Indeed, while this is not the occasion to consider the complex and plural character of Islamic law – which is far from being as monolithic and static as its critics portray it to be – it must at least be emphasised that Muslim minorities in the UK have developed a new version of it and that the relation of sharia (councils) with English law and (judicial) institutions is very multifaceted and complex (at least in the law in action if not in the law in books)[44].

Parolari, Legal Polycentricity, *intergiuridicità e dimensioni 'intersistemiche' dell'interpretazione giudiziale. Riflessioni a partire dal caso inglese* Akhter v. Khan, *DPCE online*, 2019, p. 2109 ff, www.dpceonline.it. On the notion of non-marriage, see R. Probert, *The Evolving Concept of 'Non-Marriage'*, in *Child & Family Law Quarterly*, 2013, p. 314 ff.; R. Probert – S. Saleem, *The Legal Treatment of Islamic Marriage Ceremonies*, in *Oxford Journal of Law and Religion*, 2018, p. 376 ff.

[42] A. Shachar, *op. cit.*

[43] D. Pearl – W. Menski, *Muslim Family Law*, 3 ed., London, 1998, p. v and 277.

[44] See, among many others, F. Sona, *Giustizia religiosa e* islām. *Il caso degli* Sharī'ah Councils *nel Regno Unito*, in *Stato, Chiese e pluralismo confessionale*, 2016, p. 1 ff; P. Parolari, *Diritto policentrico e interlegalità*

The second finding is that it is not necessarily the case that women who turn to sharia councils do so only because they are forced to by a patriarchal cultural and religious context. It cannot be ruled out that women freely turn to sharia councils to obtain an Islamic divorce either for genuine religious reasons or other strategic reasons, or a combination of both.

In this respect, it is very interesting to examine those studies that have focused on the plurality of ways in which women exercise their agency in deciding whether, when and on what terms to turn to sharia councils[45]. These studies have found that Muslim women's choices of the norms with which to conform and which institutions to entrust with the resolution of their disputes are not to be exclusively read in identity terms, and it would be simplistic to think that women who approach sharia councils are segregated in (religious, cultural, and legal) enclaves, isolated from the rest of society. Indeed, as Rehana Parveen pointed out, «as important as religion is, Muslim women living in the United Kingdom do not experience the breakdown of their [marriage] relationship in a purely 'Islamic' or religious context»; rather, «they navigate that breakdown within the context of English civil law, their own understanding of Islamic law, their social and family ties, and the customary practices of the cultural heritage to which they belong», and «these multiple social fields cannot be isolated from one another»[46].

Sharia councils are, therefore, at the centre of complex dynamics in which religious affiliation coexists with a plurality of other affiliations; legal universes intermingle as a result of discourse shopping processes; and women's agency is expressed (also) through forms of forum shopping (not only between sharia councils and state courts but also between different sharia councils[47]). These dynamics condition the interactions between Islamic law and state law, contributing to a process of renegotiation of the meanings of one and the other. For this reason, the activity of sharia councils cannot be understood independent from the context in which the matrimonial disputes in which they are called upon to intervene arise and develop. Symmetrically, even certain decisions of the English courts on cases of marriage and divorce between Muslim spouses cannot be understood without taking into account

nei paesi europei di immigrazione. Il caso degli sharī'ah councils *in Inghilterra*, cit.; A. Rinella, *La* shari'a *in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, Bologna, 2020.

[45] See, in particular, S. Bano, *Muslim Women and Shari'ah Councils. Transcending the Boundaries of Community and Law*, Basingstoke, 2012. For an overview of other relevant literature, see P. Parolari, *Diritto policentrico e interlegalità nei paesi europei di immigrazione. Il caso degli* sharī'ah councils *in Inghilterra*, cit., especially ch. 4.4.

[46] R. Parveen, *Do Sharia Councils Meet the Needs of Muslim Women?*, in S. Bano (ed.), *Gender and Justice in Family Law Disputes: Women, Mediation and Religious Arbitration*, Waltham, 2017, p. 143.

[47] Sona F. 2014, *Defending the Family Treasure Chest: Navigating Muslim Families and Secured Positivistic Islands of European Legal Systems*, in P. Shah – M.C. Foblets – M. Rohe (eds.), *Family, Religion and Law. Cultural Encounters in Europe*, Farnham, p.133.

the presence of sharia councils and, more generally, of Islamic «minority legal orders» in the UK.

In this scenario, it would be neither accurate nor correct to say that state justice is the venue for the protection of rights as opposed to community-based justice devoted only to the protection of (patriarchal) traditions to the detriment of women. On the contrary, each of these *fora* can play an important function in the construction of the empowerment strategies that Muslim women, as endowed with agency, from time-to-time choose to implement according to their concrete goals. As has been pointed out, informal sharia-based dispute resolution practices produce «a myriad bargains and outcomes, shaping agency and bindingness in ways that require empirical assessment, diverging as they do from the classical Islamic law model»[48].

All of this is interlegality. As a source of (new) significant options, it may create margins of agency within which women's empowerment strategies can be conceived and implemented. Of course, the relation between interlegality, agency and empowerment cannot be simply taken for granted. For instance, one could actually argue that interlegality does not necessarily produce spaces of agency and forms of empowerment, because the absence of an univocal and uncontested legal order may generate a sense of bewilderment and conflict, or undermine the certainty of law and the principle of equality, thus amplifying power imbalances within society. It could also be argued that interlegal empowerment strategies are not common practices, that they are the exception rather than the rule, and that they are at best a prerogative of the most privileged women. Further extensive empirical research would be needed, worldwide, to clarify these issues. For sure, the conditions for the exercise of women's agency are multiple and complex, go far beyond interlegality, and are still largely compromised in many cases, especially in less developed countries. But still, within its own limits, interlegality represents a potential seed for change.

4. *Beyond gender and cultural stereotypes: benefits of a cross-fertilisation between gender studies and interlegality studies*

The empowerment strategies mentioned in § 3.2 challenge the intersectional (cultural *and* gender) stereotypes[49] according to which Muslim women (or more

[48] P. Fournier, *op. cit.*, p. 38.

[49] According to Ghidoni and Morondo, gender stereotypes are constitutively intersectional: «Both patriarchy and its precipitates or products (including stereotypes) are constituted in a way that already condenses multiple hierarchical levels, according to the combination of axes, so that within the same system of oppression there will be a greater or lesser degree of invisibility of the other axes, determined by the crossing and positions of greater or lesser 'privilege' in relative terms» (See E. Ghidoni - Morondo Taramundi, *Análisis contextual, interseccionalidad y función justificativa de los estereotipos en el derecho: una réplica*, in *Discusiones*, 2022, p. 117-118, my translation). I am inclined to think that a similar argument can be made in relation to cultural stereotypes.

generally in Mohanty's words, «third world women») are simply passive victims who need to be saved from their patriarchal religion, family and community. Such strategies call us to pay more attention to the heterogeneity of the ways in which women may relate to the plurality of their affiliations and to the rules that each of these affiliations brings with it, focusing on the margins of agency that women carve out in their lives and, thus, avoiding both paternalism and ethnocentrism. At the same time, the plurality of ways in which Muslim women use state and Islamic laws as well as state courts and sharia councils show that, in contexts of interlegality, «what is plural is not only normative orders and sources of law but also *pathways to decisions, strategies and outcomes*»[50].

In this scenario, cross-fertilisation between gender studies and interlegality studies can bring many benefits. On the one hand, the gender perspective helps legal pluralism studies to get rid of cultural essentialism and to stop thinking only in terms of homogeneous identities and enclaves, because it draws attention to minorities within minorities and how autonomy and agency – understood in relational terms – can go beyond the alternative between liberalism and communitarianism. On the other hand, the focus on the interlegal dimensions of multicultural societies helps feminist studies to avoid gender essentialism. By introducing (normative and) legal complexity into the framework of analysis, interlegality reminds us that women are not only shaped by the (cultural, religious, social, political and) legal context in which they live but actively contribute to shaping it through choices and practices that make use of this complexity as a tool for empowerment.

In other words, the cross-fertilisation between gender studies and interlegality studies calls us to take note that the point is not to decide *a priori*, once and for all, what jurisdiction is more respectful of women's rights, thereby denying legitimacy to any other mechanism or institution for dispute resolution. Rather, the point is to look at the concrete practices implemented by women for managing the legal complexity in which they are immersed, trying to figure out how to foster their empowerment through the maximisation of their margins of agency.

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ABSTRACT: Abstract: By looking at the strategies of agency and empowerment enacted by women in contexts of interlegality, the article attempts to overcome the uncritical perpetuation of both cultural and gender stereotypes that still fuel the feminism v. multiculturalism debate, arguing that, on the one hand, interlegality creates spaces for the exercise of agency and, on the other hand, the exercise of agency unleashes the empowerment potential of interlegality.

[50] J. Halley, *Forward*, in P. Fournier, *Muslim Marriage in Western Courts. Lost in Transplantation*, Farnham, 2010, p. xvi.

RIVISTA DI
DIRITTI COMPARATI

ABSTRACT: Osservando le strategie di *agency* ed *empowerment* messe in atto dalle donne in contesti di interlegalità, l'articolo tenta di superare la reiterazione acritica degli stereotipi sia culturali che di genere che ancora alimentano il dibattito femminismo v. multiculturalismo, sostenendo come, da un lato, l'interlegalità crei spazi per l'esercizio dell'*agency* e, dall'altro, l'esercizio medesimo dell'*agency* sprigioni il potenziale di *empowerment* dell'interlegalità.

KEYWORDS: interlegality – multiculturalism – gender – agency – empowerment.

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RIVISTA DI
DIRITTI COMPARATI

Are European democracies good for Muslim women? The challenging question of Muslim women's political participation and representation in European constitutional states*

Maria Chiara Locchi

TABLE OF CONTENTS: 1. Introductory remarks. – 2. «European Islam» and «European Muslim women»: some clarifications. – 3. The political participation and representation of Muslim women in Europe: political and legal conditions. – 3.1. Political participation. – 3.2. Political representation. – 4. Concluding observations.

1. *Introductory remarks*

The opportunity to reflect on the issue of Muslim women's political participation and representation in Europe is given by the ELaN Final Conference dedicated to «Access to Justice: A Gender Perspective» and, in particular, by the Panel devoted to the challenging connection between access to justice, gender and multiculturalism. Such a connection evokes two main fields of analysis: on the one hand, the actually crucial role played by (constitutional, supranational and international) courts in responding to the claims of historically marginalized minorities and groups in multicultural societies; on the other hand, ADR (Alternative Dispute Resolution) processes as instruments of «privatizing diversity»[1] and, more generally, the recognition of cultural and religious minorities as (even just *de facto*) autonomous legal orders and jurisdictions.

Within the rich academic literature about the impact of the increasing cultural and religious diversity on European immigration countries' political and legal systems, the question of minority women's (and especially of Muslim women's) condition is indeed central, with a focus on the tension between some cultural and religious traditions and practices and fundamental principles and rights protected by both

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[1] A. Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, in *Theoretical Inquiries in Law*, 2008, p. 573-607.

international and constitutional law. Nevertheless, the issue of women's rights in relation to cultural/religious diversity is comparatively less addressed, especially by law scholars, with regard to the political sphere – namely to the impact on political participation and representation in European pluralistic and multicultural democracies. Given the lack of consolidated studies in the field, is it possible and, eventually, useful to use the lens of access to justice as a frame of reference?

The answer is obviously related to the semantic extension of the notion «access to justice», which, in its narrow sense, refers to having a case heard in a court law. Nevertheless, if we use access to justice as an expression encompassing all the elements needed to enable citizens to demand that their rights are upheld, the political sphere is likely to fall within its definition, to the extent that access to justice can be understood as the access to a full and effective involvement in the democratic circuit.

As a matter of fact, speaking about religious minority and migrant women in Europe (and, in particular, about Muslim women), maybe the answer is even simpler than that and there is no need to make any effort of reconceptualization in light of a formalistic justification. Keeping together access to justice, Muslim women and political participation/representation is intended to show that there is a problem: in fact, Muslim women hopefully succeed in having their rights protected (and, even before that, in being acknowledged as citizens) in the legal/judicial domain, so that the courts are confirmed as the ultimate (if not unique) defenders of the fundamental rights and liberties for those subjects who are, formally or substantially, prevented from participating in the political process. However, as it is well known, the exclusion of a significant part of the population from the process of discussing and adopting those decisions that will also affect their own condition, and that of their communities, indicates that there is a tension, if not a short-circuit, between access to justice, rights' protection, democracy, gender and cultural/religious diversity.

The aim of the paper is to contribute, with some preliminary considerations from a public comparative law perspective, to the debate on the problematic political dimension of minority rights' protection (and especially of Muslim women's rights) in European constitutional States. To do that I will preliminarily focus on the relevant aspects of some concepts that mark the perimeter of the analysis of Muslim women's political participation and representation (par. 2) and, subsequently, try to map the conditions of Muslim women's active presence in the political arena by identifying some political and legal factors that affect both its quantitative and qualitative dimension (par. 3); some final considerations will be made in par. 4 by way of conclusion.

2. *«European Islam» and «European Muslim women»: some clarifications.*

As of mid-2016 the Pew Research Center estimated the Muslim population in Europe (to this end including the United Kingdom, Norway and Switzerland) at 25.8

million (4.9% of the overall population), a number that has increased since 2010 (when it was 19.5 million - 3.8%) and is expected to further rise by the 2050, even with a «zero migration» scenario (to 7.4%)[2].

Providing a comprehensive picture of this population of almost 30 million people proves to be impossible since the highly differentiated features of European Islam prevents the identification of unitary trends; in fact, not only the origins of Muslim communities' presence in European countries are marked by relevant differences (in terms of the time of their creation and the geographical areas of origin of the population), but the complex processes of interactions and reciprocal adaptations with ethnic and religious majority population as well as with the legal and political institutions of European States have also contributed to increase this diversity[3]. The inner plurality of European Islam, which stands for a fluid and porous conception of cultural and religious identity, is also reflected by the syncretism of theological doctrines and religious practices: as Zahalka effectively remarks, European Muslims «might pray at a mosque with a *salafi* imam, seek the answers to their questions from *wasatī* leaning religious adjudicators, and read *sala* literature, all while imitating the general, non-Muslim population in their everyday lives»[4].

The distinctive feature of European Islam is being a minority Islam, in terms of Muslim communities residing in non-Islamic countries. Nevertheless, this very fact has been differently conceptualized by those Muslim intellectuals who have been reflecting, in particular, on the relationship between European Muslim communities and Western State institutions and on the role of Islam in the public and political space of European States[5]. While Hashas, for example, argues that «European Islam is possible theologically and politically», to the extent that Islamic theological and theoretical concepts are reinterpreted and recontextualized in European politics and societies[6], Cesari hopes that the concept could mean the «symbolic integration of the Islamic heritage and cultural practices within different European national cultures without endangering the basic principle of equality between citizens»[7].

European Muslim communities thus appear diversified with regard to their organization, public discourse as well as typology and extension of their demands to the State. This differentiation surely depends on their internal debate about the

[2] Pew Research Center, *Europe's Growing Muslim Population*, November 29, 2017, https://www.pewforum.org/2017/11/29/europes-growing-muslim-population/.

[3] See the monographic issue of Oasis, 28 (2018), dedicated to *Musulmani d'Europa. Tra locale e globale* and, in particular, J. S. Nielsen, *L'Islam europeo. Tendenze e prospettive*.

[4] I. Zahalka, *Shari'a in the Modern Era. Muslim Minorities Jurisprudence*, Cambridge, 2016, p. 139.

[5] For a thorough analysis of European Islamic theology's contribution to the debates related to secular-liberal democracies of Western Europe see M. Hashas, *The Idea of European Islam. Religion, Ethics, Politics and Perpetual Modernity*, London, 2019.

[6] M. Hashas, cit., p. 3.

[7] J. Cesari, *Conclusion: Is There a European Islam?*, in J. Cesari (ed.), *The Oxford Handbook of European Islam*, Oxford, 2015, p. 805.

conditions and characteristics of a possible adaptation of Islamic principles and rules to the specific and local context in which Muslims are a minority population[8], but it is also affected by the various models of both State-religion relationships[9] and integration policies in Europe[10].

In France, as is well known, the fundamental principle of secularism, in its militant version (*laicité de combat*), has been interpreted as implying: on the one hand, that the State does not recognize any religion and must be neutral towards all denominations and, on the other hand, that no one can use his religious creed in order to overcome the common norms governing the relationship between public authorities and individuals[11]. As a consequence, the focus on the *assimilation* to the Republican values results in the active opposition to (the alleged) Muslims' tendency to communalism, in terms of creating their own Islam-based associations (such as mosques or schools) and following religious values and rules instead of (or even in addition to) State law[12].

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[8] The difficulty of taking a position on the very controversial issue of «creative» interpretation of scriptures, so as to derive general principles from specific rules given in scriptures and adapt them to the local context and present time, appears to be higher in those countries where the public expression of cultural and religious identity is stigmatized, if not prohibited.

[9] The constitutional model of Religion/State relations deeply shapes not only the formal rights and duties of religious (minority) communities, but also the perception of their actual presence in the social and political domain. The Italian case is emblematic in this regard: due to political and socio-cultural reasons – related to both the history of Italy as a «country with a strong dominant religion and weak state institutions» (A. Ferrari – S. Ferrari, *Religion and the Secular State: the Italian case*, in *Religion and the Secular State: National Reports* (ICLRS 2010), Madrid, 2014, p. 432) and the peculiarity of the Italian thematization of «secularism» (*laicità*) – the «institutional» dimension of religious freedom is relevantly marked by the instrument of the bilateral agreement between the State and religious denominations. For many different reasons, including the intrinsic characters of Islam in terms of the lack of a unitary organization, the Italian State has not been able to reach a formal agreement with the articulated reality of Italian Muslim communities so far, with growing tensions affecting Muslims' relationship with the State, see A. Pin, *The Legal Treatment of Muslim Minorities in Italy. Islam and the Neutral State*, London and New York, 2016.

[10] The complex and controversial term «integration» has been undoubtedly at the centre of European States' policies on migration-related cultural and religious diversity since the beginning of the twenty-first century. In fact, the securitarian turn post 11/9 has reoriented both public discourse and legislations in Western immigration states, especially with regard to Muslim migrants: the focus is now on social cohesion as implying the integration into the national community in terms that, at least in the mainstream version sanctioned by immigration laws, seem indissociable from cultural homologation.

[11] Dec. 2004-505 of the French Constitutional Council, 19 Novembre 2004, par. 18. Nevertheless, as a liberal and democratic constitutional State, France protects religious freedom as a fundamental right, under both national constitutional and international provisions.

[12] The 2021 «Law strengthening the respect for the principles of the Republic» (*Loi n° 2021-1109 du 24 août 2021 confortant le respect des principes de la République*) may be considered as the last piece, on the State side, of the complex *puzzle* of French model of Muslims' integration. For some critical considerations on the law see, among others, F. Khosrokhavar, *Le débat censuré*, in *Orient XXI*, 2020, https://orientxxi.info/magazine/le-debat-censure,4262. The issue of political participation has been also debated in the context of this legislative process: in March 2021 the French Senate had amended

The British model of State-religion relationship and integration of diverse communities is based on a profoundly different approach, which may be framed as pluralist or multicultural to the extent that it tries to promote an open and inclusive citizenship while enforcing cultural rights of minority groups. The British legal system can thus be viewed as oriented to both eliminating *de facto* discriminations by ensuring equal opportunities and taking ethnic, cultural and religious differences into account[13]. Cultural rights and equal opportunities for minority communities, in particular, have been mostly developed at the local level, thanks to the crucial contribution of religious and ethnic-based associations[14]. The British experience has been therefore marked by a relevant presence of minority groups in civil society and the political arena; Muslims have been politically active since their arrival in Britain, back in the 19th century, even if their political engagement has risen as a reaction to growing Islamophobia in 1988-1989 (after the *The Satanic Verses* affair) and more recently after 9/11 and the 'War on Terror'[15].

Germany and Italy are, for their part, characterized by yet another different migration history and integration policies.

In Germany the differentialist turn of the 1980's and 1990's deeply questioned the concept of assimilation, with all its burdensome legacy in terms of forced germanization[16]. The *focus* of cultural and religious minorities' integration policies was on social rights, and in particular on school (with the introduction of a specific curriculum on immigrants' language and religion of origin) and social welfare (engaging immigrants' associations and communities, including Muslim ones, to provide for social benefits)[17]. Nevertheless, the increasing visibility of Islam and its place in German civil society and public space, especially from the 1990's, led to a growing identification with Islam among immigrants themselves: from this perspective, «the growing interest of Muslims in becoming members of political parties and contributing

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the text introducing an explicit, and highly controversial, ban on «communitarian lists», identified in relation to one or more candidates having made public statements contrary to the principles of national sovereignty, democracy or secularism in order to support the demands of a «portion» of the people based on the ethnicity or religious affiliation. The ban wasn't ultimately included in the final draft of the *loi*, whose Art. 35-1 forbids to hold political meetings as well as to display, distribute or disseminate electoral propaganda in facilities normally used as a place of worship.

[13] A. Rinella, *La shari'a in Occidente. Giurisdizioni e diritto islamico: Regno Unito, Canada e Stati Uniti d'America*, Bologna, 2021, p. 73-74 and 177 ff.

[14] See C. Joppke, *Immigration and the Nation-State: The United States, Germany, and Great Britain*, Oxford, 1999, p. 208 ff., and Id., *Is multiculturalism dead?*, Cambridge, 2017, p. 127 ff.

[15] T. Peace, *Muslims and Political Participation in Britain*, London, 2015, p. xv.

[16] On the side of citizenship's acquisition, in 1999 the nationality law was reformed by relaxing the right of blood (*ius sanguinis*) in favor of the right of birthplace (*ius soli*), facilitating residence-based naturalisation and allowing, albeit in exceptional circumstances, dual citizenship; as for integration policies, the communitarian approach implemented within the *Gasterbeiter* model has proved to be functional to a detached tolerance and institutionalized separation between nationals and immigrants.

[17] A. Rinella, cit., p. 70-71.

to the media as well as the developing influence of Islamic associations in public life can be interpreted as an increasing naturalization of Islam in German society»[18].

The Italian approach to the integration of Muslims is hardly correspondent to a real model: the Italian non-strategy, based on a non-aggressive version of secularism, quite paradoxically has allowed Muslim migrants to integrate themselves into society in a relatively natural way. The absence of harsh conflicts with State institutions in the integration process of Muslim migrants, on the other hand, does not automatically mean the dilution of their religious identity, which, on the contrary, can be mobilized as a resource for civic and social action, thus investing public space and contributing to change it[19]. However, while in recent years the activism of the various associations aiming at representing the Italian Muslim community has led to the intensification of the institutional dialogue with the State, political participation and representation does not seem to have undergone any significant development[20]. In fact, the existing scholarship on Italian Muslims suggests that, even though they are more involved with political activities than they were two decades ago[21], their political participation remains «surprisingly limited»: Italian Muslim communities remain less engaged compared to Muslims in France and the UK and face strong and growing anti-Muslim sentiment, without their political activism leading to a notable impact in national politics[22].

Lastly, the variegated picture of European Islam is also related to the different ways of its institutionalization, an articulated concept that encompasses the plurality of political and institutional actors aiming at representing Muslim communities'

[18] G. Nordbruch, *Germany: Migration, Islam and National Identity*, Center for Mellemøststudier, 2011, p. 11. These developments have not occurred without resistance, as demonstrated by public debates on the (alleged) threat to German «lead culture» («*Leitkultur*»), «Christian-Occidental culture» («*christlich-abendländische Kultur*») or «Judea-Christian civilization» («*Jüdisch-christliche Zivilisation*») posed by cultural and religious minorities' practices and demands.

[19] M. Brignone, *L'islam in Italia, tra partecipazione civica e reti transnazionali*, in *Quaderni di diritto e politica ecclesiastica*, 2019, p. 18.

[20] In 2017 an «Islamic constituent (assembly)» (*Costituente islamica*) has been instituted, in order not to act as a political party but to represent Italian Muslims as an «ente esponenziale» (a representative body aiming at protecting collective interests); as of March 2021, however, the *Costituente islamica* does not seem to be operational. In 2020 the creation of a new Islamic electoral list, the *Nuova Italia*, was announced: the new political movement, based in Magenta (in the metropolitan area of Milan), has run for the 2022 administrative elections but gained no local councilors.

[21] For example, protests and non-electoral means of participation, voting and running for office, building Muslim civic and political organizations (such as the UCOII – Union of Islamic Organizations and Communities in Italy; the COREIS – Islamic Religious Community; the GMI – Young Muslims of Italy; the ASMI – Association of Muslim Women in Italy.

[22] J. Pupcenoks, *The Difficulties of Italian Muslim Political Mobilization: Anti-Muslim Sentiment and Internal Fragmentation*, in *Journal of Muslim Minority Affairs*, 2021, p. 233-249. The main challenges to participation, in particular, are represented by the extremely negative popular opinion of Islam and discrimination against Muslim as well as by great internal fragmentation within the Italian Muslim communities themselves.

interests and demands[23]. These different instruments and subjects may range from Muslim public actors freely active within Muslim communities in European countries[24] and associations spread out from a strong civil society mobilization[25] to Islamic representative bodies and/or forums for dialogue aiming at consulting with the State on matters affecting Muslim communities [26] and organizations institutionally linked to migrants' countries of origin[27].

Within the notion of European Islam, the very concept of European Muslim women – as well as the many, specific, implications of the issues already discussed on Muslim women – prove to be marked by an even greater complexity, which this paper doesn't aim to systematically explore.

What it is useful to stress, in the context of our analysis, is the specific vulnerability of European Muslim women, who are often immediately identifiable as belonging to a cultural/religious minority because wearing a religious symbol (e.g. a headscarf – which may consist in a *hijab*, a *niqab* or a *burqa*) and are therefore more exposed to discriminatory treatment and harassment in a broad range of contexts not only as women, but also as minority members[28]. Their experience of discrimination must therefore be understood as intersectional, to the extent that it «cannot be

[23] For a taxonomy «on the basis of the approach used by state or promotion of these bodies» see S. Silvestri, *Public policies towards Muslims and the institutionalization of 'Moderate Islam' in Europe. Some critical reflections*, in A. Triandafyllidou (ed.), *Muslims in 21st Century Europe*, London, 2010, p. 51.

[24] Bowen identifies different types of Islamic public actors, «each with specific claims to legitimacy and specific bases in social institutions, particularly religious schools, mosques (imams), and Islamic associations», since the traditional Islamic institutions that define specific authorities (such as *muftis*, *'ulamâ*, and *faqîhs*) are «virtually absent from Europe», J. R. Bowen, *Can Islam be French? Pluralism and Pragmatism in a Secularist State*, Princeton, 2010, p. 24.

[25] The CEM (Council of European Muslims), based in Brussels, for example, defines itself as a «cultural organization», «the largest Islamic organization in Europe», bringing together hundreds of varied associations with the aim of «publicising Islam, inspiring and supporting Europe's Muslims to practise the rituals of their faith, and participate effectively in the varied aspects of life, within a frame of moderate understanding and a reformist, innovating approach». For a critical analysis of the CEM see G. Spanò, *Islamic activism: between representation and representativeness. Two case studies in Europe*, in *Revista General de Derecho Público Comparado*, 2021, p. 1-31.

[26] In the 1980's and 1990's many European governments (e.g. France, the Netherlands, Belgium and Germany) tried to find ways to organize Muslim representation: although these attempts were not always successful, they had the benefit of being a good learning experience for both government and Muslim groups, see F. Fregossi, *L'Islam en Europe, entre dynamiques d'institutionnalisation, de reconnaissance et difficultés objectives d'organisation*, in *Religions, Droit et sociétés dans l'Europe Communautaire*, 2000, p. 91-117.

[27] See, for example, the interesting case of the Moroccan Council of *'Ulamā'* for Europe (and its Brussels-based local section – the European Council of Moroccan Ulema) as part of the Moroccan diaspora policies, F. Tamburini, *The Moroccan Council of* 'ulamā' *for Europe: the development of a 'remarkable model' of Islam for Europe or just another form of state control on religion?*, in *Revista General de Derecho Público Comparado*, 2021, p. 1-27.

[28] Academic research indicates that Muslim women, and especially women with migrant background, face multiple or intersectional discrimination in the fields of employment and education, and particularly face barriers in accessing healthcare services.

regarded as solely based on their religion» but has to be «recognised as additionally situated on the grounds of gender and ethnic origin»[29]. Recent surveys by the FRA (European Union Agency for Fundamental Rights) confirm Muslim women's increased exposure to the risk of having their fundamental rights (e.g. the right to manifest one's religion or belief, in worship, teaching, practice and observance; the prohibition of discrimination on ground of religion or belief) violated[30].

Ayelet Shachar very effectively depicted minority women's difficult condition in terms of «multicultural vulnerability», a paradoxical situation entailing that some individuals within minority groups (in particular, women and minors) suffer disproportionate costs for preserving their group's identity: either they agree to be protected as individuals (in the light of a re-universalized citizenship that gives precedence to individual freedoms at the cost of cultural and religious identity) or they are rather recognized by state authorities as minority members (bearing those unavoidable costs related to the compression of individual rights and liberties)[31]. In fact, for Muslim women being protected from discrimination and violence as individuals, State policies and law often seem to require them to renounce to their personal identity, which is (not only, but also) thematized in more visibly cultural and religious terms as members of minority groups. As the Open Society Institute reports, many Muslim women perceive their only options as being «to accept their exclusion from mainstream employment or to remove their headscarf»[32].

The ambiguous and contradictory position of Muslim women can be appreciated also from a different viewpoint. Western States policies, as well as public and political discourse, are marked by both paternalism and securitization: Muslim women, typically ethnicized so as to intensify their perception as Others, are portrayed as, at the same time, religious fundamentalist and in need to be saved – where being saved from the

[29] C. Donegan, *Thinly Veiled Discrimination: Muslim Women, Intersectionality and the Hybrid Solution of Reasonable Accommodation and Proactive Measures*, in *European Journal of Legal Studies*, 2020, p. 144-145. On the concept of intersectionality in antidiscrimination theory see K. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, in *University of Chicago Legal Forum*, 1989, p. 139-167.

[30] See European Union Agency for Fundamental Rights, EU-Midis II, *Second European Union Minorities and Discrimination Survey* – on *Muslims* (2017) and *Migrant Women* (2019). The EU-Midis II Survey on Muslims, in particular, shows that «just under one third (31 %) of Muslim women who wear a headscarf or niqab in public experienced harassment because of their ethnic or immigrant background, compared to just under one quarter (23 %) of women who do not wear a headscarf or niqab. More than one third (39 %) of all Muslim women who wear a headscarf or niqab in public experienced inappropriate staring or offensive gestures in the 12 months before the survey because they did so, with more than one fifth (22 %) experiencing insults or offensive comments. Two percent were physically attacked», p. 13.

[31] A. Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights*, Cambridge, 2001, p. 3-6.

[32] Open Society Institute, *Muslims in Europe: A Report on 11 EU Cities*, 2010, p. 127.

oppression actually means «being more like us in the West»[33]. The many judicial decisions, by both national and international courts, on Islamic veil show this short-circuit finally resulting in the violation of women's fundamental rights; from this perspective, «the desecuritization of the veil involves removing covered Muslim women from the political and legal security agenda. Desecuritization might best be practiced through creative, every-day micro practices and the production of counter-narratives»[34] that challenge the monolithic image of Muslim women[35].

From the specific standpoint of political participation and representation, it is confirmed that traditionally ethnic and religious minority women have undergone a specific disadvantage due to the «multiple jeopardy» of intersectional discrimination[36]. In the next paragraph some specific considerations about the legal constraints affecting minorities' political rights will be developed; what it is important to stress here is that Muslim women suffer the limits of political participation/representation due to their double condition of women and members of a religious minority.

As for the controversial issue of gender discrimination in politics, is well known that, although gender equality is sanctioned as a fundamental principle by international and European law as well as national constitutions, women are generally still under-represented at all levels of decision-making worldwide, and, for what interests us most, in the EU[37]. No EU-wide research exists on diversity of women in politics, but the data available suggest that women groups such as ethnic and religious minorities (or LGBTI women, older or younger women, women with disabilities) are under-represented[38]; the same can be concluded with regard to women's political

[33] N. Mustafa, *Muslim Women don't need saving. Gendered Islamophobia in Europe*, Amsterdam, 2020, p. 5.

[34] A.J. Edmunds, *Precarious bodies: The securitization of the 'veiled' woman in European human rights*, in *The British Journal of Sociology*, 2020, p. 324, who additionally observes: «To counter the securitization of the veil and the complicity of judicial human rights in this, there needs to be relentless rebellion rooted in the combined resistance of human rights groups, Muslim women of various persuasions, feminists, the left and anti-racists through realizing that framing the bans on the veil in terms of national security and gender oppression has served to disguise the neo-colonial agenda underpinning them and to decolonize the language of security which has demanded assimilation and an enforced 'whiteness' of the public space dependent on age-old regulation of women's bodies under colonialism», p. 325.

[35] For a critical perspective on the dichotomy between the liberal modernity and the illiberal and anti-modern traditional practices, resulting in the conceptualization of personal autonomy necessarily in opposition to religious groups' autonomy, see the interesting analysis of S. Bano, *Agency, Autonomy and Rights. Muslim Women and Alternative Dispute Resolution in Britain*, in S. Bano (ed.), *Gender and Justice in Family Law Disputes. Women, Mediation and Religious Arbitration*, Waltham, 2017.

[36] V. Purdie-Vaughns - R.P. Eibach, *Intersectional invisibility: The distinctive advantages and disadvantages of multiple subordinate-group identities*, in *Sex Roles: A Journal of Research,* 2008, p. 377–391.

[37] For an updated gender statistics database see https://eige.europa.eu/gender statistics/dgs/browse/wmidm/wmidm_pol.

[38] European Parliamentary Research Service, *Women in politics in the EU. State of play*, Briefing, March 2021, p. 5.

participation other than representation in parliaments, that is still marked by persisting gender inequalities[39].

As for the other relevant issue of cultural and religious minorities' political participation/representation, although «scholarship on minority representation in Europe is in its infancy»[40], the existing research on the topic, and especially on Muslim minority representation, is «unanimous in diagnosing the underrepresentation of Muslim minorities in almost all the Western legislatures»[41]. As reported by a 2020 study[42], the UK has a comparatively higher percentage rate of parliamentarians with minority background (65 MP's – 10% of the *House of Commons*) than that of other important European immigration countries such as Germany (58 – 8,2% of the German Federal Parliament) and France (35 – 6,4% of the National Assembly[43]); however, if the *House of Commons* reflected the UK population (14.4% ethnic minorities in 2019) there would be around 93.

These brief remarks make it clear that the political participation and representation of European Muslim women in EU constitutional States represents a highly articulated field of analysis, not only in relation to the complexity of the concepts involved but also because they interrelate in innovative ways. In fact, most Muslims in sociological terms[44] «do not take active roles in debates about Islam, do not always highlight that dimension of their identity in their everyday lives»[45]; but, if they wish to do so, they are likely to face multiple challenges and discriminations at both the political and legal level, that will intensify with respect to women because of intersectional discrimination.

[39] F. Kostelka - A. Blais - E. Gidengil, *Has the gender gap in voter turnout really disappeared?*, in *West European Politics*, 2019, p. 437-463, recording lower levels of interest in politics among women and their lower levels of knowledge about politics, especially when it comes to second-order elections.

[40] I. Bloemraad - K. Karen Schönwälder, *Immigrant and Ethnic Minority Representation in Europe: Conceptual Challenges and Theoretical Approaches*, in *West European Politics*, 2013, p. 565.

[41] S. Aktürk - Y. Katliarou, *Institutionalization of Ethnocultural Diversity and the Representation of European Muslims*, in *Perspectives on Politics*, 2021, p. 391.

[42] E. Uberoi - R. Lees, *Ethnic diversity in politics and public life*, London, 2020.

[43] At the 2022 elections there has been a slight decline and now minority representatives are 32.

[44] That is to say people whose cultural and religious background is related to the Islamic tradition, even if they are not actual «practicing believers».

[45] J. R. Bowen, cit., p. 11.

3. *The political participation and representation*[46] *of Muslim women in Europe: political and legal conditions.*

3.1. Political participation

The presence of Muslim politicians, and Muslim female politicians in particular, within European political parties, both secular and religiously oriented, is a multifaceted issue with many legal, political, and sociological implications.

As for secular parties, Muslims may wish to join a political party expressly mobilizing as Muslims, that is to say declaring their Islamic background and supporting an Islamic oriented political agenda, or not. This second option is the prevailing one, to the extent that «generally the representation of Muslims in political positions, like municipal councils, parliaments or government, is […] often not on a religious ticket as 'Muslim', but on a political ticket such as socialist, liberal and even Christian Democrat»[47].

The possibility for Muslim women to get involved in party politics (in terms of being a party member, participating in election campaigns, standing as a candidate on behalf of a party, etc.) appears to be affected by two main factors.

A first one is related to the attitude of political parties towards the inclusion of cultural and religious minority. A research on Muslim women's participation in political process and structures in France and Great Britain shows that, although in both countries the majority of Muslim women claimed a high or fairly high level of interest in political life, when it comes to party political activism, they tend to be «occasional participants»[48]. In Germany Muslim women are also underrepresented due to several reasons, including insufficient efforts by political parties; moreover, within a challenging context that makes it difficult for migrant female politicians to participate

[46] For political participation I mean the ability to join and be active within both political parties and cultural or religious associations operating in the civic and political domain; political representation refers to the possibility for someone to be enabled to speak and act with authority on behalf of someone else.

[47] See M.S. Berger, *A Brief History of Islam in Europe: Thirteen Centuries of Creed, Conflict and Coexistence*, Leiden, 2014, p. 211.

[48] D. Joly - K. Wadia, *Muslim Women and Power. Political and Civic Engagement in West European Societies*, London, 2017, p. 128, 130. In France, «while a small number of women of Muslim background […] have held significant posts in French government, these have been the gift of incumbent presidents (Sarkozy and Hollande) wishing to be lauded as promoters of ethnic diversity. These women have also run for and won elections at the municipal and regional level but it is noteworthy that none, apart from Rama Yade […] were selected as candidates by their respective party to run in a parliamentary election», p. 130-131.

in politics and be represented, religion appears to be a «category of difference» that does not overlap with and cuts across migration background[49].

The fact that Muslim women, by wearing a headscarf or a veil, visibly show their (cultural and religious) identity generally triggers a sort of presumption of being culturally and religiously connotated. Muslim women are therefore automatically ascribed to a controversial group exposed to an «anxious scrutiny»[50] – a group that is defined in religious (or rather, fundamentalist religious) terms, but is also affected by a process of ethnicization that involves being trapped in a specific ethnic and/or religious identity determining how that person is represented and what topics she can address[51]. This complexity, that is nearly always neglected on the political level, has been highlighted in the following terms: when actively engaged, Muslim women are «coopted because they are a good sample of secular Muslims (*i.e.*, they do not wear the *hijab*, they do not wear modest clothes)», or, on the contrary, they are «involved *because* they are veiled and can therefore become a good vehicle in order to win the support both of the Muslim community and of its sympathizers»[52].

The second factor is about the legal obligations related to the principle of non-discrimination, since political parties may, directly or indirectly, exclude or disadvantage persons as Muslims.

Generally speaking, in consolidated democracies this doesn't happen; in fact, political parties' statutes and internal regulations do not generally contain restrictive clauses on the basis of ethnic or religious affiliation. In the United Kingdom, for instance, there is a specific legislation aimed at guaranteeing an equal access to political parties' membership and parties are also allowed to undertake positive actions to overcome the under-representation of particular groups within elected bodies. Also in light of these legal obligations, the main British parties have adopted internal codes of conduct that bind members of the parliament, party officials and party members to respect equality, diversity, tolerance[53]. Obviously, the lack of formal restrictive clauses on party membership does not automatically imply that Muslim citizens, and Muslim women in particular, actually do have an effective space for political participation on

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[49] A. Jenichen, *Muslimische Politikerinnen in Deutschland: Erfolgsmuster und Hindernisse politischer Repräsentation*, in *Femina Politica*, 2018, p. 70-82.

[50] S. Mullally, *Civic Integration, Migrant Women and the Veil: at the Limits of Rights?* in *The Modern Law Review*, 2011, p. 28, who observes that «Muslim women have been placed at the center of such scrutiny».

[51] M. Nadim, *Ascribed representation: ethnic and religious minorities in the mediated public sphere*, in A.H. Midtbøen - K. Steerjohnsen - K. Thorbjønsrud (eds.), *Boundary Struggles: Contestations of Free Speech in The Norwegian Public Sphere*, Oslo, 2017, p. 230.

[52] A. Vanzan, *Veiled Politics: Muslim Women's Visibility and Their Use in European Countries' Political Life*, in *Social Sciences*, 2016, p. 21.

[53] See the Appendix 9, dedicated to the *NEC Codes of Conduct*, of the *Labour Party Rule Book 2020* and the *Code of Conduct for Conservative Party Representatives*. The *Labour Muslim Network* (LMN) is an inclusive organisation which seeks to promote British Muslim engagement with the *Labour Party* and in the political process; in July 2021 the first «Islamophobia code of conduct» in the history of the Labour Party has been adopted, supplementing the aforementioned Appendix 9.

equal terms; as already noted, even if the situation is quite diversified in EU countries, they generally have scarce visibility in European political parties.

As for European Islamic oriented parties[54], the landscape is really diversified in respect of both party ideological manifestos and electoral performances. In fact, if the equation between Islamic oriented party and Islamist party must be rejected[55], some of the Islamic oriented parties active in European countries have not yet participated in elections or never succeeded in electing their candidates, while other have already elected their representatives at both the national and the local level[56]. From a legal point of view, it can be stated that, within the context of Western contemporary constitutionalism, Islamic oriented parties, as well as other forms of Islamic presence at the political level, are in principle legitimate thanks to fundamental principles and rights, such as: the principle of democracy; freedom of expression, thought, belief and religion; freedoms of assembly and association. Therefore, any restrictions and prohibitions may be considered acceptable as proportionate exceptions to those principles and rights, to the extent that they prove to serve to the protection of other constitutional principles and interests (e.g. the principle of democracy itself and the integrity of the constitutional order; the principle of equality and prohibition of discrimination; the defense of national security and public order). In any case, the presence of Islamic oriented parties, as is obvious, does not automatically entail an effective political participation of Muslim women[57].

Another important aspect to consider when we talk about political participation and representation, as we will see in the next paragraph, is the legal status of Muslim women as national citizens or foreigners. Anyway, specifically regarding political

[54] The very definition of «Islamic oriented parties» – namely, those political parties and movements that aim to represent the interests of Muslim citizens and residents in European countries – is quite challenging. See L. Lage, M.C. Locchi, *Political Participation and Representation of the Muslim Population in Europe*, in *Comparative Law Review*, 2020, p. 109-141.

[55] The catch-all term Islamist, associated to organizations, movements and political parties, is likely to be controversial, see P. Mandaville, *Islam and Politics*, London, 2020, p. 73-74, who stresses how Islamists greatly differ in methods and priorities. While many of them have taken the form of political parties and social movements seeking to achieve an Islamic political order «via political (electoral, legislative, power-sharing) or social (civil society, informal networking) means», radical Islamists combines «a vision of Islamic political order that rejects the legitimacy of the modern sovereign-state and seeks to establish a pan-Islamic polity or renewed caliphate» with «an emphasis on violent struggle (*jihad*) as a primary or even the exclusively legitimate method for the pursuit of political change», p. 345-346.

[56] A relevant case is represented by the Dutch party *Denk*, that was founded in 2015 with the aim of representing Muslim immigrants and elected three MPs at the Lower House in both the 2017 and 2021 elections.

[57] Consider, for example, the controversial case of the prominent Dutch-Surinamese TV-personality Sylvana Simons, who has joined the Islamic oriented party *Denk* in 2016 and that same year left the party because, among the other reasons, she felt little support for her focus on LBGT and women's emancipation. Soon after Simons established her own party, *Artikel 1*, and was elected in 2021 at the Dutch House of Representatives.

participation, comparative research shows that in European countries migrants are ordinarily allowed to participate in politics – within movements, trade unions, political parties and religious associations; therefore, generally there is no formal barrier in this respect[58].

3.2. Political representation

The political representation of Muslim women in Western immigration States needs to be comprehended in relation to the more general and tricky question of how to conceive political representation and democracy in super-diverse societies. Although the many ramifications of this question cannot be addressed in this paper, it is useful to recall just some fundamental concepts and instruments that underlie, on both the legal and the political level, minority political representation.

A very relevant point to raise is the legal status – namely, national citizen or foreigner – of Muslim women.

In fact, national legislation in Europe is varied in this respect, with more than half of European countries (including some consolidated democracies like France, Germany and Italy) excluding non-European immigrants from the right to vote and to be elected. However, when the right to vote is not granted, political rights may be enforced, especially at the local level, through other means, such as consultative bodies (that may be directly or indirectly elected, individual or collective)[59].

A further, apparently promising, way of minority inclusion is participatory democracy, as a form of people's engagement different from both the electoral-representative circuit and referendum[60]; participation mechanisms would ensure that members of minority groups, even when they're not national citizens, are involved in the political life of their own's community as residents[61]. However – despite the undeniable potential of participatory democracy in reshaping the concept of citizenship in a more inclusive and active way by contrasting the oligarchic character

[58] Estonia, Georgia, Greece, Azerbaijan, Macedonia, Romania, Lithuania, Slovenia are exceptions to that rule. In Germany foreigners may join political parties, but the majority of party's members is required to hold German nationality.

[59] See J. Paffarini – C. Calvieri, *Los límites a los derecho politicos de los extranjeros. La experiencia italiana y europea en comparación*, in *Revista General de Derecho Público Comparado*, 2021, p. 1-31.

[60] A. Algostino, *La democrazia partecipativa e i suoi lati oscuri*, in *Direito, Economia e Sociedade Contemporânea*, 2020, p. 50, distinguishing «participatory democracy» (e.g. participatory budgeting, Berlin's citizen juries, participatory urban planning, the French *débat public*, forums, consensus building, stakeholder involvement, etc.) from «democracy from below, that is marked by spontaneity, self-organization and independence from institutions.

[61] On the inclusive nature of participatory democracy see U. Allegretti, *La democrazia partecipativa in Italia e in Europa*, in *Rivista AIC*, 2011, p. 1-12.

of (classic) representative democracy – there remain concerns about the capacity of such mechanisms to provide disadvantaged groups' effective emancipation[62].

From a more general constitutional perspective, a second issue at stake is how to reconcile political representation in liberal democracies and democratic justice, to the extent that the diversity protected in a pluralistic democracy cannot be restricted to «a diversity of beliefs, opinions, preferences, and goals, all of which may stem from the variety of experience, but are considered in principle detachable from this»[63]. To this «politics of ideas» there is who contrasts a «politics of presence», on the assumption that, «once difference is conceived […] in relation to those experiences and identities that may constitute different kind of groups, it is far harder to meet demands for political inclusion without also including the members of such groups»[64].

In light of an accommodation strategy oriented to recognizing, institutionalizing and even fostering differences[65], which is typical of promotional constitutional systems[66], minority political representation may be thus comprehended as a set of instruments aimed at enforcing the right of minority groups to an effective participation in public life. Even if comparative scholarship duly highlights the variety of concepts and mechanisms elaborated within the constitutional law on minority participation[67], also in relation to the multifaceted notion of minority itself[68], it is

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[62] A. Algostino, cit.

[63] A. Philips, *The Politics of Presence*, Oxford, 1995, p. 7.

[64] *Ibidem*. Philips further develops her argument in the following terms: «Men may conceivably stand in for women when what is at issue is the representation of agreed policies or programmes or ideals. But how can men legitimately stand in for women when what is at issue is the representation of women *per se*? White people may conceivably stand in for those of Asian or African origin when it is a matter of representing particular programmes for racial equality. But can all-white assembly really claim to be representative when those it represents are so much more ethnically diverse?».

[65] J. McGarry – B. O'Leary – R. Simeon, *Integration or accomodation? The enduring debate in conflict regulation*, in S. Choudry (ed.), *Constitutional Design for Divided Societies*, Oxford-New York, 2008, p. 41, opposing the «accommodation» strategy to an «integration» model oriented to not fueling, and potentially exacerbating, differences.

[66] F. Palermo – J. Woelk, *Diritto costituzionale comparato dei gruppi e delle minoranze*, Milano, 2021, p. 43 ff., identifying repressive, liberal, promotional and multinational models in relation to the legal treatment of diversity.

[67] M. Latimer, *Minority Participation and New Constitutional Law*, in *Minority Participation and New Constitutional Law*, 2005, p. 228.

[68] The notion of minority is likely to be elusive and potentially unlimited, since it is irremediably dependent upon the idea of being different from the majority group in relation to one or more aspects that are considered worthy of attention. On the other hand, making a distinction between groups deserving of special protection as minorities (e.g. autochthonous national minorities, ethnic minorities, religious minorities, linguistic minorities) and groups that are excluded from this legal protection (e.g. migrants with a minority cultural and/or religious affiliation) is challenging, if not arbitrary, even if grounded in international law, E. Palici di Suni, *Intorno alle minoranze*, Torino, 2002. This distinction obviously recalls the well-known classification, based on the State attitude towards the different kinds of minority, proposed by W. Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford, 2000: while in «multinational States» cultural diversity is usually the result of the absorption into a larger

possible to outline some common aspects of what has been framed as descriptive representation[69].

The debate on political representation's foundation and characters goes back to the origins of Western constitutionalism, with the opposition between two main models: a first one, that of unitary representation, is oriented towards the construction of the sovereign nation's *volonté générale* and has its source in the French revolution and Southern Europe's constitutions; a second one, that may be labelled as pluralist, was established with the Glorious Revolution and has been marking Northern Europe's constitutional experience, with a view to mirroring the complexity of social articulations through representative institutions[70]. In this broader context the conceptualization of a descriptive representation is obviously developed within the pluralist model, by envisaging the adoption of legal mechanisms – such as reserved seats, proportional electoral systems, decentralization, federalism – aimed at ensuring the election of minority candidates. In her seminal work Pitkin opposed this concept to that of substantive representation, which instead refers to the effective influence of minorities on the political process in terms of representatives acting «in the interest of the represented, in a manner responsive to them»[71]: while descriptive representation can serve as a mechanism for obtaining substantial representation, the latter can also be achieved without the former[72].

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state of previously self-governing territorially defined cultural communities (e.g USA and Canada) and national minorities are entitled to rights to «self-government» and «special representation», in «polyethnic states» cultural diversity is rather a product of migrations. In this last case immigrant communities and religious minorities with migrant background should enjoy «polyethnic rights» such as the right to one's cultural and religious identity, the legal recognition of religious holidays, the right to wear religious symbols in the public space, etc.

[69] H. Pitkin, *The concept of representation*, Berkeley, 1967.

[70] See C. Casonato, *Minoranze etniche e rappresentanza politica: i modelli statunitense e canadese*, Trento, 1998, p. 39 ff. and P. Ridola, *Rappresentanza e associazionismo*, in G. Pasquino (a cura di), *Rappresentanza e democrazia*, Roma-Bari, 1988, p. 101.

[71] H. Pitkin, cit., p. 109.

[72] Besides, there is still much room for debate on what substantive representation exactly entails and how to measure it: for example, «is it linked to certain activities in the legislative process and to actual policy outcomes […], or do representatives also substantively represent when they speak on behalf of a marginalized group in the broader public sphere […]? Where shall we look for representative acts – is one place/level of socio-political interaction more important, powerful, and meaningful to society, than another, and will it help us refine its definition and thus move forward? Moreover, does substantive representation of one marginalized group (for instance, women) have the same meaning as substantive representation of another group (for instance, ethnic or religious minorities), and if not, wherein lies the difference? How should we assess and measure the quality of substantive representation across social groups and political contexts? And, finally, why should we care: what makes substantive representation so important? Is there a link between the quality of substantive representation and the level and expression of equality within a country?», E. Rashkova – S. Erzeel, Abstract of the Panel *Substantive Representation of Marginalised Groups: Re-Conceptualising, Measurement, and Implications for Representative Democracy*, European Consortium for Political Research (ECPR), *The Joint Sessions of Workshops 2021*, 17-28 May 2021.

Minority quotas in political positions, as is well known, are among the most intense measures to promote, or even guarantee, political representation of disadvantaged groups such as ethnic and/or linguistic minorities and women.

As for the former, in Western Europe such institutional mechanisms may operate for cultural/linguistic communities[73], but do not apply on the basis of ethnicity or religion[74], with the consequence that in European countries the diversity of parliaments is more the result of political dynamics concerning the effectiveness of minority members' political participation and citizens' free electoral choices.

In relation to women's political representation, reserved quotas are relatively widespread at a global level, with a variety of instruments such as voluntary political party quotas and legislative quotas; these latter, sanctioned by constitutions or statutes, may operate at both the candidacy level (legislative candidate quotas) as well as instruments to determine the number of women to be elected to legislative bodies (legislated reserved seats)[75]. Although the use of quotas, as is well known, is controversial[76], research shows that they are a good thing for women candidates and have been influential in promoting women's political inclusion[77], so much that across Europe «there has been a move to introduce them and a shift from voluntary party quotas […] to legislated quotas that are binding for all political parties»[78].

On a theoretical and prescriptive level this mirror representation is considered by many to be an appropriate mechanism in order to guarantee multicultural societies' democratic sustainability; however, from a positive law perspective, a certain (political and, therefore, legislative) resistance must be attested in allowing new minorities (e.g. migrants, cultural and religious minorities with a migration background, women) to the full range of national minorities' political rights. Nevertheless, the distinction between new and old minorities is a consequence of the political choice not to equate the

[73] E.g. in Slovenia, Croatia, Bosnia and Herzegovina, Romania, Denmark, Finland, Belgium.

[74] M.L. Krook, *European States and their Muslim Citizens: The Impact of Institutions on Perceptions and Boundaries*, in J.R. Bowen – C. Bertossi – J.W. Duyvendak – M.L. Krook (eds.), *European States and their Muslim Citizens. The Impact of Institutions on Perceptions and Boundaries*, Cambridge, 2013, p. 189. Globally ethnic and linguistic minorities are those generally protected by guaranteed representation's formulas, even if there are some cases of reserved parliamentary seats on a religious basis.

[75] D. Dahlerup – Z. Hilal – N. Kalandadze – R. Kandawasvika-Nhundu, *Atlas of Electoral Gender Quotas*, Strömsborg, 2013, p. 16-24. Legislated reserved seats, in particular, «are the least-used quota type globally, but they are increasingly used in Africa and South-East Asia. To date, 36 countries and territories have adopted the system of reserved seats [...] for lower and/or upper houses and/or sub-national level councils», p. 25.

[76] See D. Dalherup, *Women, Quotas and Politics, Routledge Research in Comparative Politics*, London and New York, 2006. Criticism about gender quotas is related to both their legitimacy vis-à-vis the equality principle and their efficacy.

[77] See E. Lépinard – R. Rubio-Marín (eds.), *Transforming Gender Citizenship. The Irresistible Rise of Gender Quotas in Europe*, Cambridge, 2018.

[78] European Parliamentary Research Service, *Women in politics*, cit., p. 9. Legislative candidate quotas are, for example, established in Albania, Belgium, Croatia, France, Greece, Ireland, Italy, Luxembourg, Malta, Poland, Portugal, Slovenia, Spain.

positions of these two different categories, since legally the tools to protect and empower traditionally disadvantaged subjects are the same[79].

Trying to apply what it has been observed so far to our case study, we may wonder if European Muslim women are conceivable as a new minority in respect of which some mechanisms of descriptive political representation are enforced.

In relation to the more strictly electoral sphere, as it has been mentioned, proportional systems are in themselves considered preferable in order to guarantee minority political representation; sometimes differential, more favorable, rules can be also established, such as the derogation to the electoral threshold, if any[80]. Furthermore, proportional systems are indeed viewed as mechanisms potentially able to increase political opportunities for women and result in smaller gender gaps in formal political representation[81]. As for cultural and ethnic minorities, proportional systems have been associated to a higher rate of minority representation and to an improved Muslim representation than in those States in which there is a majority system[82].

This has been demonstrated to be especially true for the election of Muslim women. An investigation on Muslim political representation across 20 Western countries between 2000 and 2010 shows that Muslim women have had the greatest success in the Netherlands, Belgium and, to some extent, in Sweden and Norway, namely four European immigration countries with proportional electoral systems[83]. The fact that Muslim women are more often elected in countries with proportional systems compared with plurality-majority systems may be explained in various ways and, interestingly, seems to suggest that «the rising Islamophobia and stigmatisation of Muslims living in the West will interact with electoral systems in gendered ways»[84].

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[79] F. Palermo – J. Woelk, cit., p. 24-25. The most striking example of that is gender equality measures: in fact, although women aren't obviously a «national minority», more and more often some traditional minority rights are enforced also for the purpose of ensuring gender equality (e.g. gender quotas in the field of political participation and representation). Therefore, as for women, «non è necessario essere definiti una minoranza per godere dei diritti di minoranza», p. 272.

[80] A. Reynolds, *Electoral systems and the protection and participation of minorities*, Minority Rights Group International, 2006, www. minorityrights.org.

[81] R.E. Matland, *Women's Representation in National Legislatures: Developed and Developing Countries*, in *Legislative Studies Quarterly*, 1998, and K. Beauregard, *Gender, Political Participation and Electoral Systems: A Cross-National Analysis*, in *European Journal of Political Research*, 2014.

[82] A.H. Sinno, *Muslim Underrepresentation in American Politics*, in A.H. Sinno (ed.), *Muslims in Western Politics*, Bloomington, 2009, p. 69 ff.

[83] M.M. Hughes, *Electoral Systems and the Legislative Representation of Muslim Ethnic Minority Women in the West, 2000–2010*, in *Parliamentary Affairs,* 2016, p. 1-21.

[84] Hughes identifies the following reasons: list-balancing mechanisms in proportional systems benefit ethnic minority women; in the case of Muslim minorities, electorates may take into account the «perceived electability of men and women» with connections to Islam, for example by running Muslim minority women so as to «draw in Muslim minority supporters while not alienating majority voters fearful of militant Muslim men», *ivi*, p. 8; since the number of political parties increases with proportional systems, political opportunities for Muslim ethnic minority women also increase.

However, from what has been previously observed it should be clear that Muslim women are not among those minority groups expressly favored by descriptive representation measures.

Certainly, they're not explicitly protected as Muslim since, as already mentioned, in Western Europe the existing institutional mechanisms aiming at guaranteeing political participation and representation usually work for national minorities and linguistic communities and do not apply on the basis of religion.

If we consider Muslim women in their being women, the question is whether and to what extent gender quotas, as positive actions aimed at accelerating the achievement of gender-balanced participation and representation, are likely to promote the presence of cultural and religious minority, and especially Muslim, women as well.

The French case, in this respect, proves to be particularly illustrative. The French Parliament passed a bill promoting an equal access of women and men to electoral mandates and elective functions in 2000; under the new act political parties are required to nominate 50% women candidates in most elections. The adoption of the law fueled a huge debate, with many opponents arguing the legislative candidate quotas were against the universalistic conception of French *citoyenneté*. What is interesting, from our perspective, is that those who supported the law, and therefore contrasted that universalistic conception, did not extend their reasoning to other minority categories, such as ethnic and religious groups (and, in particular, to the female component within these groups)[85]. Therefore, the diversity regarded as acceptable, and indeed claimed as a value to be protected, seems to be the one enclosed by the walls of the French republican polity, with the neutralization of particularistic identities in the political domain. On the other hand, parity has been considered to have activated, even if unintentionally, the promotion of a more general descriptive representation: in fact, in recent years there has been a growing number of minority candidates, and especially female candidates, although they appear to be, on the one hand, usually placed in unwinnable seats and, on the other hand, exploited as symbols of gender equality and secularism[86].

[85] C. Raissiguier, *Reinventing the Republic. Gender, Migration, and Citizenship in France*, Stanford, 2010.

[86] Such exploitation has occurred by excluding visible signs of religious, and specifically Muslim, affiliation, as observed by C. Achin, *Au-delà de la parité*, in *Mouvements*, 2021, p. 52, who also stigmatizes how «La ressource 'féminité', comme la ressource 'diversité', se révèlent stigmatisantes pour celles qui s'y trouvent réduites et enfermées, lorsqu'il s'agit d'accéder aux réelles positions de pouvoir pour lesquelles les ressources politiques 'claniques' classiques demeurent décisives. Les logiques puissantes d'institutionnalisation et de reproduction du champ politique ont ainsi conduit à une rapide normalisation de la parité, vidée de ses potentialités subversives et transformée en un simple outil supplémentaire dans la boîte des faiseurs de listes ou d'investitures», *ibidem*.

4. *Concluding observations*

I will not propose, by way of conclusion, some final observations aiming at putting an end to a highly debated question that certainly deserves much more attention in both the political and the academic field. The possibility for European Muslim minorities to really participate in the political life of their communities and to be substantially represented at the political level remains a very controversial issue and, with regards to Muslim women, proves to be even more complex due to the intersection of gender with ethnicity and religion. In fact, as seen, «gender alone may not best explain why women are underrepresented in a given country. Women can face obstacles to power because of their status as racial, ethnic, and religious minorities – or because of their combined status as minority women. Acknowledging differences among women may therefore help us to better understand when, where, and how gender contributes to inequality in representative institutions»[87].

A further element of complexity is the context within which the specific question of Muslim women participation and representation in European countries arises, that is the crisis of representative democracy. From our angle of observation, in particular, it must be read as the crisis of democratic systems' representativeness in relation to the increasing complexity and diversity of European multicultural and multireligious communities. The contradictions and short-circuits inherent in such processes make clear the need to reshape and revitalize the concepts of nationality and citizenship[88] in both their vertical and horizontal dimensions[89]: the people, that is sovereign in democratic states and indeed establishes the State, must be understood inclusively as composed of individuals and groups of different (which means also minority) cultural and religious identities[90].

This inclusive stance of European democracies, that we are here considering from the (limited, albeit relevant) angle of Muslim women's political participation and representation, proves to be necessary at least under two main aspects. In fact, the right of everyone to participate on an equal basis in the definition of the rules of

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[87] M. M. Hughes, *Diversity in National Legislatures Around the World*, in *Sociology Compass*, 2013, p. 26.

[88] On the terminological distinction between nationality and citizenship see G. Cordini, *Elementi per una teoria giuridica della cittadinanza. Profili di diritto pubblico comparato*, Padova, 1998, p. 132.

[89] On the distinction between a vertical conception of nationality as a form of belonging to the State and a horizontal conception as the right to participate in the life of the political community see E. Grosso, *Le vie della cittadinanza: le grandi radici, i modelli storici di riferimento*, Padova, 1997, and T.H. Marshall, *Cittadinanza e classe sociale*, a cura di S. Mezzadra, Roma-Bari, 2002 (or. ed. 1950).

[90] From the perspective of nationality law, it means orienting the modes of nationality's acquisition towards the convergence between the «substantial» (in terms of the actual community of people who lives in the country) and the «formal» level (in terms of the community of national citizens entitled to the full range of fundamental rights). As regards political rights, it means privileging the recognition of the right to political participation and representation as connected to the actual (legal and stable) residence in the territory rather than to the condition of «national citizen».

coexistence in plural societies may be understood: first of all, as a means to strengthen and (re)legitimize the democratic character of European constitutional States[91]; secondly, as a means to enforce the right to individual and social emancipation. This last, fundamental, right is based on equality principle and, therefore, entails not only non-discrimination on the basis of one or more protected grounds, but also the right to have each own particular and multiple identities acknowledged and respected. Therefore, the under-representation of minority groups, and especially of Muslim women, as we discussed, is likely to affect the very democratic and emancipatory character of pluralist constitutional States and has to be considered as a *vulnus* to the ultimate meaning of Western constitutionalism.

Confronted with the multiple tensions affecting political participation and representation vis-à-vis cultural and religious diversity, and specifically with the intensive diversity of Muslim women, European states have undergone significant, although different, developments. In fact, the political and legal responses to this structural problem of under-representation largely differ depending on several factors – such as the nature of formal politics, the conception of nationhood and citizenship, the attitude towards the expression of cultural and religious diversity in the public space, but also cultural ideologies as well as legal differences about discrimination laws and affirmative action policies[92].

All these factors have an impact on the possibility to enforce one or more mechanisms of descriptive representation. Global comparative analysis shows that descriptive representation, although controversial in many respects, may serve as a powerful means for fostering a substantial representation, which refers to the effective influence of minorities on the political process; however, the former doesn't ensure the latter.

Generally speaking, as we saw, in Europe there have not been the conditions so far for establishing such mechanisms in favor of Muslim women as a disadvantaged group; nonetheless, even if being voted and elected as a Muslim woman by Muslim voters does not necessarily mean pursuing political goals for the benefit of the Islamic

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[91] L. Pegoraro, Blows against the Empire. *Contro la iper-costituzione coloniale dei diritti fondamentali, per la ricerca di un nucleo interculturale condiviso*, in *Annuario di Diritto comparato e Studi legislativi*, 2020, p. 460, who refers to the idea «no taxation without representation» as one of constitutionalism's fundamental pillars, sacrificed on the altar of citizenship: «La marginalizzazione dalle decisioni politiche, contro la quale si compirono le 'rivoluzioni' inglese – sin dal XIII secolo –, e americana, viene sanzionata a livello accademico dall'oblio delle radici liberali dell'eguaglianza, che in passato, ma non più ora, giustificarono l'ammissione di nuovi ceti e classi all'esercizio del potere». The «democratic argument», in terms of enhancing democratization of governance in both transitional and consolidated democracies, is one of the main justifications also for the equal representation of (new) minorities, and especially for gender balance in politics.

[92] For an interesting comparative analysis of Muslim women's engagement in politics in European countries see D. Joly – K. Wadia, cit., and A. Easat-Daas, *Muslim Women's Political Participation in France and Belgium*, London, 2020.

community (and especially of Muslim women themselves)[93], the relevance of having more diverse parliaments reflective of people's inner plurality is undeniable. The complexity of the interrelation between the descriptive and the substantial dimension of political representation, in any case, suggests that «future cross-national research should systematically investigate the political positions and activities of Muslim ethnic minority women, the extent to which they 'act for' Muslims or Muslim women, and how these women are viewed by Muslim voters»[94].

In conclusion – despite the ambiguities, also in terms of political exploitation, and the pitfalls related to minority political participation in European countries – promoting or even ensuring Muslim women's voice and agency not only should be considered as a way to protect both their political rights and their right to self-determination and emancipation, but it may also work as a tool to change the mindset on the (indeed diversified) conditions of the real (and not reified) Muslim women[95].

In addition, the Muslim women's participation and representation case study proves to be relevant in order to further reflect on the more general, and crucial, issue of manifesting own particularistic identities, and especially religious ones, in European democracies' public space.

In fact, it is undeniable that the expression of Islamic religious affiliation in the political arena of European countries, regardless of whether it is a sectarian and anti-democratic manifestation of identity or not, is generally perceived in negative terms. Restrictions and prohibitions of such political manifestations are frequently invoked in public discourse of consolidated democracies, with a view to preserving the public sphere's (supposed) neutrality from the (likewise supposed) disruptive effect of cultural and religious particularisms and, ultimately, to guaranteeing the conditions of democratic coexistence in pluralistic legal systems. In the field of political participation and representation, from this perspective, seems to be confirmed what Berger, more generally, observes with regard to the clash of values between Islam and Europe, that is to say that such a clash «is not that European Muslims adhere to values that are prohibited by law – on the contrary, the political-legal values allow for diversity and liberty –, but by the religious-cultural objection that 'this is not how we do things

[93] See M. M. Hughes, *Diversity in National Legislatures*, cit., p. 29: «physical presence in a legislative body does not guarantee that a group will be able to influence policy outcomes».

[94] M. M. Hughes, *Electoral Systems and the Legislative Representation*, cit., p. 18.

[95] *Ivi*, p. 2: «Electing Muslim ethnic minority women to national legislatures may have profound effects. Gender, ethnicity and religion are thought to influence the political interests and priorities of politicians and ultimately how they legislate [...]. In Europe, Muslim women hold distinct political views, particularly when issues involve gender and/or Islam […], rendering the exclusive representation of Muslim ethnic minority women by other groups as problematic. But even if electing representatives of particular groups does not affect which laws are proposed or passed, including marginalised groups in democratic institutions may reduce political alienation, contribute to social stability, affect how societies perceive group members, and influence how group members see themselves […]. In sum, including Muslim ethnic minority women in visible positions of power could make a difference».

here'»[96]. Without underestimating the risks related to the multifaceted issue of political participation and representation of Muslim minority in Europe, for a pluralist constitutional State the question of Islam in the political arena can no longer be conceptualized in the light of an «Islamic exceptionalism» but has rather to be reframed in terms of a resignified citizenship and political participation[97].

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ABSTRACT: Muslim women's political participation and representation in European countries proves to be a relevant case study for reflecting on the capacity of pluralist democracies to effectively enforce the rights of new minorities to be actively involved in the life of their communities and to both individual and social emancipation. By trying to map some political and legal factors affecting Muslim women's active presence in the political arena the paper wishes to contribute to the knowledge of a controversial issue where gender challengingly intersect with ethnicity and religion.

ABSTRACT: La questione della partecipazione e della rappresentanza politica delle donne musulmane nei paesi europei si dimostra un caso di studio rilevante per riflettere sulla capacità delle democrazie pluraliste di garantire l'effettività dei diritti delle nuove minoranze al coinvolgimento attivo nella vita delle proprie comunità nonché all'emancipazione, individuale e sociale. Attraverso l'analisi di alcuni dei fattori politici e giuridici che influenzano la presenza attiva delle donne musulmane nell'arena politica, il paper vorrebbe contribuire alla conoscenza di una questione controversa in cui il genere si interseca in modo complesso con l'etnia e la religione.

KEYWORDS: European Muslim women - minority political participation - minority political representation - descriptive representation - reserved seats

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[96] M.S. Berger, cit., p. 234.
[97] G. Spanò, cit., p. 30.

RIVISTA DI
DIRITTI COMPARATI

Una dottrina religiosa più rispettosa dell'eguaglianza di genere: un affare di stato oppure no? Riflessioni dall'analisi casistica e comparata*

Paola Pannia

«*I don't believe in God, but she doesn't mind*»
Hayden Kays

SOMMARIO: 1. Introduzione – 2. Religioni ed eguaglianza di genere. Si può chiedere al diritto di modellare la dottrina religiosa? – 3. Donne, accesso alla giustizia e il rapporto stato-religione nella giurisprudenza della corte Edu: «scontro frontale» o astensione. *Tertium non datur*. – 4. Religioni senza individui… e individui senza religione. – 5. Una veste religiosa per i diritti umani. – 6. Note conclusive: lo stato e il genere del sacro.

1. Introduzione

La questione del governo della diversità religiosa, unita a quella della tutela giuridica e dell'accesso alla giustizia (dei soggetti membri) delle minoranze, è da tempo al centro di un vivace dibattito che coinvolge, in Italia, così come altrove, studiosi, *policy-makers* e operatori del diritto. Si tratta, tuttavia, di una questione ancora bisognosa di studio e riflessione, che fatica a raggiungere una sintesi pacificata (e pacificante). La discussione è stata, di recente, arricchita e riaccesa da un nuovo filone, che conta al suo interno studiosi e studiose che affermano come l'esclusione delle donne dal sacerdozio prevista da alcune confessioni religiose, come quella cattolica, rappresenti una violazione dei diritti delle donne non tollerabile in una società democratica[1]. L'eguaglianza di genere andrebbe promossa e tutelata con l'adozione di specifiche misure che intervengano direttamente o indirettamente a salvaguardare i diritti delle

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[1] Si vedano tra gli altri C. Sustein, *Sexual equality vs. religion: what should the law do?*, in *Boston review*, 1998, A. Stuart, *Freedom of religion and gender equality: inclusive or exclusive?*, in *Human Rights Law Review*, 2010, p. 429 ss. e, in Italia I. Ruggiu, *L'esclusione delle donne dal sacerdozio: un problema costituzionale?*, in AA. VC., *Scritti in onore di Pietro Ciarlo*, Napoli, 2022, p. 1263 ss. Invero, al di là di questi autori, è nutrita la schiera degli studiosi che si sono occupati, attraverso diverse prospettive, degli intrecci tra la libertà religiosa e l'eguaglianza di genere. Essi saranno menzionati via via all'interno del lavoro.

donne e che consentano a queste ultime di ottenere tutela anche contro il gruppo religioso cui esse appartengono. La principale obiezione che viene opposta a quest'idea è la tradizionale separazione tra stato e religione che protegge le confessioni da indebite intromissioni statali rispetto al loro ordinamento interno.

L'argomento della neutralità dello stato sembra aver catalizzato tutti i dubbi e le riserve espresse dai maggiori detrattori di queste proposte (sia sul piano teorico-concettuale che su quello della concreta implementazione), assorbendo, così, l'intero sforzo ricostruttivo degli autori prima menzionati. Sembrano restare sullo sfondo, invece, per lo più negletti, altri profili problematici che rispolverano domande antiche e che meriterebbero ben altri spazi: chi ha il diritto di parlare[2]? Chi ha il diritto di agire? E, in un'ottica intersezionale, come si possono superare le posizioni e le soluzioni manichee? Qual è il ruolo del diritto nella tensione tra la normativa antidiscriminatoria di genere e la libertà di religione? Se l'accesso alla giustizia «è anche uno strumento che abilita e dà forza»[3] può esso incarnare e veicolare un approccio olistico, che consenta alla libertà di religione e all'eguaglianza di genere di rafforzarsi a vicenda, e, per questo tramite, di dare potere agli individui e alle comunità che questi abitano? O, qualora una negoziazione non sia possibile, quali misure, quali interventi lo stato può assumere efficacemente per tutelare e promuovere l'eguaglianza, senza sacrificare del tutto la libertà religiosa e/o chiedere sacrifici agli individui, anche rispetto ad una compiuta e piena espressione della propria identità?

Nel tentativo di dare una risposta a queste domande, questo contributo si serve primariamente dell'approccio casistico e comparato. L'analisi si divide in quattro parti. La prima parte effettua una ricognizione degli argomenti e delle misure proposte della dottrina che ha portato la questione alla ribalta. Successivamente, si tenta di ridimensionare quello che viene indicato dai più come il principale ostacolo all'intervento statale in funzione antidiscriminatoria in ambito religioso: l'autonomia dell'ordinamento religioso e la separazione stato-chiesa. A tal fine, attraverso opportuni richiami alla giurisprudenza della Corte Edu si cercherà di imporre all'attenzione ulteriori aspetti che richiedono di essere presi in considerazione nel difficile bilanciamento operato dalle corti tra la libertà di coscienza e religione, e il diritto alla non discriminazione. Nello specifico vengono in gioco non solo ragioni di opportunità, collegate all'impatto che le decisioni giudiziarie possono avere sulla stessa minoranza, ma anche la tutela all'identità culturale e il principio del pluralismo, che richiede di attribuire riconoscimento, attraverso procedure partecipate, alla complessità del precetto religioso e delle sue, spesso non univoche, interpretazioni, nonché alla molteplicità di risposte che le donne elaborano di fronte a questi precetti, nella costruzione del proprio sé religioso. Una tutela effettiva dei diritti delle donne, infatti,

[2] D'obbligo il richiamo a G.C. Spivak, *Can the Subaltern Speak?*, in C. Nelson – L- Grossberg (eds), *Marxism and the Interpretation of Culture*, London, 1988.

[3] Agenzia dell'Unione europea per i diritti fondamentali e Consiglio d'Europa, *Manuale di diritto europeo in materia di accesso alla giustizia*, 2016, disponibile all'indirizzo https://www.echr.coe.int/Documents/Handbook_access_justice_ITA.PDF.

non può non tenere conto dell'intero agglomerato culturale e religioso in cui esse sono immerse. L'analisi consegna, dunque, un'intricata ragnatela di equilibri delicatissimi. Gli elementi da tenere in considerazione sono numerosi e non tutti possono essere affrontati compiutamente (esondano dai confini di questo contributo, ad esempio, aspetti pure centrali come la tutela giuridica che va assicurata all'individuo o alle «minoranze all'interno delle minoranze», soprattutto nel momento in cui la tensione si traduce in una battaglia giudiziaria[4]). I dati osservati convergono nella riflessione finale circa le possibilità, gli esiti, le implicazioni dell'accesso alla giustizia nel campo che interseca l'eguaglianza di genere e la libertà religiosa. In tal senso, le note conclusive caldeggiano un approccio improntato alla laicità inclusiva, intesa come rigorosa eguaglianza tra le religioni, nonché una risposta primariamente di tipo «promozionale», piuttosto che di tipo repressivo o sanzionatorio, che si muova per lo più lungo un crinale di tipo procedurale, che consenta alle donne di partecipare delle scelte che le riguardano. Il rischio, altrimenti, è di compromettere l'*agency* degli individui, e in particolare delle donne, e di farlo attraverso il potere statale, ancora più inaccettabile e tirannico di quello religioso, perché indiscutibile.

2. Religioni ed eguaglianza di genere. Si può chiedere al diritto di modellare la dottrina religiosa?

Sebbene il tema dei diritti delle donne sia da tempo al centro del dibattito dottrinario e del discorso giuridico internazionale e nazionale, vi sono alcune questioni che si iscrivono all'interno di questo perimetro che finora hanno ricevuto scarsa attenzione: «*the negative influence that gender discrimination within religion has on gender equality as a whole has not yet been addressed as a worldwide phenomenon, present in every country*»[5]. La prima parte di questo contributo si preoccupa di presentare gli argomenti e le ragioni degli autori che si sono fatti promotori della questione e che premono perché questo

[4] Questo tema, infatti, solleva ulteriori questioni, estremamente spinose, si veda la complessa vicenda, di lotte sociali e giudiziarie, che ha coinvolto l'associazione ebraica Women of the Wall (WOW) che rivendica il diritto a pregare presso il Western Wall di Gerusalemme nello stesso modo in cui fanno gli uomini, per esempio leggendo la Torah, e indossando il *talled*, i *tefillin* e la *kippah*. Per un approfondimento si veda P. Lahav, *The woes of WoW. The women at the wall as a religious social movement and as a metaphor*, in F. Banda – L. Fishbayn Joffe (eds.), *Women's rights and religious law*, London, 2016, p. 123 ss. L'espressione «minoranze all'interno delle minoranze» e il merito di aver portato all'attenzione della dottrina la questione è di A. Eisenberger – J. Spinner-Halev, (eds.), *Minorities within minorities: Equality, rights and diversity*, Cambridge, 2005. Si vedano pure, tra gli altri, S. M. Okin, *Is multiculturalism bad for women?*, in *Boston Review*, 1997, p. 2 ss.; A. Phillips, *When culture means gender: Issues of cultural defense in the English courts*, in *Modern Law Review*, 2003, p. 510 ss.; L. Volpp, *Feminism versus multiculturalism*, in *Columbia Law Review*, 2001, p. 1 ss.

[5] A. Stuart, *Freedom of religion and gender equality*, *op. cit*., p. 430. In termini simili osserva pure I. Ruggiu, *L'esclusione delle donne dal sacerdozio*, *op. cit*., p. 1268.

vuoto, della pratica giuridica, così come dell'indagine scientifica, venga urgentemente colmato.

Nello specifico, si osserva come la mancanza di un ruolo paritario tra uomini e donne all'interno delle istituzioni religiose, nonché l'accesso diseguale alle posizioni apicali della gerarchia, impedisca alle donne di partecipare alla scrittura o riscrittura, all'interpretazione, all'applicazione delle regole che governano la vita della comunità religiosa. Di conseguenza, in tal modo, le donne non solo vedono violato il loro diritto a non essere discriminate, ma anche la loro libertà a professare la propria religione, nella misura in cui restano lontane dalle strutture di potere, insita all'interno di ogni istituzione religiosa, e dunque anche dalla possibilità di contribuire a definire o modificare i contenuti del dettato religioso[6].

D'altra parte – si evidenzia – un assetto di questo tipo, così poco rispettoso dell'eguaglianza di genere, finisce con l'avere ripercussioni che vanno ben al di là della sfera religiosa. I precetti che attribuiscono alle donne una posizione diseguale rispetto agli uomini all'interno dell'organizzazione clericale, proiettano, tramandano e cristallizzano un'idea di diritti e dignità diseguali che viene poi interiorizzata, subita e agita dalle donne non solo nella quotidianità del rito e della comunità, ma anche nella vita di tutti i giorni e che condiziona la rappresentazione che le donne hanno e danno di sé. Così, come le onde concentriche che crea il sasso gettato nell'acqua di uno stagno, la diseguaglianza tra uomini e donne presente all'interno delle religioni può arrivare a toccare e influenzare indirettamente anche gli equilibri di genere che caratterizzano una data società[7]. In altre parole «*rules regulating the status of men and women, including in the appointment of clergy or in institutional structures that enforce anti-LGBT+ bias, may be 'religious' in nature but they are also political; norms and practices which promote stereotypical masculinities and femininities about roles and about sexuality have profound impacts on the polity*»[8]. Il ruolo delle donne all'interno della comunità religiosa, dunque, non incide solo sulla relazione tra clero e congregazione. Allo stesso modo, i precetti che considerano le donne in posizione subalterna e si rifiutano di riconoscere i diritti delle persone LGBT+ non possono essere ricondotti unicamente alla sfera dell'autonomia confessionale[9].

Nonostante ciò – si contesta – questa faglia nel principio di eguaglianza, che dall'interno degli ordini religiosi si propaga fino alle strutture della più ampia compagine sociale, rimane al di fuori della sfera di azione statale, con buona pace dei numerosi obblighi che, sia nella dimensione internazionale che costituzionale,

[6] *Ibidem*.

[7] Si vedano sul punto le considerazioni frutto dell'esperienza individuale di I. Ruggiu, *L'esclusione delle donne dal sacerdozio op. cit.*, p. 1272, che riconosce nel diverso assetto dell'ordine religioso di Okinawa e del resto del Giappone, caratterizzato il primo da un clero esclusivamente femminile, il secondo da una base meramente maschile una delle ragioni atte a spiegare il diverso ruolo delle donne all'interno delle rispettive società.

[8] N. Tebbe, *Reply: Conscience and Equality*, in *Journal of Civil Rights and Economic Development*, 2018, richiamato da A. Shaheed, *Report of the Special Rapporteur on freedom of religion or belief*, Human Rights Council. *Forty-third session*, 24 *February*–20 *March* 2020, par. 50.

[9] M. Sunder, *Piercing the Veil*, in *Yale L.J.*, 2003, p. 1399 ss.

vincolano gli stati alla tutela e alla promozione del principio di non discriminazione. Si pensi, in tal senso, non solo alla CEDAW, il principale trattato di diritto internazionale volto all'eliminazione della discriminazione nei confronti delle donne[10], ma anche agli articoli 2(1) e 3 del Patto internazionale sui diritti civili e politici e all'art. 2(2) del Patto internazionale sui diritti economici, sociali e culturali[11]. Invero, v'è da osservare, sul punto, che non vi sono luoghi del diritto internazionale che menzionino esplicitamente e contemporaneamente la tutela della libertà religiosa e di credo e quella dell'eguaglianza di genere[12]. Questa mancanza di riferimenti e tutele incrociate nel discorso politico e giuridico internazionale, tuttavia, è stata in qualche misura compensata dal Comitato Generale sui Diritti Umani delle Nazioni Unite che nel Commento Generale n. 28 ha sottolineato come «*all human beings should enjoy the rights provided for in the Covenant, on an equal basis and in their totality … States should ensure to men and women equally the enjoyment of all rights provided for in the Covenant*»[13] imponendo agli stati di adottare tutte le azioni necessarie, che ricomprendono misure positive e misure di protezione, quali «*the removal of obstacles to the equal enjoyment each of such rights, the education of the population and of state officials in human rights and the adjustment of domestic legislation so as to […] achieve the effective and equal empowerment of women*»[14].

Muovendo da questi riferimenti normativi, alcuni autori hanno messo in discussione il dogma dualista, di matrice illuminista, che vuole Chiesa e Stato come due

[10] Si veda nello specifico l'art. 7 della CEDAW che recita «States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country […]».

[11] In particolare, così recitano gli articoli citati del Patto Internazionale sui diritti civili e politici: l'art. 2(1) «Ciascuno degli Stati Parti del presente Patto si impegna a rispettare ed a garantire a tutti gli individui che si trovino sul suo territorio e siano sottoposti alla sua giurisdizione i diritti riconosciuti nel presente Patto, senza distinzione alcuna, sia essa fondata sulla razza, il colore, il sesso, la lingua, la religione, l'opinione politica o qualsiasi altra opinione, l'origine nazionale o sociale, la condizione economica, la nascita o qualsiasi altra condizione»; l'art. 3 «Gli Stati Parti del presente Patto s'impegnano a garantire agli uomini e alle donne la parità giuridica nel godimento di tutti i diritti civili e politici enunciati nel presente Patto». Mentre con riferimento al Patto internazionale sui diritti sociali economici e culturali, l'art. 2(2) afferma «Gli Stati Parti del presente Patto si impegnano a garantire che i diritti in esso enunciati verranno esercitati senza discriminazione alcuna, sia essa fondata sulla razza, il colore, il sesso, la lingua, la religione, l'opinione politica o qualsiasi altra opinione, l'origine nazionale o sociale, la condizione economica, la nascita o qualsiasi altra condizione».

[12] N. Ghanea, *Navigating the Tensions: Women's Rights, Religion and Freedom of Religion or Belief*, in *Religion and Human Rights*, 2021, p. 67 ss. L'autrice così spiega questo dato: «*The human rights sources that address FORB and women's rights to equality are distinct, and emerged from the lobbying of separate constituencies*» (p. 68). Inoltre, spesso gli stati giustificano con la religione le loro riserve ai trattati sui diritti umani (si pensi in particolare alla CEDAW). La religione viene pure addotta quale ragione sottostante alle violazioni dei diritti delle donne perpetrate in alcuni contesti, rispetto alle quali lo stato assume una posizione inerte o talvolta connivente (p. 72 ss.).

[13] Human Rights Committee, *General Comment 28: Equality of Rights between Men and Women*, CCPR/C/21/Rec.1/Add.10 (2000), par. 2.

[14] *Ibidem*, par. 3.

ordini separati e distinti[15]. Accantonata l'opzione estrema di un divieto *tout court* dei precetti religiosi che confliggono con l'eguaglianza (come quello che riguarda ad esempio l'ordinazione di sacerdotesse), vengono passate al vaglio altre ipotesi, volte a garantire non solo il rispetto del principio egualitario, ma anche una compiuta attuazione del principio di laicità. Queste proposte richiedono allo stato un esercizio di regolamentazione che implica anche delle incursioni, più o meno incisive, più o meno dirette, nell'autonomia confessionale, il cui strumentario si muove lungo uno spettro che va dalla dimensione sanzionatoria a quella promozionale.

Con riferimento al primo approccio, sono numerose le declinazioni che esso può assumere. Così ad esempio, vi è chi raccomanda una serie di azioni che lo stato dovrebbe mettere in campo, che ricomprendono interventi di persuasione, attraverso, ad esempio, l'organizzazione, il finanziamento e la pubblicizzazione di conferenze interreligiose sull'eguaglianza di genere; interventi di sensibilizzazione, attraverso l'affidamento e la pubblicazione di studi e statistiche che dimostrino l'impatto della discriminazione di genere all'interno della religione sulla società[16]; interventi di dissuasione, attraverso la presentazione di disegni di legge che prospettino una modifica d'imperio dei rapporti di lavoro instaurati dall'autorità religiosa, funzionale ad innescare un processo di revisione e ripensamento interno[17]. Sono stati, poi, prospettati interventi sanzionatori di tipo «mite», quali ad esempio, la cessazione dei finanziamenti alle religioni che non assicurano alle donne un ruolo di *leadership* nella gerarchia ecclesiastica o della trasmissione di cerimonie religiose celebrate da sacerdoti maschi o dell'attribuzione a religioni patriarcali di cerimonie di rilevanza pubblica[18]. Infine, è stata altresì proposta l'attivazione di un approccio che preveda una più incisiva interferenza dello stato nel territorio del religioso, soprattutto per il tramite delle decisioni delle Corti, chiamate ad implementare «*the State's duty to ensure gender equality ad the equal right of women to freedom of religion*»[19], contro l'esenzione dal rispetto delle leggi sull'eguaglianza di genere riconosciuta alle confessioni religiose. Lo stato dovrebbe, dunque, applicare il diritto antidiscriminatorio anche con riferimento alle istituzioni e alle pratiche religiose non rispettose dell'eguaglianza di genere[20].

Contestualmente sono state invocate altre misure, di tipo promozionale, che sollecitano lo stato a mettere in campo interventi di favore rispetto a quelle religioni che si fondano sulla piena equiparazione tra uomini e donne anche nella gerarchia

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[15] N. Colaianni, *La laicità al tempo della globalizzazione*, in *Stato, Chiese e pluralismo confessionale*, 2009, p. 4.

[16] A. Stuart, *Freedom of religion and gender equality*, *op. cit.*, p. 452 ss. Si veda in tal senso anche DiDi, *Are religious women more traditionalist? A cross-national examination of gender and religion*, in *Journal for the scientific study of religion*, 2020, p. 606.

[17] È quanto accaduto ad esempio nel caso della Nuova Zelanda, rispetto al dibattito sulla possibilità di ammettere pastori gay. Si veda sul punto R. Ahdar, *Religious group autonomy, gay ordination and human rights law*, in R. O'Dair – A. Lewis (eds.), *Law and Religion: Current Legal Issues*, 2001, p. 274.

[18] I. Ruggiu, *L'esclusione delle donne dal sacerdozio*, *op. cit.*, p. 1275.

[19] A. Stuart, *Freedom of religion and gender equality*, *op. cit.*, p. 454 ss.

[20] C. Sustein, *Sexual equality vs. religion*, *op. cit.*

ecclesiastica, come i culti neopagani, attraverso l'affidamento delle cerimonie di rilevanza pubblica o l'attribuzione di finanziamenti. Infine, non mancano anche proposte che hanno più a che vedere con la dimensione simbolica, quali, ad esempio quella di «far entrare la tragedia dell'esclusione delle donne dal sacro nelle politiche della memoria»[21].

Al di là delle varie sfumature di contenuto, le proposte volte a sollecitare un intervento statale che assicuri l'uguaglianza di genere anche in ambito religioso hanno in comune un unico, principale, bersaglio polemico: i principi di laicità e di separazione tra stato e religione, accusati di legittimare, preservare e favorire, sotto le mentite spoglie della neutralità, un assetto di potere che vede gli uomini in posizione dominante. Le voci che, dagli anni 70, hanno invocato l'adozione di «politiche della differenza»[22], volte a riequilibrare la posizione del femminile (così come di altri gruppi emarginati) all'interno della società, sembrerebbero confermare questo attacco al principio liberale della neutralità e non interferenza, mostrando come l'inerzia statale, in questo come in altri campi, rischi di consacrare l'ordine patriarcale che contraddistingue numerosi gruppi culturali e confessioni religiose, tra cui le principali religioni monoteiste del pianeta[23].

Tuttavia, al tempo stesso, invocare un'azione dello stato in ambito religioso non è scevro da minacce e pericoli, che non si riducono esclusivamente ad un potenziale attentato all'autonomia degli ordinamenti religiosi. Concentrarsi unicamente su questo principio non solo semplifica il dibattito, ma lo monopolizza, lasciando in ombra altre importanti considerazioni e, soprattutto, la salvaguardia di altri fondamentali principi, come la tutela dell'identità personale (la religione può rivestire un ruolo decisivo e pregnante per la vita e lo sviluppo della personalità individuale). La difficile questione del se e in che misura il diritto possa intervenire a ripristinare la simmetria giuridica di uomini e donne anche in ambito religioso sarà ora esaminata attraverso l'analisi della giurisprudenza della Corte Edu che si è già confrontata con questo tipo di casi.

3. Donne, accesso alla giustizia e il rapporto stato-religione nella giurisprudenza della Corte Edu: «*scontro frontale» o astensione.* Tertium non datur

Se si passa in rassegna la giurisprudenza della Corte Edu, si può notare come non siano pochi i casi in cui i giudici di Strasburgo hanno considerato legittima l'azione statale che ha limitato la libertà religiosa (anche) in nome della tutela dell'eguaglianza di genere. Come noto, infatti, l'art. 9 della Convenzione, posto a tutela del diritto alla

[21] I. Ruggiu, *L'esclusione delle donne dal sacerdozio*, *op. cit.*, p. 1276.

[22] Si veda per tutti, I. M. Young, *Justice and the politics of difference*, Princetown, 1990.

[23] È noto come, sulla base di differenti ragioni, le donne non possano accedere all'ordinazione sacerdotale e non possano svolgere le funzioni di *imam* e di rabbino. Per un approfondimento, si veda S. Ferrari, *I diritti delle religioni sono contro le donne? Problemi e prospettive*, in *Quaderni di diritto e politica ecclesiastica*, 2018, p. 9 ss.

libertà di coscienza, pensiero e religione, individua al secondo comma delle limitazioni a questo diritto che possono essere legittimamente messe in campo, ovvero quelle che sono previste dalla legge e che sono necessarie in una società democratica all'interesse della sicurezza pubblica, alla protezione dell'ordine pubblico, della salute e della morale e alla tutela dei diritti e delle libertà altrui[24]. La Corte Edu ammette un'interferenza statale alla libertà di religione solo se le pratiche e i riti da essa prescritti risultino «*incompatible with the key principles underlying the Convention, such as* […] *a flagrant breach of gender equality*»[25]. I giudici di Strasburgo sono giunti ad una conclusione di questo tipo in diverse occasioni.

Esemplificativo di questa tendenza è, ad esempio, il caso *Şahin c. Turkey*, in cui una giovane studentessa turca, a causa del velo che indossa, vede negarsi l'accesso all'Università di Istanbul e la possibilità di sostenere un esame[26]. La decisione è stata presa sulla base di una circolare dell'università che vieta a coloro che indossano il velo e portano la barba di essere ammessi a corsi e lezioni. La studentessa chiede alla Corte di accertare la violazione della sua libertà religiosa mentre lo stato turco difende il divieto sulla base dei principi del pluralismo religioso e del secolarismo nonché della tutela dell'eguaglianza di genere. La sentenza che chiude la vicenda giudiziaria decreta la legittimità dell'interferenza statale nella sfera della libertà religiosa della ricorrente. Secondo i giudici di Strasburgo, il divieto stabilito all'interno della circolare, anche in ragione dell'ampio margine di apprezzamento riconosciuto allo stato in questi casi, deve ritenersi proporzionato, volto a perseguire un fine legittimo e necessario in una società democratica. Questa conclusione si accompagna ad affermazioni discutibili che investono la pratica del velo e, più in generale, la religione islamica. Così, richiamando un suo precedente, *Dahlab c. Switzerland*[27], la Corte si riferisce al velo come ad un «*powerful external symbol*» che appare *«to be imposed on women by a religious precept that was*

[24] Ai sensi dell'art. 9 della CEDU: «1. Ogni persona ha diritto alla libertà di pensiero, di coscienza e di religione; tale diritto include la libertà di cambiare di religione o di credo e la libertà di manifestare la propria religione o credo individualmente o collettivamente, sia in pubblico che in privato, mediante il culto, l'insegnamento, le pratiche e l'osservanza dei riti. 2. La libertà di manifestare la propria religione o il proprio credo può essere oggetto di quelle sole restrizioni che, stabilite per legge, costituiscono misure necessarie in una società democratica, per la protezione dell'ordine pubblico, della salute o della morale pubblica, o per la protezione dei diritti e della libertà altrui».

[25] Si vedano in tal senso le seguenti sentenze della Corte EDU: 10 giugno 2010, ric. 302/02, *Jehovah's Witnesses of Moscow and Others c. Russia*, par. 119; 07 giugno 2022, ric. 32401/10, *Taganrog Lro and Others C. Russia*, par. 172.

[26] Corte EDU, 10 novembre 2005, ric. 44774/98, *Leyla Şahin c. Turkey*.

[27] Corte EDU, 15 febbraio 2001, ric. 42393/98, *Dahlab c. Switzerland*. Qui la Corte esamina il caso di una insegnante di una scuola pubblica che, dopo essersi convertita all'Islam, rivendica la sua libertà religiosa che si esprime nel porto del velo anche durante le ore di insegnamento. La Corte non accoglie il ricorso considerando il divieto imposto dallo stato in linea con i dettami dell'art. 9 comma 2. In particolare, rispetto alla necessità del divieto in una società democratica, la Corte osserva come «*wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality*» (p. 13).

hard to reconcile with the principle of gender equality»[28]; inoltre «*wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination*»[29].

Nello stesso solco si muovono altre sentenze della Corte in cui il limite statale alla libertà religiosa è stato considerato legittimo alla luce (anche) del principio dell'eguaglianza di genere. Si tratta ancora una volta di casi cha hanno ad oggetto il porto del velo in luogo pubblico. Nello specifico, nel 2017, in due sentenze, *Dakir c. Belgio* e *Belcacemi e Oussar c. Belgio*, la Corte decreta la legittimità della legge belga che vieta di indossare indumenti che coprano il volto[30]. Nella sua decisione, la Corte, nell'esaminare le ragioni alla base della legge, richiama le parole della Corte Costituzionale belga che già si è espressa sul punto, secondo cui «*even where the wearing of the full-face veil is the result of a deliberate choice on the part of the woman, the principle of gender equality, which the legislature has rightly regarded as a fundamental value of democratic society, justifies the opposition by the State, in the public sphere, to the manifestation of a religious conviction by conduct that cannot be reconciled with this principle of gender equality. As the court has noted […], the wearing of a full-face veil deprives women – to whom this requirement is solely applicable – of a fundamental element of their individuality which is indispensable for living in society and for the establishment of social contacts*»[31]. Sebbene la Corte riconosca il carattere polisemico del simbolo, e lo squarcio al principio pluralistico che la legge belga realizza («*the ban prevents certain women from expressing their personality and their beliefs by wearing the full-face veil in public*»[32]), al tempo stesso, riprendendo il ragionamento già condotto dalla *Grande Chambre* nel caso *S.A.S. c. Francia* del luglio 2014[33], fa prevalere sulla tutela della libertà di religione, coscienza e credo, il principio di nuovo conio «del vivere insieme» e le norme che presidiano l'interazione e la comunicazione sociale, «*essential, in the respondent State's view, to the functioning of a democratic society*»[34].

Senza dubbio i casi sul porto del velo e la questione al centro di questo contributo (l'applicazione del principio di eguaglianza di genere anche all'interno delle religioni) presentano una vistosa differenza. Entrambi ineriscono alla libertà religiosa, ma nel primo caso, l'accesso alla giustizia ha al centro la limitazione della libertà di manifestazione del credo religioso posta in essere dalla legge statale, mentre nel secondo caso, ad essere messa in discussione è, principalmente, l'autonomia del gruppo religioso. Tuttavia, queste sentenze possono comunque offrire utili spunti rispetto al

[28] *Leyla Şahin c. Turkey*, par. 111.

[29] *Ibidem*.

[30] Corte EDU, 11 luglio 2017, ric. 4619/12, *Dakir c. Belgium*; nello specifico la legge belga introduce al codice penale l'art. 563bis, secondo cui «*Seront punis d'une amende de quinze euros à vingt-cinq euros et d'un emprisonnement d'un jour à sept jours ou d'une de ces peines seulement, ceux qui, sauf dispositions légales contraires, se présentent dans les lieux accessibles au public le visage masqué ou dissimulé en tout ou en partie, de manière telle qu'ils ne soient pas identifiables*».

[31] *Dakir c. Belgium*, par. 21.

[32] *Dakir c. Belgium*, par. 55.

[33] Corte EDU, 1° luglio 2014, ric. 43835/11, *S.A.S. c. France [GC]*.

[34] *Dakir c. Belgium*, par. 56.

complesso rapporto tra libertà religiosa ed eguaglianza di genere, per come impostato e risolto dalla Corte Edu nonché per l'inquadramento giuridico da essa assegnato e per le implicazioni derivanti da questa costruzione.

Dalla ricognizione casistica effettuata, emerge, innanzitutto, come i due principi della libertà religiosa e dell'eguaglianza di genere vengano presentatati come i *proxy* di un agone necessario, che si ripropone sempre identico. Da un lato vi è chi vuole proteggere i diritti delle donne, anche contro il loro volere, con tutti i rischi connessi a questa posizione, primo fra tutti il paternalismo. Dall'altro lato, vi è chi, invece, rivendica il primato della libertà religiosa, in qualunque circostanza, in qualunque situazione, con il pericolo che pratiche potenzialmente lesive dei diritti dei più vulnerabili rimangano impunite, sancendo così la vittoria del patriarcato, libero di perpetuarsi e rimanere in vita al netto di un intervento statale.

Questo assetto, d'altra parte, non deve stupire: esso trova corrispondenza in numerosi luoghi del diritto internazionale, sia di *hard law* – si pensi alla CEDAW e alla Convenzione di Istanbul[35] – che di *soft law*[36], nonché in buona parte delle ricostruzioni dottrinarie[37]. Inoltre, più in generale, questa impostazione non è altro che la fedele trasposizione delle forme del discorso con cui il diritto si manifesta e si esprime: il c.d. «*rights talk*»[38]. Le vicende giudiziarie sono strutturate per avere una parte che vince e una parte che perde, e, anche qualora si proceda ad un bilanciamento, o nelle motivazioni si dia conto delle ragioni di entrambi, l'esito è sempre divisivo, ontologicamente dicotomico, difficilmente «conciliante». Lo stesso si applica anche, e ancor di più, allo strumento legislativo. Non a caso, sono numerose le voci che individuano altrove il percorso per una qualche soluzione della tensione tra principi individuata[39]. Così, lo *Special Rapporteur* per la tutela della libertà religiosa, nelle sue raccomandazioni finali, invita lo stato a sostenere attivamente l'eguaglianza di genere

[35] Si veda inoltre CEDAW/C/GC/31/CRC/C/GC/18, CEDAW and CRC, *Joint General Recommendation* No. 31 of the Committee on the Elimination of Discrimination against Women/General Comment No. 18 of the UN Committee on the Rights of the Child on harmful practices, 2014.

[36] Si veda, ad esempio, Report of the Special Rapporteur on freedom of religion or belief, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Freedom of religion or belief*, 27 February 2020.

[37] Si vedano tra gli altri F. Raday, *Culture, Religion, and Gender*, in *International Journal of Constitutional Law*, 2003, p. 665. In senso critico, invece, tra gli altri, P. Parolari, *La violenza contro le donne come questione (trans)culturale. Osservazioni sulla Convenzione di Istanbul*, in *Diritto e questioni pubbliche*, 2014, p. 859 ss. Più in generale al tema è stata dedicata di recente una special issue: R. Fazaeli – M. Yildirim, *Introduction: Women's Religious Freedom and Freedom of Religion or Belief*, in *Religion and Human Rights*, 2021, p. 63 ss.

[38] Il richiamo va ovviamente a M. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, Glencoe, 1991, ma si veda pure, per le riflessioni ivi contenute, che saranno poi riprese anche in seguito, B. M. Oomen – J. Guijt – M. Ploeg, *CEDAW, the Bible and the State of the Netherlands: the struggle over orthodox women's political participation and their responses*, in *Utrecht Law Review*, 2010, p. 158.

[39] In dottrina si veda ad esempio S. Ferrari, *I diritti delle religioni sono contro le donne? Problemi e prospettive*, cit., che afferma come «Quello che a mio parere sarebbe preferibile è evitare un'uguaglianza tra lo statuto giuridico di uomini e donne imposta alle comunità religiose a colpi di leggi e sentenze dei parlamenti e dei tribunali dello Stato» (p. 19).

attraverso «*educational programmes and public policies that promote gender equality and non-discrimination*» assicurando necessarie risorse finanziarie, a supportare coloro che «*advocates for equality and non-discrimination through access to education, including equality training for teachers*», a predisporre corsi di formazione per i *leaders* religiosi, a sollecitare attori privati «*to facilitate the realization of women's agency within religions*», a promuovere l'educazione sulla religione e la libertà di religione e credo all'interno delle comunità di donne, ragazze e persone LGBT+[40]. In un altro, ben diverso, contesto, la stessa *Commission Gérin-Raoult*[41], che pure ha fornito la base ideologica per la legge francese n° 2010-1192, *Interdisant la dissimulation du visage dans l'espace public*, nella terza parte del rapporto – eloquentemente intitolata «*Interdir*?» – ha manifestato tutti i suoi dubbi sulla tenuta giuridica, alla luce dei principi costituzionali e convenzionali, di una legge che vieti in modo generale il porto del velo integrale nei luoghi pubblici. Altre misure sono state dunque suggerite, quali «*le renforcement des actions de sensibilisation et d'éducation au respect mutuel et à la mixité et la généralisation des dispositifs de médiation*»[42].

Strettamente connesso a questo aspetto, ve n'è poi un altro. Nella polarizzazione tra libertà religiosa ed eguaglianza di genere che emerge nell'aula giudiziaria non solo non c'è spazio per una linea di azione politica complessa, articolata, negoziata, ma neppure sembra esservi spazio per una tutela intersezionale, che consenta alle donne di avanzare contemporaneamente la propria domanda di eguaglianza e quella di riconoscimento della propria libertà religiosa, senza dover scegliere tra l'una e l'altra[43]. In questo contesto, infatti, l'unico diritto che viene riconosciuto agli individui è quello di dismettere i panni del fedele, abbandonando il proprio gruppo religioso. In altre parole, si impone così alle donne la drastica alternativa del «tutto o niente» [44] che riduce la complessa questione dei diritti delle donne e della libertà religiosa alla soluzione semplicistica del «diritto di *exit*» garantito dallo stato. Tuttavia, questa soluzione non solo, talvolta, non è quella desiderata (l'appartenenza ad una certa comunità religiosa rappresenta una parte fondante della propria struttura identitaria, familiare, sociale, anche prima e al di là della specifica questione del «credo»), ma spesso non è neppure concretamente praticabile, data la dipendenza sperimentata a livello economico,

[40] Report of the Special Rapporteur on freedom of religion or belief, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development*, cit., par. 77.

[41] *Rapport d'information fait en application de l'article 145 du Règlement au nom de la mission d'information sur la pratique du port du voile intégral sur le territoire national, enregistré à la Présidence de l'Assemblée nationale le 26 janvier 2010*.

[42] *Ibidem*, p. 129 ss. Gli altri strumenti individuati sono: il voto di una risoluzione che condanni l'uso del velo integrale in quanto contrario ai valori repubblicani, l'approvazione di una legge che «*assurerait la protection des femmes victimes de contrainte, qui conforterait les agents publics confrontés à ce phénomène et qui ferait reculer cette pratique*», e, infine, il rinvio al Consiglio di Stato affinché continui ad esplorare soluzioni giuridiche per restringere il più possibile la legittimità del porto del velo integrale.

[43] N. Ghanea, *Navigating the Tensions*, *op. cit.*, p. 67.

[44] Sul paradigma del «*put up and shut up or leave*» si vedano tra le altre: A. Stuart, *Freedom of religion and gender equality*, *op. cit.*, e M. Sunder, *Cultural dissent*, in *Standford Law review*, 2001, p. 495.

sociale, e personale rispetto alla comunità religiosa (e ciò vale soprattutto per le donne)[45].

Sebbene sia stato sottolineato come la tutela della libertà religiosa «*does not protect religions per se (e.g., traditions, values, identities, and truth claims) but aims at the empowerment of human beings, as individuals and in community with others*»[46], questa costruzione non permette che gli individui siano presi in considerazione insieme all'infinita gamma di relazioni, credenze e ruoli che contribuisce a costituire l'identità personale di ognuno. Questo rischio non può essere sottovalutato nel momento in cui si sollecita un intervento statale che ripristini attraverso le sue corti, o con una legge, la simmetria di genere all'interno della gerarchia ecclesiastica. Alla luce dei principi internazionali e costituzionali prima richiamati, è senza dubbio problematica la posizione passiva ed inerte dello stato di fronte ad un discorso religioso fortemente patriarcale che, attraverso strumenti quali la musica religiosa, l'arte figurativa, l'interpretazione dei testi sacri, la preghiera, ha un impatto fortissimo sulla definizione del sé e dei ruoli, anche sociali, degli individui. Dall'altro lato, però, anche l'opzione opposta risulta discutibile nel momento in cui l'intervento statale, diretto o indiretto, rischia di tradursi nella *reductio ad unum* della pluralità delle narrazioni «del divino (e quindi anche dell'umano)»[47]. Quest'ultimo elemento merita di essere ulteriormente sviluppato.

4. Religioni senza individui… e individui senza religione

Tra gli argomenti usati dal giudice Tulkens per dissentire dalla decisione assunta dalla maggioranza, nella sentenza *Leyla Şahin c. Turkey*, non vi è solo una critica alla valutazione che la Corte Edu offre del porto del velo (qualificata come «*unilateral and negative*»). La decisione maggioritaria, infatti, viene anche tacciata di aver imposto il suo punto di vista su quello della ricorrente. Osserva in proposito il giudice: «*The applicant, a young adult university student, said – and there is nothing to suggest that she was not telling the truth – that she wore the headscarf of her own free will. In this connection, I fail to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them*»[48].

Le parole del giudice Tulkens denunciano vividamente come, all'esito della contrapposizione effettuata dalla Corte – precetto religioso contro eguaglianza di

[45] Special rapporteur, par. 52 e DiDi, *Are religious women more traditionalist*, *op. cit.*

[46] Report of the Special Rapporteur Heiner Bielefeldt on freedom of religion or belief, *Addressing the Interplay of Freedom of Religion or Belief and Equality between Men and Women*, A/68/290, 2013, par. 70, richiamata da N. Ghanea, *Navigating the Tensions*, *op. cit.*, p. 77.

[47] M. Murgia, *Ave Mary. E la Chiesa inventò la donna*, Torino, 2011, p. 138 ss. per i riferimenti soprattutto alla musica religiosa e all'arte figurativa. Con riferimento ai luoghi della preghiera si veda P. Lahav, *The woes of WoW. The women*, cit.

[48] *Leyla Şahin c. Turkey*, par. 12 della *dissenting opinion*.

genere – si produca un'essenzializzazione del gruppo religioso in cui l'individuo sparisce. Il pensiero che il singolo nutre rispetto al significato da attribuire al simbolo, così come più in generale al rito, e alla pratica religiosa, non viene preso in considerazione; il suo punto di vista non viene né ascoltato né tutelato. Dalle sentenze della Corte Edu emerge un'idea di religione che non ammette la molteplicità di interpretazioni e punti di vista.

Sebbene la casistica consegni un panorama multisfaccettato e complesso in cui sono numerosi gli attori (e i sistemi normativi) coinvolti, che interagiscono e si costituiscono e condizionano a vicenda – il quadro dei diritti e dei principi internazionali, il dibattito a livello nazionale, le comunità religiose coinvolte, ma anche gli individui che le abitano – le religioni sono presentate come un «blocco unico», come l'unico interlocutore ammesso di fronte alle ragioni dello stato. Un assetto di questo tipo, infatti, consente allo stato, e prima ancora alle corti, di non doversi rapportare alla diversità. Il compito di armonizzare (e, se del caso, mettere a tacere eventuali dissensi e dissonanze con l'irrilevanza) è rimesso all'ordine religioso, cui spetta gestire e regolamentare la pluralità di voci (incluse quelle «disobbedienti»).

Questa tendenza offre una nuova angolazione attraverso cui osservare e interpretare il primato chiaro e indiscusso che la Corte Edu sistematicamente accorda al principio di non discriminazione sulla tutela della libertà religiosa. Non si tratta di una «gerarchia» di diritti costruita in modo consapevole e perentorio. Questo orientamento giudiziale si spiegherebbe, piuttosto, con l'ampio margine di apprezzamento riconosciuto in questi casi allo stato, libero di attribuire rilevanza alla visione della società e alla dimensione culturale che gode di maggiore consenso. Peraltro, vi è chi osserva come, di recente, il *favor* per la cultura maggioritaria abbia finito col tradursi in un'adesione della Corte Edu ad un concetto di pluralismo che, nella confusione tra diritti e valori, viene principalmente tradotto in termini secolaristi e cristiani, a scapito dei componenti della società europea che non si riconoscono in questa versione[49].

Al di là delle ragioni sottese a questo approccio, in ogni caso questa impostazione (sostenuta e rafforzata dal paradigma oppositivo libertà religiosa versus eguaglianza di genere) finisce con l'oscurare tutta la complessità che contraddistingue la relazione che lega un individuo alla propria comunità religiosa/religione. La pregnanza che il gruppo religioso riveste per l'individuo non si riduce all'elemento identitario, di costruzione del sé, ma abbraccia anche la dimensione sociale, economica, familiare. D'altro canto, al tempo stesso, non si può ignorare il ruolo che gli individui rivestono all'interno della propria comunità religiosa, riempiendola di significato. Queste riflessioni ovviamente possono essere trasposte al particolare status della donna all'interno della comunità religiosa. Non è questa la sede per offrire una disamina esaustiva di tutte le implicazioni

[49] M. Chaibi, *Protection of European values at the International level: the European court of Human rights and freedom of religion*, in *PHRG*, 2022, p. 9 ss., si veda in particolare p. 33, in cui l'autrice afferma «*a form of pluralism resting on values constructed through a long historical dialectical process of constant interactions between society and Christian religions*».

che questa questione presenta. Tuttavia, una riflessione sulla libertà di religione e l'eguaglianza di genere non può prescindere dalla necessaria contestualizzazione sia degli ordinamenti religiosi (soprattutto delle parti più strettamente collegate al genere) che della risposta che le donne articolano di fronte ad essi. In altre parole, occorre tener presente la pluralità dei modi con cui le donne vivono la propria religione e il proprio ruolo all'interno della comunità nonché la pluralità delle interpretazioni con cui i precetti religiosi possono essere letti.

Per quanto riguarda il primo punto, è possibile osservare come le donne rispondano in modo diverso ai precetti e alle rappresentazioni che, nelle diverse religioni, hanno a che vedere col genere. Gli studiosi evidenziano in proposito un ampio spettro di reazioni ai precetti religiosi che va dall'obbedienza, alla reinterpretazione, alla resistenza[50]. Senza dubbio, è sempre più frequente imbattersi in fenomeni di femminismo religioso in cui le donne, attraverso una rilettura della dottrina, tentano non solo di rinegoziare il proprio ruolo sociale, ma anche di contestare il carattere patriarcale che informa la struttura e la gerarchia ecclesiastica nonché il potere di costruire, trasmettere e tramandare il catechismo religioso. Si pensi ad esempio al fenomeno delle *bhikkuni* nel Sudest asiatico, l'ordine monastico femminile nella religione buddista[51]. Tuttavia, al tempo stesso, non è detto che la costruzione della propria identità femminile e religiosa passi necessariamente da una critica ampia e radicale nei confronti del patriarcato, come mostra ad esempio, il movimento interno alla religione ebraica noto come *Post-Orthodoxy* o *Orthopost*[52]. Così, allo stesso modo, è importante tenere presente che anche nei casi di piena adesione all'ortodossia religiosa, è sempre possibile rinvenire una qualche forma di *agency* che le donne mantengono nella costruzione e manifestazione del proprio sé, come donne e come fedeli. Dunque il dualismo tra religione e tradizione da un lato e mondo secolare e eguaglianza di genere dall'altro rischia di essere una mera presunzione che finisce col semplificare in qualche misura «*the dialectical relationship between gender and religion from the broader society where women live and practice their faith*»[53]. Ciò induce a non sottovalutare una congerie di fattori che possono incidere sul livello di eguaglianza di genere espresso da una certa società, come, accanto ai precetti religiosi, l'indice di *gender inequality* del più ampio contesto sociale e istituzionale di un paese e – *last but not least* – l'attitudine

[50] DiDi, *Are religious women more traditionalist?*, *op. cit.*, p. 606.

[51] A. Chiricosta, *Vie femminili di liberazione. Il movimento tradizionale delle bhikkuni nel Sudest asiatico*, in *Storia delle donne*, 2015, p. 39.

[52] M. Neubauer-Shani, *Orthodoxy, post-orthodoxy and religious feminism: the case of the 'Shirat Rivka' prayer group*, in *Israel Affairs*, 2021, p. 475 ss. Si dà conto di come l'obiettivo, diversamente dal riformismo ebraico, che dal 1972 ha aperto alle donne l'ordinazione rabbinica, non sia tanto l'eguaglianza, quanto piuttosto la *feminization* della dottrina ebraica, ovvero la rilettura in chiave femminista di riti e altri aspetti tradizionali del canone ebraico, come la preghiera. Nello specifico, l'autrice, utilizzando come caso studio il gruppo di preghiera *Shirat Rivka* in Israele, evidenzia come questa esperienza «*enables Orthodox women, who do not necessarily want to view themselves and to be viewed by others as part of the feminist revolution, to be more involved in the prayer arena without having to leave self-defined* '*comfort zone*'», p. 488.

[53] DiDi, *Are religious women more traditionalist?*, *op. cit.*, p. 609.

individuale, che talvolta utilizza la questione di genere per differenziare il proprio sé, o «noi» religioso, dal «*secular other*»[54].

A complicare ulteriormente il quadro, vi è, poi, la questione delle molteplici interpretazioni che una certa dottrina religiosa può conoscere. Così, ad esempio, sono numerosi i casi in cui si attesta come, nella fase degli albori, alcune tra le principali religioni del mondo attribuissero alle donne una posizione decisamente migliore di quella riconosciuta successivamente. Ciò vale, ad esempio, con riferimento alla religione cristiana[55], a quella islamica[56] e a quella buddista[57], per citarne alcune. Ciò che gli studiosi evidenziano è che a fare la differenza, ora come allora, è il particolare sostrato sociale e culturale in cui una certa dottrina attecchisce e dunque la porosità della religione agli uomini e alle donne che la praticano, alle istituzioni, alla dimensione culturale e alle reti sociali in cui sono immersi[58]. Così, ad esempio, sebbene nella religione cattolica le donne non abbiano accesso al sacerdozio, è vero pure tuttavia che vi sono alcune congregazioni cattoliche del «sud del mondo» – le c.d. chiese di missione – in cui le donne hanno un peso determinante sia nella pratica pastorale che in quella liturgica, in ragione del ruolo cruciale rivestito dai laici in questi contesti[59]. Altrettanto indicativi di questa tendenza sarebbero poi le correnti religiose che, soprattutto all'indomani della seconda guerra mondiale, in concomitanza con la rivoluzione femminista, sono nate come costola di alcune delle principali religioni monoteiste anche con l'esplicito obiettivo di assicurare una maggiore eguaglianza tra uomini e donne nella dottrina, così come nella gerarchia religiosa. Si pensi, tra tutte, al

[54] *Ibidem*, p. 624.

[55] I. Zuanazzi, *La condizione della donna nella Chiesa cattolica: il paradigma della 'reciprocità nell'equivalenza e nella differenza'*, in *Quaderni di diritto e politica ecclesiastica*, 2018, p. 25 ss.

[56] Si veda in tal senso G. Dammacco, *La condizione della donna nel diritto delle religioni*, in *Stato, Chiese e pluralismo confessionale*, 2007, in cui si afferma come «Le donne, nel quadro del diritto musulmano classico, godevano di enormi privilegi rispetto alle proprie simili di altre culture o religioni dell'epoca (l'epoca dell'Islam classico va dal VII sec d.C. al Settecento): erano considerate soggetto di diritto, potevano ereditare, potevano divorziare. Ma, in virtù dell'essenza plurale del diritto musulmano, queste regole generali subirono sin dall'inizio differenti interpretazioni e applicazioni a seconda dei luoghi e dei tempi, cosicché la condizione reale delle donne musulmane non si uniformò mai a unico modello» (p. 6).

[57] A. Chiricosta, *Vie femminili di liberazione*, *op. cit.*, p. 42.

[58] Si veda DiDi, *Are religious women more traditionalist?*, *op. cit.*, p. 624 in cui, all'esito dello studio effettuato, si conclude come «*the relationship between religious attendance and women's gender ideologies is conditioned by national context*». Nello specifico si osserva come, nei paesi che presentano una maggiore eguaglianza di genere, esiste una correlazione negativa tra l'attitudine individuale delle donne rispetto all'eguaglianza di genere e la partecipazione ad una comunità religiosa. Tuttavia, questa correlazione diventa addirittura positiva nei paesi in cui vi è un indice basso dell'eguaglianza di genere.

[59] Dall'intervista al prete cattolico effettuata il 6.1.2023, è emerso inoltre come i sacerdoti cattolici possano delegare il commento dei vangeli a chiunque sia battezzato. Questa pratica, poco diffusa nel mondo occidentale, è invece più frequente nelle Chiese di missione, in cui i preti gestiscono comunità che possono contare diverse centinaia di fedeli.

riformismo ebraico, che conta circa il 27% di rabbini donne o alla Chiesa di tradizione protestante negli Stati Uniti in cui il 67% del clero è formato da donne[60].

In altre parole, le comunità religiose non sono entità monolitiche: esse sono abitate da una pluralità di narrazioni, teologie, correnti, alcune delle quali si mostrano più sensibili di altre all'eguaglianza di genere, all'inclusività, alla lotta al patriarcato[61]. Le comunità religiose, inoltre, non sono un unicum omogeneo: in esse convivono credo molteplici, sempre più diversi, e in continuo movimento, anche rispetto a questioni cruciali come il fine vita, o i diritti riproduttivi[62]. Intanto, il trend globale di progressiva atomizzazione e polverizzazione dell'autorità sembra aver contagiato da tempo anche il campo religioso[63].

5. Una veste religiosa per i diritti umani

Collegato a quanto osservato finora, c'è un altro ordine di considerazioni da introdurre, che una sentenza della Corte Edu ben mette in luce. Si tratta del caso *SGP c. The Netherlands*[64], la cui vicenda vede al centro un partito politico, lo *Staatkundig-Gereformeerde Partij* (SGP), che nel suo statuto nega esplicitamente alle donne la possibilità di tesserarsi al partito e di accedere all'elettorato passivo[65]. Si tratta di un partito collegato alla c.d. «chiesa riformata», espressione con cui – con una traduzione molto «libera» – si individua una costola del calvinismo olandese, dai tratti spiccatamente ortodossi, seguita soprattutto nella c.d. *Bible belt*, un lungo lembo di terra che attraversa la regione meridionale dei Paesi Bassi. Nel quadro della politica della pillarizzazione, ufficialmente abbandonata, ma che nei fatti continua a caratterizzare

[60] D. Masci, *The divide over ordaining women*, Pew Research Center, 9 settembre 2014, disponibile su https://www.pewresearch.org/fact-tank/2014/09/09/the-divide-over-ordaining-women/.

[61] Da qualche anno, ad esempio, nella Chiesa cattolica è in atto una consultazione interna sull'accesso delle donne a ministeri come il diaconato. F. Giansoldati, *Vaticano, il cardinale Marx avverte: «È ora di aprire alle donne diacono»*, Il Messaggero, 4 luglio 2022. Nello specifico, Papa Francesco ha finora nominato due commissioni per indagare sul ruolo delle donne diacono alla luce di quello che accadeva nella Chiesa delle origini. Il Papa ha di recente ribadito il suo «no» all'ordinazione sacerdotale delle donne, nonostante le forti istanze espresse in tal senso dall'episcopato tedesco. Tuttavia, ha di recente nominato due donne nel Dicastero per i vescovi e suor Raffaella Petrini come segretario generale del Governatorato dello Stato di Città del Vaticano.

[62] M. Sunder, *Piercing the Veil*, cit.

[63] A. Stuart, *Freedom of religion and gender equality*, *op. cit.*, riferisce i dati di una ricerca in cui risulta che la maggioranza dei credenti «*now feel that the locus of religious authority lies within themselves*», p. 452.

[64] Corte EDU, 10 luglio 2012, ric. 58369/10, *Staatkundig Gereformeerde Partij c. The Netherlands*.

[65] In particolare, B. M. Oomen – J. Guijt – M. Ploeg, *CEDAW, the Bible and the* State, *op. cit.*, riferiscono quanto contenuto nel programma politico del SGP «*The notion of universal suffrage, based upon a revolutionary emancipatory ideal, conflicts with women's destiny. This obviously applies to women taking a place in political bodies, both representative and managerial. A woman's conscience will guide her in deciding whether to vote, taking into account the place given to her by the Lord*». (p. 165). Sui partiti politici a orientamento religioso si veda lo studio di M. C. Locchi, *La disciplina giuridica dei partiti a orientamento religioso*, Torino, 2018.

l'approccio olandese alla diversità, gli ortodossi riformati hanno un proprio quotidiano, votano per il SGP e frequentano delle scuole «riformate», finanziate dallo stato[66].

Il caso qui ad oggetto viene portato all'attenzione della Corte nel 2005, quando alcune Ong olandesi che agiscono per la tutela dei diritti delle donne contestano la mancata ratifica da parte dello stato olandese dell'art. 7 della CEDAW, che ricomprende tra gli obblighi governativi il contrasto attivo alla discriminazione di genere, con specifico riferimento al momento dell'accesso al voto e alla libertà di associazione (art. 7(a.) e (c.)). La Corte dà ragione alle Ong[67] e ordina allo stato olandese di interrompere i finanziamenti elargiti al SGP. Quest'ultimo decide quindi di modificare le parti dello statuto che conferiscono solo agli uomini l'accesso al partito, ma mantiene la sua posizione rispetto all'elettorato passivo: «*If we take in all the information in the Bible, we must conclude that it reserves positions in government to men*»[68]. L'appello presentato dal SGP contro questa sentenza viene rigettato dalla Corte d'appello[69] e successivamente anche dalla Corte Suprema, finché anche la Corte europea dei diritti dell'uomo non giunge con la sua decisione a sancire che, nel caso ad oggetto, non sussiste violazione della libertà di religione, di espressione e di associazione, tutelate rispettivamente dagli art. 9, 10, 11 della Cedu. L'evoluzione e lo sviluppo dell'eguaglianza di genere negli stati membri impedisce che uno stato possa dare il proprio supporto ad un'idea «*of the man's role as primordial and the woman's as secondary*»[70]. In seguito alla sentenza, nel 2013, su pressione del governo olandese, ma soprattutto della società civile e delle Ong coinvolte nel caso, il SGP modifica il suo regolamento eliminando il divieto per le donne di presentarsi alle elezioni e di ricoprire

[66] Per ulteriori dettagli si veda B. M. Oomen – J. Guijt – M. Ploeg, *CEDAW, the Bible and the State*, *op. cit.*, p. 162 ss. Sia consentito rinviare a P. Pannia, *La diversità rivendicata*, Padova, 2021, per i riferimenti alla politica della diversità adottata nei Paesi Bassi, p. 96.

[67] Nello specifico si tratta delle seguenti NGOs: the Clara Wichmann Foundation, the Dutch Chapter of the ICJ, the Humanistic Council on Human Rights, the Netherlands Foundation for Women's Interests, Women's Work and Equal Citizenship and the Women's Network of the Netherlands. È opportuno sottolineare come queste NGO abbiano cercato, anche attraverso annunci sui quotidiani, di trovare una donna all'interno della chiesa riformista che volesse avviare il caso, ma senza riuscirvi. Così in B. M. Oomen, *The application of socio-legal theories of legal pluralism to understanding the implementation and integration of human rights law*, in *European Journal of Human rights*, 2014, p. 488.

[68] B. M. Oomen – J. Guijt – M. Ploeg, *CEDAW, the Bible and the State*, *op. cit.*, p. 167.

[69] Occorre al tempo stesso chiarire che, in realtà, il SGP ha presentato ricorso anche contro la decisione della Corte di prima istanza di interrompere l'elargizione di finanziamenti. Su questo punto, la sezione amministrativa del Consiglio di Stato ha dato ragione al SGP dichiarando come, in questo caso, il diritto alla partecipazione politica debba avere la meglio rispetto al principio di non discriminazione, dato il suo ruolo cruciale per una società pluralistica e democratica. Di conseguenza «*Even a party whose beliefs on equality and equal dignity of men and women differ from society at large from general public opinion and legal norms should, criminal law aside, be able to participate in public debates without being hindered*». Così in *Administrative Division of the Council of State of the Netherlands, SGP vs. the Minister for the Interior*, 5 December 2007, 200609224/1, par. 2.14.1. e 2.14.2.

[70] *Staatkundig Gereformeerde Partij c. The Netherlands*, par. 70.

funzioni pubbliche (sebbene il *leader* del partito aggiunga che spetterà alle donne decidere sulla base delle loro intime convinzioni)[71].

È importante ora volgere l'attenzione alle complesse implicazioni sociali di questi verdetti. In proposito, uno studio empirico ha mostrato come tra i membri del SGP, incluse le donne, sia prevalso un sentimento di disappunto, preoccupazione ed esclusione[72]. All'indomani della prima sentenza, inoltre, decine di migliaia di protestanti ortodossi hanno firmato una petizione, rivendicando il sacrificio di libertà fondamentali ad opera del «super diritto» della non-discriminazione[73]. Inoltre, con più specifico riferimento alle donne appartenenti alla chiesa riformata, la vicenda giudiziaria sembra aver provocato in esse una reazione negativa, un effetto *backlash*. L'analisi qualitativa condotta, infatti, mostra come tra le fedeli della chiesa riformata fosse prevalente un senso di ribellione rispetto ad una narrazione «pietista», portata avanti dalle associazioni per i diritti delle donne, nonché dalla stampa e dalla maggior parte dell'opinione pubblica nazionale e internazionale, che le ha ritratte come incapaci di difendere la propria posizione. Al tempo stesso, se per un verso le decisioni giudiziarie e la decisione del governo hanno indubbiamente accelerato la discussione sulle ragioni teologiche sottostanti al divieto di accesso per le donne alle cariche pubbliche, tuttavia, per altro verso, esse hanno contribuito anche ad accendere i toni e a polarizzare il dibattito, sotto la minaccia di un intervento percepito come un «attacco esterno». Il caso ha creato un senso di pericolo, tra i credenti della chiesa riformata, rispetto ad una questione che si riteneva opportuno venisse risolta al proprio interno. Di converso, i fattori che hanno più profondamente influenzato le opinioni interne alla confessione religiosa sul punto sono quelli avvenuti «dall'interno», sui quotidiani di partito, o sotto l'influenza di congregazioni simili in altri stati, e, soprattutto, sulla base di argomenti fondati sulla Bibbia[74].

Sebbene già nel 2014, all'indomani della modifica del regolamento del SGP, diverse donne abbiano deciso di candidarsi alle elezioni locali[75], e al di là delle implicazioni dirette che il caso ha avuto sulla comunità – i rapporti di causa-effetto in ambito sociale sono estremamente difficili da analizzare – ciò che la vicenda (giudiziaria e non solo) racconta (e denuncia) è che l'interlocutore con cui sia il governo che la Corte si sono rapportati non sono mai state le donne della chiesa riformata. Nel caso qui esaminato, la domanda di riconoscimento dell'ingiustizia subita non è partita dalla

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[71] J. Temperman, *Freedom of Religion or Belief and Gender Equality in the Netherlands: Between Pillars, Polders, and Principles*, in *The Review of Faith & International Affairs*, 2022, p. 77 ss.

[72] B. M. Oomen – J. Guijt – M. Ploeg, *CEDAW, the Bible and the State*, *op. cit.*, p. 159 e 168. Gli autori riportano come il *leader* del SGP in Parlamento ha lamentato come «*The women in our party consider this verdict to be threatening. We feel pushed aside. That's a position to get used to. We have profound beliefs, and want to participate in this society as full and responsible citizens. And now there is the message: your beliefs don't fit*».

[73] *Ibidem*, p. 159.

[74] *Ibidem*, p. 172-173.

[75] B. M. Oomen, *The application of socio-legal theories*, *op. cit.*, dà conto, tuttavia, di come queste candidature siano state motivate alla luce della dottrina biblica e del proprio ruolo (e dovere) di appartenenza religiosa e non delle sentenze della corte EDU (p. 489).

comunità, ma da attori in qualche misura esterni ad essa, privi di quella legittimazione necessaria a fugare il senso di alienazione, esclusione e vittimizzazione provato dalle donne che hanno subìto personalmente l'esperienza di discriminazione. È mancata, dunque, la partecipazione dei soggetti coinvolti.

Questo fenomeno non si rinviene solo in questo caso. Altrettanto esemplificativo è, ad esempio, il processo di consultazione pubblica che ha portato in Francia alla legge sul divieto del velo nell'inverno 2003-2004. La Commissione non ha intervistato neppure una donna musulmana che vestisse l'*hijab* dichiarando fin da subito che «non sarebbe stata sensibile ai loro argomenti». Inevitabilmente il *report* finale, infarcito di stereotipi orientalisti, ha finito col rappresentare l'Islam come una religione misogina e arretrata[76]. La mancanza di un processo di coinvolgimento effettivo e attivo delle persone che subiscono discriminazioni di genere fondate sulla religione (e, in particolare delle donne e dei credenti LGBT+), che ascolti e tenga in considerazione il loro punto di vista, i loro discorsi e le loro esperienze, ostacola il raggiungimento di una comprensione profonda e autentica della questione e di tutte le sfumature che la contraddistinguono.

Peraltro, a rischiare di essere compromessa, anche quando si discute delle regole che governano l'ordinamento sacerdotale o la vita monastica di una certa comunità religiosa, non è solo l'autonomia confessionale, ma anche i diritti dei singoli membri, e innanzitutto la loro identità personale, che si esprime anche nella rappresentazione che gli individui hanno di sé e del gruppo religioso cui appartengono. Questi diritti, come visto, possono risultare minacciati, soprattutto quando l'accesso alla giustizia viene compiuto da un soggetto esterno alla comunità religiosa condotta «a processo». Un intervento statale di tipo «forte», dunque, rischia di essere percepito come un «attacco frontale». Nel caso in cui il «duello giudiziario» abbia luogo nella contumacia delle dirette interessate (le donne appartenenti alla comunità religiosa) il pericolo è che si rimedi alla mutilazione simbolica messa in atto da un catechismo e da una gerarchia religiosa di matrice patriarcale attraverso un'ulteriore, più sottile forma di dominio: l'imposizione di una religione civile, coi suoi sacerdoti, le sue gerarchie e le sue dottrine. Essa incarna una risposta alle ragioni del pluralismo, alla complessità e al dissenso, che si fonda sull'imposizione, portata avanti con una duplice strategia: «*institutional silencing* (*the state pays no regard to the views of group members about the meaning of one of their practices* […]) *and institutional misrecognition (the state officially validates stereotypical, essentialist and demeaning prejudices* […])»[77].

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[76] C. Laborde, *Female Autonomy, Education and the Hijab*, in *Critical Review of International Social and Political Philosophy*, 2006, p. 351 ss., si veda in particolare p. 373. Inoltre, sarebbe necessaria una maggiore riflessione antropologica sul velo, che lo smarchi dalle rappresentazioni e dalle sovrapposizioni simboliche occidentali. Ad esempio, il velo è anche un mero capo di abbigliamento, funzionale a certi contesti climatico-ambientali. Ringrazio Ilenia Ruggiu per questa preziosa osservazione. Sul punto, si veda R. Pepicelli, *Il velo nell'Islam. Storia, politica, estetica*, Roma, 2012, soprattutto p. 19 ss. e il Capitolo 5 «L'estetica del corpo tra sacro e moda», p. 117 ss.

[77] C. Laborde, *Female Autonomy, op. cit.*, p. 374.

6. Note conclusive: lo stato e il genere del sacro

Secondo un noto aforisma afroamericano, le donne rappresentano «*the backbone of the church*». Questa espressione sintetizza icasticamente l'ambiguità del ruolo della donna all'interno della struttura ecclesiastica: ne è al centro, ma al tempo stesso è messa in secondo piano da un ordine che attribuisce agli uomini il monopolio nella costruzione, nella narrazione e nella trasmissione della dottrina religiosa. Se in questo campo l'accesso alla giustizia, volto a riequilibrare la posizione di uomini e donne nella gerarchia e nella dottrina religiosa, trova numerosi appigli nelle costituzioni nazionali così come nel diritto internazionale, al tempo stesso occorre tenere presenti i rischi connessi a queste azioni che non possono essere ricondotti unicamente alla salvaguardia dell'autonomia confessionale.

«[I] cambiamenti culturali si realizzano in primis entrando nelle culture. L'alternativa è lo scontro di principio, ma richiede energie immense e la persecuzione che ne deriva […] è stata sempre meno utile della negoziazione e addirittura del sincretismo»[78]. Risulta difficile non aderire a questa osservazione, che trova conferma nelle riflessioni stimolate dalla giurisprudenza della Corte Edu qui analizzata. D'altra parte, esiste una fonte importante nella dottrina religiosa, che è il sentire del popolo (quello che nella religione cattolica è il c.d. *sensus fidei fidelium*)[79], oggetto di sempre maggiori riconoscimenti, nonostante lo scollamento tra il vertice e la base degli ordinamenti religiosi si faccia sempre più importante. Da questo elemento passa anche il tema dell'accesso al sacerdozio delle donne che coinvolge inevitabilmente questioni cruciali, afferenti ad esempio al ruolo e all'evoluzione, nella società che cambia, delle varie comunità religiose, o alla funzione del sacerdote al suo interno. Questi richiami servono ad introdurre anche un'altra considerazione: così come altre questioni – quali ad esempio la lingua in cui deve essere celebrata la funzione religiosa – l'accesso al sacerdozio non rientra tra gli aspetti «strutturali», i principi di fede, di una data religione. La necessaria separazione tra l'elemento teologico e quello meramente culturale non può intervenire dal «di fuori»[80]. Questa operazione richiede una consapevolezza della

[78] M. Murgia, *God save the queer. Catechismo femminista*, Torino, 2022, p. 61.

[79] Commissione Teologica Internazionale, *Il* Sensus Fidei *nella vita della Chiesa*, 2014, https://www.vatican.va/roman_curia/congregations/cfaith/cti_documents/rc_cti_20140610_sensus-fidei_it.html. Così viene definito il *sensus fidei* «Come concetto teologico, il sensus fidei fa riferimento a due realtà distinte, anche se strettamente connesse; il soggetto proprio dell'una è la Chiesa, «colonna e sostegno della verità» (1Tm 3,15), mentre il soggetto dell'altra è il singolo credente, che appartiene alla Chiesa per mezzo dei sacramenti dell'iniziazione e che partecipa alla fede e alla vita ecclesiali particolarmente mediante la celebrazione regolare dell'eucaristia».

[80] Peraltro, sul punto si veda S. Ferrari, *I diritti delle religioni sono contro le donne?* cit., che sottolinea come «il divieto di conferire alle donne posizioni di guida della comunità è fondato sul diritto divino orale, sulla Tradizione o sulla Sunna. Nessuno dei tre principali testi sacri – Bibbia, Vangelo e Corano – contiene una esplicita proibizione» (p. 13).

pratica pastorale e un processo di riflessione dogmatica che spetta condurre alle comunità religiose e agli uomini e alle donne che le costituiscono e ne sono parte. Coloro che sono estranei alla tradizione religiosa potranno offrire la propria prospettiva, porre domande o presentare argomenti volti a mettere in discussione, o viceversa a supportare, una certa visione e interpretazione dei credenti, ma spetta a questi ultimi definire la questione[81]. In tal senso, la «saga» giudiziaria del SGP qui illustrata ha mostrato i possibili pericoli connessi all'intervento di un *deus ex machina*, di un soggetto che da fuori, in assenza di un mandato interno, si faccia portatore dinanzi alle corti delle istanze delle donne appartenenti ad una data comunità. Non solo c'è il problema della corretta traduzione della domanda di tutela, ma anche quello della possibile «vittimizzazione» nonché del senso di esclusione e dell'effetto *backslash* che può essere sperimentato da coloro che contemporaneamente subiscono e agiscono il precetto religioso discriminatorio.

Certamente, di fronte a queste considerazioni si può obiettare come le gerarchie ecclesiastiche, come tutte le istituzioni, tendano alla conservazione e dunque oppongano una strenua resistenza al cambiamento, e al vento rivoluzionario femminista che minaccia le file degli uomini al potere. D'altro canto non si può negare come esistano anche dei *turning points*, dei punti di rottura, dei cedimenti al cambiamento, pena la sopravvivenza dello stesso ordinamento religioso che rischia, altrimenti, di «trovarsi perdente nei confronti della Storia»[82]. È senz'altro vero però che i processi di cambiamento all'interno delle religioni sono molto lunghi e, sebbene la sensibilità dei fedeli stia mutando, le donne ancora faticano ad incidere sulle regole che governano le comunità religiose cui appartengono.

Dunque cosa bisogna fare nel frattempo? Bisogna forse concludere per una separazione netta tra Stato e Chiesa che non consenta alcun tipo di interferenza?

Nel valutare la tipologia di interventi che lo stato può implementare sul piano giuridico – e qui si entra nel campo di un accesso alla giustizia intesa in senso più ampio, assiologico[83] – emerge come le misure di natura «sanzionatoria» presentino più di un pericolo, sia che si tratti di sanzioni più incisive, quali l'applicazione della legislazione anti-discriminatoria estesa anche alla dimensione religiosa, che di sanzioni (apparentemente) più «miti», come la cessazione dei finanziamenti alle religioni che non garantiscano l'accesso al sacerdozio delle donne. Come è emerso dagli studi e dalla casistica cui si è precedentemente fatto riferimento, queste azioni rischiano di aprire un conflitto o comunque di compromettere e pregiudicare la funzione sociale esercitata

[81] C. B. Preston, *Women in traditional religions: refusing to let patriarchy (or feminism) separate us from the source of our liberation*, in *Mississipi College Law Review*, 2003, p. 185 ss.

[82] Intervista del 6.1.2023 ad un prete cattolico che osserva: «il giorno in cui non ci saranno più preti, ad esempio, bisognerà far qualcosa…non si potrà più bloccare l'accesso alle donne, alle persone LGBT…».

[83] Per un utilizzo del sintagma «accesso alla giustizia» in termini assiologici si veda in questa *Special Issue* M.C. Locchi, *Are European democracies good for Muslim women's political participation and representation in European constitutional states?*.

dalle comunità religiose, quali formazioni in cui si sviluppa la personalità dell'individuo. Si tratta di interventi che possono paradossalmente ostacolare il cambiamento. Oscurando tutte le sfumature e le correnti interne che si muovono all'interno del mondo composito delle comunità religiose, nonché le plurime fedi e individualità che vi partecipano, queste misure rischiano di produrre un *vulnus* ai danni del diritto alla libertà religiosa e all'identità religiosa, sia del gruppo che della persona. Preferire gli strumenti promozionali rispetto a quelli sanzionatori, inoltre, sembra porsi più in sintonia con il paradigma pluralista, che scoraggia operazioni escludenti e richiede allo stato un trattamento eguale di tutte le comunità religiose. Questo approccio, ad esempio, risulta palesemente tradito in Italia dal sistema delle intese, che in spregio a numerosi precetti costituzionali, talvolta lascia fuori dal riconoscimento (e dal finanziamento) statale proprio quelle dottrine e quelle pratiche più rispettose dei diritti delle donne (e, in generale, più votate all'eguaglianza e all'inclusione)[84].

D'altra parte, pure un atteggiamento inerme e passivo dello stato è da ritenersi problematico. Ad esempio, già il quadro giuridico internazionale e costituzionale afferma chiaramente che la rivendicazione dell'autonomia confessionale, della libertà religiosa o dell'identità personale non può godere di una tutela assoluta, a scapito di altri diritti. Al dettato giuridico si aggiungono anche le evidenze della prassi che mostra come in alcune aree del mondo leggi apparentemente *gender-neutral*, come quelle che puniscono la blasfemia, possano di fatto impedire l'espressione del dissenso rispetto a leggi che legittimano pratiche discriminatorie nei confronti delle donne, giustificate sulla base del credo[85]. Lo stato, dunque, non può astenersi dal mettere in campo degli strumenti al fine di supportare e trainare il movimento verso l'eguaglianza di genere delle comunità religiose. Ma in che modo? Innanzitutto, al fine di favorire un mutamento di discorsi e rappresentazioni sul genere all'interno delle comunità religiose, lo stato potrebbe sollecitare e sostenere ricerche di tipo qualitativo e quantitativo. Sono numerose, infatti, le voci che lamentano la carenza di dati statistici, nonché di studi che consentano di esplorare e dare risonanza ai numeri e alle narrazioni prodotte dalle identità femminili che partecipano alla vita religiosa. Lo stato darebbe così risposta ad un bisogno trasversale, registrato in Europa, con riferimento alla chiesa anglicana[86], così come in Africa, dove sempre più la chiesa cristiana pare assumere un

[84] Il sistema delle intese, nonostante i numerosi profili di incostituzionalità già da tempo e da molti denunciati, resta per lo stato italiano l'unico strumento con cui al momento sono regolati (o non regolati) i rapporti con le varie religioni praticate nella società nazionale. Si veda, tra gli altri, M. Croce, *La libertà religiosa nell'ordinamento costituzionale italiano*, Pisa, 2012.

[85] *Report of the Special Rapporteur on freedom of religion or belief*, Human Rights Council. *Forty-third session*, 24 *February*–20 *March* 2020, cit., è quanto accade in particolare nel sud e nel sudest asiatico, mentre un meccanismo simile interessa anche la Polonia in cui l'articolo 196 del codice penale che punisce le offese ai sentimenti religiosi ha ridotto i margini della libertà di espressione «*and pose serious obstacles to those who seek to confront and promote reform of the discriminatory laws and policies identified above*» (par. 59).

[86] WATCH, *Women in Ministry, the Church of England and Statistics: A closer look*, 2020, su https://womenandthechurch.org/features/women-in-ministry-the-church-of-england-and-statistics-a-closer-look/.

«volto femminile»[87]. Ugualmente proficua potrebbe essere l'organizzazione di conferenze nonché il supporto del dialogo interreligioso sul tema del ruolo e della pratica dell'autorità all'interno delle varie religioni[88].

Inoltre, muovendo da un'ottica più ampia, se non v'è dubbio che la religione incida sugli equilibri sociali, è altrettanto vero che la società condiziona potentemente gli assetti religiosi. In proposito, è stato dimostrato come l'attitudine delle donne rispetto al genere e l'appartenenza ad una fede religiosa siano due funzioni che variano in relazione al livello generale di diseguaglianza di genere sperimentata all'interno del particolare contesto nazionale. Dal momento che le religioni non sono impermeabili ai mutamenti sociali[89], lo stato potrebbe intervenire impegnandosi ad aumentare l'indice di eguaglianza che, nel complesso, contraddistingue le istituzioni politiche, economiche e sociali di un dato territorio.

Più in generale, per sostenere e alimentare modelli e sensibilità alternativi sul genere anche all'interno delle congregazioni religiose, lo stato dovrebbe assicurare e mantenere vivi i luoghi pubblici del dibattito, assicurando che in essi sia promossa una forma di laicità inclusiva, ovvero un atteggiamento istituzionale di eguaglianza rispetto a tutte le comunità religiose[90]. Sempre in quest'ottica, sembra imprescindibile un vincolo procedurale che imponga la consultazione delle donne appartenenti ad un determinata comunità religiosa prima dell'approvazione di un disegno di legge che le riguardi. L'approccio da perseguire è quello che mette all'angolo i tradizionali paradigmi oppositivi (si pensi ai dualismi sfera privata-sfera pubblica; libertà religiosa-eguaglianza di genere; neutralità-interventismo statale) per prendere coscienza e valorizzare piuttosto le interrelazioni e la mobilità delle dinamiche del reale. Solo dando riconoscimento alle sinergie tra tutela della libertà religiosa e tutela dell'eguaglianza di genere è possibile offrire tutela effettiva all'individuo. D'altra parte, forse non è un caso che proprio la dimensione partecipativa e dialogica trovi corrispondenza nel paradigma relazionale predicato da un'altra, composita, «religione» umana: quella femminista.

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[87] G. Zurlo, *Why The Future of The World's Largest Religion Is Female — And African*, in *Religion Unplugged*, 2022. Approda alla medesima conclusione il report del Pew Research Center, *The Gender Gap in Religion Around the World*, 2016, secondo cui vi sono vistose «*country-level differences in religious commitment between men and women*». Questo report più in generale registra che «*compared to Christian men, Christian women are more likely to attend weekly church services (53% versus 46%), pray daily (61% versus 51%), and say religion is important in their lives (68% versus 61%)*».

[88] Questa misura è già suggerita da A. Stuart, *Freedom of religion and gender equality*, *op. cit.*

[89] Così pure E. Camassa, *Presentazione*, in *Quaderni di diritto e politica ecclesiastica*, 2018, p. 4 ss.

[90] Sulla laicità inclusiva si veda M. Ferrante, *Diritto, religione, cultura: verso una laicità inclusiva*, in *Stato, Chiese e pluralismo confessionale*, 2017, che così chiarisce il senso dell'aggettivo «sia dal punto di vista dello Stato che, aderente alla lettura che ne fa la Corte costituzionale, non esprime avversione verso il fatto religioso; sia in quanto indicativo di una laicità aggregante e aperta, una laicità cioè, per intenderci, diversamente intesa rispetto a quella c.d. 'alla francese'».

RIVISTA DI
DIRITTI COMPARATI

* * *

ABSTRACT: Da qualche tempo, il tema dei rapporti tra eguaglianza di genere e libertà religiosa è stato interessato da una nuova questione: spetta al diritto, e se sì, in che misura, intervenire di fronte all'esclusione delle donne dal sacerdozio prevista da alcune confessioni religiose? Questo contributo partecipa al dibattito attraverso un'analisi comparata, portando all'attenzione la tutela del pluralismo e dell'identità culturale oltre a ragioni di efficacia e di opportunità dell'intervento statale. I dati emersi chiedono di tenere in considerazione la complessità del precetto religioso (e delle sue interpretazioni), nonché la molteplicità di risposte che le donne, immerse in uno specifico contesto sociale, economico, culturale, elaborano di fronte a questi precetti, nella costruzione del proprio sé (religioso e non solo).

ABSTRACT: A new question has enriched the issue of the relationship between women's equality and freedom of religion: if, and to what extent, should the law intervene to tackle the exclusion of women from the decision-making, leadership and ordained roles provided by many religions? This paper participates in the debate adopting a comparative approach, which aims to bring to light the protection of pluralism and cultural identities together with the efficacy and opportunity of the state intervention. These elements ask to take into account on the one hand the complexity of religious rules (and their interpretation) and, on the other hand, the multiplicity of answers given by women to the religious precepts. These responses, which are essential to build the (religious) self, depend on the specific social, economic and cultural context in which women are situated.

KEYWORDS: libertà religiosa – eguaglianza di genere, autonomia confessionale – accesso alla giustizia – giurisprudenza corte Edu – approccio intersezionale

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Institutional Violence against Women Victims of Domestic Violence and Access to Justice in the Inter-American Human Rights System*

Natalia Margarita Rueda Vallejo

TABLE OF CONTENTS: 1. Introduction. – 2. Some details on access to justice in the Inter-American system and its relation to institutional violence. – 3. Institutional violence in contexts of domestic violence. – 4. Institutional violence and its relationship with the state responsibility. – 5. Conclusion.

1. Introduction

This paper presents some reflections on institutional violence in the context of domestic violence as a widespread problem in Latin America. It will show some general characteristics of this phenomenon in relation to the tendency to judge and decide legally on the basis of stereotypes, especially sexist ones, as a systematic violation of women's human rights. In this regard, I will refer to some cases taken from the jurisprudence of the Inter-American Court of Human Rights. I will try to make some observations on the implications for human rights and the international responsibility of States that impede access to justice.

Institutional violence is a concept that has been used by the Inter-American Court of Human Rights to draw the attention of States to a persistent problem in their own institutions. Curtin and Litke affirms that «institutional violence is violence made possible and facilitated by social organizations having relatively explicit rules and formal status within a culture. *Examples are the educational system, the military, the police force, and the judicial system*. When such institutions promote violence, however, they often do so within a broader social context of systemic violence. Hence, *the rules are more vague [sic], and there may be no identifiable social institutions that facilitate violence*»[1].

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* The article has been subjected to double blind peer review, as outlined in the journal's guidelines.

[1] D. Curtin – R. Litke (eds.), *Institutional violence*, Amsterdam, 1999, xiv. Italicised added. A. Joxe, *A critical examination of quantitative studies applied to research in the causes of violence*, in UNESCO, *Violence and its causes*, Paris, 1981, p. 69, presents the relationship between institutional violence and structural violence. According to this author, structural violence is a concept derived from the notion of institutionalised violence presented by the Latin-American Bishops' Conference (Medellín, 1969): «People are not simply killed by direct violence but also by the social order». In the same vein, E.

In relation to the States, institutional violence is a phenomenon that occurs when the authorities, in the exercise of their functions, create obstacles to the exercise of human rights. This problem is aggravated when the obstacle is based on stereotypes about the various conditions that combine to discriminate against a group or an individual. One relevant consideration is that «we might reasonably be asked, as Dom Helder Camara has done, to consider '*that injustice, wherever it occurs, is a form of violence*' and that 'it can and must be proclaimed that is constitutes everywhere the leading form of violence'. *It is this initial and primordial violence that leads to the formation of a 'spiral of violence' in which every act of violence leads to further violence*»[2].

These premises are linked to the idea of law as legitimised violence[3]. To illustrate the increased risks and entrenched barriers created by the androcentric conception of law and its inherent violence, I will therefore focus on the situation of women and girls. Indeed, violence against women is widespread and culturally, socially and institutionally reinforced, normalised and legitimised. At the same time, however, it is minimised and underestimated in relation to the enormous damage it can cause and exacerbate. In this context, institutions provide the ideal framework for the reproduction of patterns of violence that allow it to remain in the collective imagination as natural and, in many cases, as necessary. In this way, institutions can also be the driving force behind the transformation of the situation of systematic violence.

For example, depending on the context, violence against women is also manifested as a form of punishment in which the cruelty with which it is inflicted is part of a broader purpose: that of sending a message, in a scheme that could well be

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Boulding, *Women and social violence*, in UNESCO, *Violence and its causes*, Paris, 1981, p. 240, emphasises the link between structural violence and institutional violence when she states that «The concept of structural violence, that which frames behavioural violence, refers to the *organized institutional and structural* patterning of the family and the economic, cultural and political systems that determine that *some individuals shall be victimized through a withholding of society's benefits, and be rendered more vulnerable to suffering and death than others*». Italicised added.

[2] P. Mertens, *'Institutional' violence, 'democratic' violence and repression*, in UNESCO, *Violence and its causes*, Paris, 1981, p. 215. Italicised added.

[3] The idea of law as violent is developed by W. Benjamin, *Critique of violence*, in M. Bullock – M. W. Jennings (eds.), *Walter Benjamin, Selected Writings, 1913-1926*, London, 1996, p. 236-252; then taken up again by C. Menke, *Recht und Gewalt: Erweiterte Neuauflage mit einem Nachwort des Autors*, Berlin, 2018. M. P. Fersini, *Diritto e violenza. Un'analisi giusletteraria*, Firenze, 2018, analyses the theories of Benjamin, Menke and Derrida on the relationship between law and violence in order to show that there is a paradox whereby law is the instrument with which illegitimate violence must be fought with legitimate violence, with which law itself benefits from violence. In this sense, the author states that legal theory is at a crossroads with regard to the recognition of this paradox, since the recognition of this paradox implies the search for alternatives to overcome it. Otherwise, according to the author, not recognising this contradiction means taking sides between a fierce criticism of the law or an idealisation that legitimises it.

defined as psychological terrorism[4]. This is the case, for example, with the femicide of women involved in prostitution, whose bodies are tortured, dismembered, slashed, and impaled[5]. In this context, the way in which the institutions react is relevant, because it is precisely the institutional approval, for example at the judicial level, that can favour the possibilities of leaving the objective violence unchanged[6]. Indeed, some of the cases presented in this paper show how the situation of systematic violation of women's human rights in Latin America favours a climate of generalised impunity, which, in turn, translates into greater institutional violence. The only way to break this vicious circle is to begin by identifying institutional violence in its forms and implications.

2. Some details on access to justice in the Inter-American system and its relation to institutional violence

Without claiming to be exhaustive, institutional violence can be described as any behaviour (by action or omission) of state agents that constitutes effective aggression against people from discriminated groups. All in the exercise of their duties as public officials.

For example, as can be seen below, institutional violence occurs when the authorities have a mandatory duty to investigate crimes and fail to do so, by failing to investigate and sanction those responsible for the crimes, or by doing so ineffectively. When they make a decision based on discriminatory stereotypes or when their decisions reinforce prejudices against a discriminated group of people. When they adopt interpretations that prioritise procedural rituals over substantive exercise of human rights, thereby concretising various forms of denial of justice. When they fail to apply differentiated approaches to determine the disproportionate impact of the decision in aggravating pre-existing vulnerabilities, thereby materialising manifest inequality. When they fail to issue protection orders due to underestimation of the facts based on prejudices about the potential victim. When they do not fully evaluate all the materials and evidence in the process, or when they do not question a person's testimony because they belong to an institution as a proof of credibility, as is often the

[4] Among others see L. Ramos Lira – M. T. Saltijeral Méndez, *¿Violencia episódica o terrorismo íntimo? Una propuesta exploratoria para clasificar la violencia contra la mujer en las relaciones de pareja*, in *Salud Mental*, 2008, p. 469-478. Available in: http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S0185-33252008000600007&lng=es; I. M. Martín-Pozuelo, *Perspectivas teoricas sobre la violencia contra las mujeres: una aproximación jurídica al concepto de 'terrorismo machista' en España*, in *Femeris*, p. 76-102, 2019, https://doi.org/10.20318/femeris.2019.4930; B. Marugán Pintos, *Domesticar la violencia contra las mujeres: una forma de desactivar el conflicto intergéneros*, in *Investigaciones feministas*, 2012, p. 155-166.

[5] It is important to note that this tendency towards brutality in crimes against women is not limited to prostitution.

[6] For a reflection on the need to distinguish between objective (and symbolic) and subjective violence, see S. Zizek, *Violence: Six Sideways Reflections*, Hampshire, 2008.

case with the actions of members of the security forces, politicians, public figures, among others. When they fail to recognise the systemic nature of violence in order to assess individual incidents.

These examples concern one facet of institutional action: access to justice. It is important, however, to consider access to justice not only as a guarantee of access to the courts, but also as «components related to the application of criteria of material or substantive justice in the resolution of social conflicts, on the one hand, and with elements related to the design and elaboration of laws and their interpretation and practical application by legal operators, on the other»[7]. In this sense, access to justice would also include the recognition of rights and the guarantees for their exercise, including the provision of all institutional means for their full enforcement.

In the Inter-American system, access to justice has been characterised as an international obligation of States, derived from Article 25 of the American Convention on Human Rights (ACHR) (right to judicial protection)[8]. According to the Inter-American standards, this obligation has two facets: a positive one, which consists in organising their institutions in such a way that all individuals, without discrimination, have access to judicial resources; and a negative one, which consists in not impeding access to any remedy. Therefore, States must act actively to remove all obstacles of any kind that impede access to justice.

The basis of this obligation is its relationship with the right to live a life free from violence and discrimination, in accordance with the protection provided by the Inter-American Convention to Prevent, Punish, and Eradicate Violence against Women (hereinafter the Belem do Pará Convention) and the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter CEDAW) and its Optional Protocol. This is because access to justice is a necessary and indispensable condition for the eradication of violence against women. Therefore, the problem of institutional violence in states has been examined by the IACHR and some national courts, since institutional violence has the effect of perpetuating violence, because it usually leads to re-victimisation and impunity.

In this regard, both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have noted the existence of various obstacles to women's access to justice. The Inter-American bodies consider obstacles to access to justice, those imposed by the administration of justice. In this sense, reference is

[7] D. Heim, *Mujeres y acceso a la justicia*, Buenos Aires, 2016, p. 15.

[8] «1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. 2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted». English version taken from the website of the IACHR available on https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm.

made to the judiciary, but also to the police authorities in the investigation of crimes. The Commission has expressed concern about several structural problems in the administration of justice in the Americas. In particular, about impunity and the ineffectiveness of judicial systems in preventing violence against women. This problem is aggravated by the attacks on the independence and impartiality of the judiciary, lack of funding and precarious infrastructure, instability of judges or the threats received by judges, prosecutors and witnesses, accompanied by inadequate protection measures on the part of the State[9].

The IACHR has also recognised important economic barriers to access to justice. These may result in the impossibility of exercising the right of defence or in asymmetries between the parties that may make it impossible to enforce rights. Thus, in the Inter-American system, the guarantee of access to justice includes the elimination of any hindrance that results from the economic situation of the persons concerned. This can be achieved through the provision of free legal services to those who do not have the resources to guarantee their effectiveness, taking into account the rights concerned or the technical aspects of the legal actions. Another economic barrier could be the cost of proceedings. Indeed, excessive costs could violate Article 8 of the ACHR[10], since effective judicial protection (Article 25) is not only possible through the formal existence of the remedies, which should be effective and affordable. Furthermore, it is essential to consider the material differences between social groups

[9] Report of the Rapporteurship on the Women's rights, Inter-American Commission on Human Rights on Access to justice for women victims of violence in the Americas, 2007, p. 3, available at https://www.cidh.oas.org/pdf%20files/Informe%20Acceso%20a%20la%20Justicia%20Espanol%20020507.pdf.

[10] «1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature. 2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: a. the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court; b. prior notification in detail to the accused of the charges against him; c. adequate time and means for the preparation of his defense; d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; e. the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law; f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; g. the right not to be compelled to be a witness against himself or to plead guilty; and h. the right to appeal the judgment to a higher court. 3. A confession of guilt by the accused shall be valid only if it is made without coercion of any kind. 4. An accused person acquitted by a nonappealable judgment shall not be subjected to a new trial for the same cause. 5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice».

in order to identify structural situations of inequality, as discriminated persons face greater difficulties in accessing justice.

In fact, the guarantee of access to justice for vulnerable or discriminated groups must start from a necessary premise: the law is not neutral, and therefore, its literal application, without considering the way in which vulnerability determines the possibilities of the subjects, will end up deepening inequalities. In this way, another form of institutional violence can be identified. One criterion for recognising when there is a risk of this form of violence being configured could be to identify the occasions on which patterns of discrimination can occur, because they can place people in a particular position of vulnerability vis-à-vis the state. In this way, a relevant asymmetry is configured that jeopardises equality, since the person is completely unable to defend himself or herself or to exercise his or her rights. In these cases, States have the obligation to provide qualified, complete, and comprehensible information on the rights of marginalised groups and the legal means to guarantee them.

This obligation is reinforced in relation to specific groups of persons for whom special protection obligations exist, such as children or detainees[11]. In these cases, it is necessary to take into account the interaction of different conditions of vulnerability, without losing sight of the fact that there is an aggregation of vulnerabilities, which requires the State to adopt a differentiated perspective. This implies analysing discrimination in relation to its historical roots. For this reason, sex-based discrimination must be an inevitable consideration in establishing the standards that should guide State action.

Another important aspect of access to justice is the right to due process, which implies, among other things, the obligation to establish clear rules in order to determine the permissible and specific behaviour of institutional agents. In this way, it is possible to avoid discretionary and arbitrary state action, which can constitute institutional violence. In the Inter-American system, due process includes: the right to legal assistance; the right to defence; the right to a reasonable time to exercise all defence mechanisms; the right to receive an informed and legally defensible decision; the right to judicial review; the right to an adequate and effective judicial remedy and; the right to equality of arms.

With regard to equality of arms, its consideration as an essential aspect of due process makes it possible to confront discrimination. Its application implies the adoption of any measure that agrees to mitigate the effects of material inequalities

[11] With regard to these two groups of people, the IACHR has issued various advisory opinions in which it has emphasised the need to understand their rights as human rights. Thus, the Court has explained how States can apply some differentiated approaches in order to comply with their international obligations. See Advisory Opinion OC-29/22, of 30 May 2022, on differentiated approaches to some groups of persons deprived of their liberty, available at https://www.corteidh.or.cr/docs/opiniones/seriea_29_esp.pdf (in Spanish only) and Advisory Opinion OC-17/2002, 28 August 2022, on the legal situation and human rights of children, available at https://www.acnur.org/fileadmin/Documentos/BDL/2002/1687.pdf (in Spanish only).

between the parties, so that they do not result in disadvantages within the process[12]. This would be a way of guaranteeing the principle of equality and non-discrimination. According to this principle, states must establish instruments to prevent the incidence of the asymmetry of the relationship between the parties within the process. This would be the case, for example, in a labor dispute between an employer and an employee, or in a complaint for sexual harassment between a student and a professor, or of domestic and sexual violence between a daughter and her father. In the case of violence, the asymmetry between the victim and the aggressor is obvious, as well as the possibilities of control.

Likewise, access to justice is linked to the effectiveness of judicial protection under Article 25 of the ACHR. In fact, in the Inter-American system, the adequacy of effective judicial protection is guaranteed by the fulfilment of the obligation to define a simple, rapid and effective recourse for the protection of human rights. The adequacy of remedies requires that they be simple, urgent, informal, accessible, and independent. They must be dealt with by independent bodies, as individual resources or as collective precautionary measures; there must be no limits on the legitimacy of action; people must be able to appeal to national bodies if the local ones do not guarantee impartiality; and various forms of protection must be available. According to this, institutional violence could exist if the authorities prioritise formalities over substantive protection.

Given this characterisation, it is possible to identify when public servants commit institutional violence. In principle, this type of violence exists when institutions do not respect these standards. Particularly problematic, as the IACHR has recognised, is the adoption of measures or decisions based on prejudices regarding the

[12] This requirement was developed by the Colombian Constitutional Court in the decision T-344/2020. In this case, the Court applied the gender perspective in two different private law cases: in these cases, two women (poor, illiterate, without formal employment), victims of domestic violence, constituted enforceable titles forced by the need for their aggressors to leave the shared home. In both cases, they were sued in separate executive proceedings for breach of the guaranteed obligation. In both cases, they lost due to what is known in Colombian law as *manifest ritual excess*, whereby public officials, bound by an unrestricted respect for procedural forms, omit the substantive assessment of facts and evidence, seriously violating the fundamental rights of the parties. This is particularly relevant in contexts of vulnerability, where the equality of arms imposes an obligation to ensure that the underlying discrimination does not result in the impossibility of exercising and enforcing rights. In both cases, the officials ignored the fact that executive titles were born vitiated by force and violence. The Constitutional Court concludes that institutional violence has been configured here. In one of the cases, the Court itself incurs in institutional violence because, although it recognised the defect in the title, it upheld the auction of the property on the grounds that it had already been delivered. With regard to this last case, the Court expressly affirms that the victim can have recourse to the contentious-administrative jurisdiction to demand that the State be held responsible for the institutional violence suffered. It is indeed reprehensible and contradictory that the Court did not order the annulment of all the proceedings, with the consequent reimbursement of what has been paid, as an effective way of overcoming the violence suffered by the victim. On the contrary, its decision, while condemning the institutional violence suffered, ends up revictimising the woman, since in addition to losing her house - which she shared with her minor son- she will have to initiate a new process against the State, with all the delays that this entails.

identity conditions of people (migrants, women, blacks, etc.), and this determines a lack of seriousness in the verification of the facts within the process.

This is what Miranda Fricker refers to as epistemic injustice and Kristie Dotson defines as epistemic violence[13]. These concepts are relevant in relation to institutional violence and the administration of justice. Indeed, as Gaile Pohlhaus, Jr. assesses, «the idea of 'epistemic injustice' draws together three branches of philosophy -political philosophy, ethics, and epistemology *to consider how epistemic practices and institutions may be deployed and structured in ways that are simultaneously infelicitous toward certain epistemic values (such as truth, aptness, and understanding) and unjust with regard to particular knowers*»[14]. Therefore, epistemic injustice, in the form of testimonial injustice[15] and hermeneutical injustice[16], is a very common phenomenon in law. The reason for this is that each person, according to his or her upbringing and life experiences, has a set of prejudices (conscious and unconscious), by which some knowers (women, children, immigrants, blacks, persons with disabilities, etc.) are not considered as subjects capable of producing authoritative knowledge. In this way, the law itself is produced and administered by people with prejudices (e.g., based on sexist, ableist, racist, adult-centred, xenophobic stereotypes, etc.). This lack of neutrality in law and justice creates invisible barriers to access to justice and then leads to the perpetuation of violence[17].

This situation imposes on individuals and institutions the need to correct epistemic injustices. In legal terms, this would mean an exercise in identifying prejudices and biases, in order to challenge them. It also means identifying asymmetries in order to recognise the others as real subjects. It is an exercise of epistemic responsibility, as Medina argues, to pay attention to the conditions of oppression under

[13] See M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford, 2007; M. Fricker, *Evolving concepts of epistemic injustice*, in J. Kidd – J. Medina – G. Pohlhaus, Jr., *The Routledge Handbook of Epistemic Injustice*, New York, 2017, pp. 53 ss.; and K. Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, in *Hypatia*, 2011, p. 236-257.

[14] G. Pohlhaus, Jr., *Varieties of epistemic injustice*, in J. Kidd – J. Medina – G. Pohlhaus, Jr., *The Routledge Handbook of Epistemic Injustice*, New York, 2017, p. 13. Italicised added.

[15] It occurs when a Hearer does not give a Speaker sufficient credibility, based on prejudicial stereotypes: M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford, 2007, p. 20. For more on this concept, besides Fricker's book , see J. Wanderer, *Varieties of testimonial injustice*, in J. Kidd – J. Medina – G. Pohlhaus, Jr., *The Routledge Handbook of Epistemic Injustice*, New York, 2017, p. 27 ff.

[16] J. Medina, *Varieties of hermeneutical injustice*, in J. Kidd – J. Medina – G. Pohlhaus, Jr., *The Routledge Handbook of Epistemic Injustice*, New York, 2017, p. 41, defines it as «the phenomenon that occurs when the intelligibility of communicators is unfairly constraint or undermined, when their meaning-making capacities encounter unfair obstacles».

[17] «At many turns, opportunities for epistemic injustice abound in the practices of our legal system because our institutions and ourselves are not up to the challenges of understanding the experiences of others in difficult situations foreign to our own and because we remain unaware of the role that unexamined prejudice and bias play even in our best efforts to be impartial»: M. Sullivan, *Epistemic justice and the law*, in J. Kidd – J. Medina – G. Pohlhaus, Jr., *The Routledge Handbook of Epistemic Injustice*, New York, 2017, p. 293.

which an individual acts. This would imply overcoming the social imaginary based on a culpable ignorance about those who suffer discrimination[18].

With these premises, I will now present some examples in which the IACHR has identified institutional violence in cases of domestic violence, in terms of the violation of access to justice. These are not the only examples of institutional violence in the Americas, but given the need to limit the analysis, I prefer to focus the attention on domestic violence, because it allows us to see a direct relationship between the negligence of the State (institutional violence) and the perpetuation of private violence. This explains the selection of the only two relevant decisions; although there are many other cases in which the IACHR has ruled on institutional violence that can be considered paradigmatic, they are not presented because they do not relate to domestic violence.

3. Institutional violence in contexts of domestic violence

With specific reference to family relations, one of the examples in which the IACHR has considered institutional violence to be systematic is in the context of domestic violence. In this scenario, it is common for the actions of the authorities to be mediated by different types of stereotypes, although here the authoritarian conception of the family and couple relationships assumes greater importance[19]. For example, in the case of violence perpetrated by the victim's partner or ex-partner, there is usually more than one red flag, sometimes even with several complaints of aggression or threats of aggression.

This was the case in the 2001 decision Maria da Penha Maia Fernandes vs. Brazil. In 1983, she was the victim of a double murder attempt by her then husband and father of her three daughters. Her attacker shot her in the back while she slept causing irreversible paralysis and other serious damage to her health. He later tried to electrocute her in the bathroom. By 1998, more than 15 years after the crime, and despite two convictions by the Ceará Court of Inquiry (in 1991 and 1996), there had still been no final decision in the case and the assailant remained free. In 2001, the IACHR found the State responsible for omissions, negligence, and tolerance of domestic violence against Brazilian women.

For the Court, the conditions of domestic violence and State tolerance were defined in the Belém do Pará Convention. Thus, the State was responsible for the

[18] See J. Medina, *The epistemology of resistance. Gender and racial oppression, epistemic injustice, and resistant imagination*, Oxford, 2013, p. 119 ff.

[19] By this I mean the influence of the concept of *potestas* in the configuration of violence. In fact, the idealisation of family relationships and the exaltation of authority favour the legitimation of certain behaviours as the exercise of authority. Violence is then justified as normal and, finally, as necessary to maintain harmony within the family. See N. Rueda, *La responsabilidad civil en el ejercicio de la parentalidad. Un estudio comparado entre Italia y Colombia*, Bogotá, 2020, p. 141 ff. and 331 ff.

failure to comply with the obligations under Article 7, in relation to the rights it protects, including the right to a life free from violence (Article 3), the right to respect for their life, physical, mental and moral integrity and personal security; the right to personal dignity, the right to equal protection, and the right to a simple and rapid remedy before the competent courts that will protect them against acts that violate their rights (Article 4). The Court also considered that the right to judicial guarantees and protection under Articles 8 and 25 of the American Convention, in conjunction with the obligation to respect and guarantee rights under Article 1(1), had been violated as a result of the unjustified delay and negligent handling of the case.

The Court also made individual recommendations and public policy suggestions. In short, these are: Complete the prosecution of those responsible; Investigate and account for irregularities and unjustified delays in the process; Grant symbolic and material reparations to the victim; Promote the training of specialised judicial and police officials; Simplify criminal justice procedures; Promote alternative ways of resolving intra-family conflicts; Increase the number of women's police stations with special resources and support to the Public Ministry in its judicial reports; Include in educational curricula units on respect for women, their rights, the Belém do Pará Convention and the management of intra-family conflicts.

Case law shows that the authorities tend to underestimate some behaviours, considering them «normal», such as controlling the victim's movements and communications, for which they do not order protective measures. The use of sexist language to blame the victim for her situation is also common[20]. Officials often state that jealousy, even when expressed in coercive behaviour, is part of a love relationship. The influence of biases and cultural prejudices is evident[21]. There is also a significant under-reporting of violence suffered by children and men, probably due to stereotypes. Indeed, children are seen as the property of their parents and, as with all other forms of violence, there is a misunderstanding of what constitutes abuse and maltreatment.

[20] For example, the Court identified these practices in relation to the situation in Ciudad Juárez in Mexico. It stated that «(...) almost at the same time as the homicide rate began to rise, some of the officials responsible for investigating these events and prosecuting the perpetrators began to use a discourse that ultimately blamed the victim for the crime. According to public statements by some high-ranking authorities, the victims wore miniskirts, went dancing, were carefree, or were prostitutes. There are reports that the response of the relevant authorities to the victim's relatives ranged from indifference to hostility»: IACHR, *Situación de los Derechos Humanos de la Mujer en Ciudad Juárez, México: El Derecho a No Ser Objeto de Violencia y Discriminación*, OEA/Ser.L/V/II.117, Doc. 44, March 7, 2003, par. 4, available at https://www.cidh.oas.org/annualrep/2002sp/cap.vi.juarez.htm. This report highlights the serious situation of violence faced by women and girls in Ciudad Juárez, including homicides, disappearances, and sexual and domestic violence, and makes recommendations to help the State strengthen its efforts to respect and guarantee their rights.

[21] This was recognised by several States in the replies to the questionnaire distributed by the IACHR on women's access to justice. One question related to the greatest achievements and challenges in the implementation of laws and public policies to prevent, punish, and eradicate discrimination and violence against women. See the Report on women's rights of the Inter-American Commission on Human Rights on Access to justice to women victims of violence in the Americas, cit., par. 150.

In this way, a first barrier to access to justice arises from the behaviour of state agents. It is therefore a form of institutional violence. This discourages reporting and makes it even more difficult to intervene to break the cycle of violence. But even when complaints are received, there is no guarantee of effective access to justice.

An example of this can be found in the 2018 case of V.R.P, V.P.C. and other vs. Nicaragua. Mrs. V.P.C. took her nine-year-old daughter to the doctor. The doctor found that the girl had a torn hymen and condylomas in the perianal area. He concluded that the girl had venereal disease, a diagnosis confirmed by an obstetrician-gynaecologist. Both doctors then stated that, according to these findings, V.R.P. had been the victim of sexual abuse and had suffered anal penetration. The girl then declared that her father was the aggressor. For this reason, the mother denounced him to the criminal authorities for the crime of rape.

During the criminal proceedings, in a public hearing, and before the jury met to deliberate in secret, one of the defence lawyers gave the foreperson of the jury a package and two sheets of paper sent by the defendant. The jury declared the defendant innocent. The private prosecution filed a petition for annulment on the grounds of alleged bribery of the jury members, and the verdict was declared null and void after various recourses and appeals. In the end, however, a district court declared the annulment action inadmissible and confirmed the innocence of the accused.

During the trial, Mrs. V.P.C. attempted to denounce several irregularities in the investigation, including complaints against the forensic doctor and the deputy public prosecutor, as well as against the judge in charge of the trial and the judge acting as president of the jury court. As a result of V.P.C.'s complaints, the Deputy Public Prosecutor, the forensic doctor, a member of the jury and the judge and jury president filed lawsuits against V.P.C. and her relatives for slander and defamation. However, they were legally assisted by lawyers related to the defendant. In the end, Mrs. V.P.C. and her two daughters had to leave Nicaragua and go to the United States, where they were granted asylum.

The Court held that the State was a second aggressor because of the revictimisation, which constituted institutional violence according to the definition of violence adopted by the Belem do Pará Convention. According to the Court, institutional violence includes violence directly or indirectly perpetrated or tolerated by the State or one of its agents.

In addition, the tendency to use the figure of the alleged parental alienation syndrome in cases of sexual abuse of children as another form of institutional violence has become widespread in the region. So much so that the Committee of Experts on the Methodology of Systematic and Permanent Multilateral Evaluation[22] and the United Nations Special Rapporteur on Violence against Women have expressed their

[22] The Committee of Experts is the technical body of MESECVI in charge of analysing and evaluating the implementation process of the Belém do Pará Convention.

concern about the illegitimate use of this figure in countries that are parties to the Belem do Para Convention. They affirm that the alleged parental alienation syndrome is a figure that perpetuates gender-based violence and violence against children. They also make it clear that its use in legal proceedings can lead to state responsibility for institutional violence[23].

4. Institutional violence and its relationship with the state responsibility

If institutional violence is seen as something that the victims of domestic violence do not have to tolerate, then the behaviour of state agents when they must intervene is the efficient cause of an unlawful harm that would allow them to claim a compensation. Even if the direct violence is perpetrated by a person who has no connection with the State, the failure of the State to fulfil its obligations to protect women's human rights and, in particular, to the guarantee the right to a life free from violence, worsens the position of the victim and, therefore, any negligence in this regard allows her to claim compensation from the State for all the damage she has suffered as a result of institutional violence.

To this end, the Inter-American Court of Human Rights has established the admissibility of the international responsibility of the State in cases where it violates the standard of due diligence and where foreseeable and avoidable risks become real. For example, in V.R.P., V.P.C. and other vs. Nicaragua, the Court acknowledged that the State appeared as a second aggressor, its institutional violence had multiplied the girl's traumas and could be classified as cruel, inhuman and degrading treatment under Article 5(2) of the American Convention[24].

Thus, the Court has stated that a better understanding of specific crimes is achieved when officials take into account the structural and systematic nature of inequalities and violence against certain groups of people. According to its own jurisprudence, States have a positive duty to act to protect and prevent violence against vulnerable groups particularly exposed to discrimination. For this reason, it has been possible to hold States responsible even when the victimising act was committed by a

[23] Committee of Experts of the MESECVI and the United Nations Special Rapporteur on Violence against Women express their concern about the illegitimate use of the figure of parental alienation syndrome against women, August 12, 2022, available at https://www.ohchr.org/sites/default/files/documents/issues/women/sr/2022-08-15/Communique-Parental-Alienation-SP.pdf

[24] Other cases in which the IACHR has ruled explicitly on institutional violence include Fernández Ortega and other vs. Mexico and Rosendo Cantú and other vs. Mexico, both in 2010, the Court identified a series of institutional barriers that prevent attention to violence against women in indigenous and rural areas, which could lead to State responsibility; in Masacres de El Mozote y lugares aledaños vs. El Salvador, in 2012, the Court ordered the strengthening of the institutional capacity of the State through the training of members of the Armed Forces of the Republic of El Salvador on the principles and norms of human rights protection and the limits to which they must be subjected.

third party. This was possible when the conduct was perpetrated against discriminated groups or through structural patterns of violence.

In this way, the Court presents a broader vision of the State's obligations in relation to human rights. This is an interpretation of equality that requires abandoning the idea of the law as neutral with regard to differences, in order to make the state the main actor. It must therefore create social balances, especially when we are dealing with people who have been historically discriminated against or who are victims of structural violence, as is the case with women.

In these cases, the attribution of responsibility is based on a specific negligence of the state in not preventing or tolerating the violent actions of third parties. These criteria help to integrate the concept of institutional violence in order to include the irregular failures of public authorities. State responsibility for institutional and structural violence could be a relevant instrument for addressing it, especially if the attribution is in a restorative key and if alternative forms of symbolic reparations are taken into account.

This requires a process of training public servants in the exercise of their functions with an intersectional perspective, but also a structural transformation of law programmes at universities to teach human rights and develop the capacity to recognise the discrimination that women suffer on a daily basis, and to recognise how some stereotypical ideas and values impede the realisation of human rights.

5. Conclusion

This paper has presented some inter-American standards on access to justice in order to show their relationship with institutional violence, defined as the violence perpetrated by state agents in the exercise of their functions. In this way, they create de facto obstacles to access to justice and then facilitate the perpetuation of violence.

Although the IACHR has explicitly identified institutional violence in cases of violence against women, this paper presents the only two decisions on domestic violence studied by the Court. In both cases, impunity was encouraged by the State, and there were several omissions that hindered access to justice. In this context, it is clear that the State appears as a second aggressor, perpetrating institutional violence. This legitimizes the victims to demand reparation for the damage suffered as a result of the actions and omissions of state agents, since this is a violation of women's human rights.

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RIVISTA DI
DIRITTI COMPARATI

ABSTRACT: Il contributo presenta gli standard interamericani di accesso alla giustizia nel contesto della violenza contro le donne. Analizza i criteri per identificare la violenza istituzionale nei casi di violenza domestica. Cita alcuni casi tratti dalla giurisprudenza della CIDU.

ABSTRACT: This paper presents the Interamerican standards on access to justice in context of violence against women. It presents the criteria to identify institutional violence in cases of domestic violence. It cites some cases taken from the jurisprudence of the IACHR.

KEYWORDS: access to justice – domestic violence – institutional violence – women's human rights – IACHR

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RIVISTA DI
DIRITTI COMPARATI

Access to Justice and Right to Victim's protection in the Case-law of the European Court of Human Rights About Domestic Violence*

Roberta Rossi

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1. Introduction

Access to justice in cases of gendered violence is a crucial point to pursue the goals to prevent the phenomenon, prosecute and punish the perpetrators, and protect the victims. In this perspective, while the EU legal framework on the issue is still under construction[1], the Council of Europe and its institutions have produced quite important documents and case-law, building a strong response to counteract gender-based violence, especially in its form of domestic and intimate partner violence, through criminal law and procedure.

Although Members States are urged to develop comprehensive and widespread cultural initiatives and policies as a core action to prevent gendered violence, criminal justice has a pivotal role in the fight against this form of criminality, being the courtrooms the main place for the victim to get protection as well[2].

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[1] Lively is the debate about the choice of the legal solution within the EU, looking both at the ratification of the Istanbul Convention and at the adoption of an autonomous Directive (European Commission 2022/0066, Proposal for a Directive of the European Parliament and of the Council on combating violence against women and domestic violence). On the topic, C. Rigotti – C. McGlynn, *Towards an EU criminal law on violence against women: the ambitions and limitations of the Commission's proposal to criminalise image-based sexual abuse*, in *New Journal of European Criminal Law*, 2022. The EU has so far adopted a series of specific measures but a comprehensive regulatory framework on the phenomenon is still lacking; R. Lamont, *Beating domestic violence? Assessing the EU's contribution to tackling violence against women*, in *Common Market Law Review*, 2013, p. 1787-1807.

[2] It has been highlighted that there is a connection between the prevention of violence and the protection of victims: in this sense, see L. Grans, *The Istanbul Convention and the positive obligation to prevent violence*, in *Human Rights Law Review*, 2018, p. 141 and p. 144.

Hence, victim protection on the one hand, prosecution and punishment of perpetrators of violence on the other hand, are two of the main pillars on which the Council of Europe built the framework of the most relevant source on this subject: the Istanbul Convention calls for a criminalisation of gendered violence, for a timely and effective investigation and trial where protective measure can respond to the victim's need of safety.

A special attention is, therefore, reserved to victim's protection in its intertwining with criminal justice: Article 18 of the Istanbul Convention sets a general obligation to adopt «the necessary legislative regulation or other measures to protect all victims from any further acts of violence» and, for this provision to be effective, procedural duties are also established, requiring that judicial proceedings be carried out without undue delay (Article 49) while offering adequate and immediate protection to victims (Article 50).

A similar approach has been developed by the European Court of Human Rights in the wake of a broader and more general case-law aimed at protecting human rights: so, the protection of fundamental rights binds the State Parties not only to the traditional negative obligation (i.e. the State's duty to refrain from conduct detrimental to the rights of the person) but also to positive action to intervene through substantive and procedural measure protecting the person from third-party aggressions.

Moving along these lines, the Strasbourg judges have progressively developed an articulated system of protection for victims of domestic violence with respect to the violations dealt with, in particular, Article 2, 3, 8 and 14 ECHR[3].

2. The positive obligation under Article 2 of the European Convention of Human Rights

The positive obligation under Article 2 of the European Convention of Human Rights, which states a primary duty on the State to secure the right to life, requires the State not only to refrain from the intentional taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction.

This could also imply in certain circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life

[3] The case law of the Strasbourg judges is now extensive, the most part of which concerns Articles 2 and 3, in some cases drawing on Article 8, while the violation of the prohibition of discrimination in Article 14 has been identified only in the presence of deep-rooted discriminatory practices and structural prejudice against women (see ECtHR's leading case, 9 June 2009, *Opuz v. Turkey*, appl. no. 33401/02, but also ECtHR, 9 July 2019, appl. no. 41262/17, *Volodina v. Russia*). On the subject, see J. D. Mujuzi, *Preventing and combating domestic violence in Europe: the jurisprudence of the European Court of Human Rights,* in *International Survey of Family Law* 2016, p. 165 ff.; the most recent developments are dealt with by R. McQuigg, *The evolving jurisprudence of the European Court of Human Rights on domestic abuse*, in P. Czech – L. Heschl – K. Lukas – M. Nowak, G. Oberleitner (eds.), *European Yearbook on Human Rights*, Cambridge, 2022; in Italian, see M. Montagna, *Obblighi convenzionali, tutela della vittima e completezza delle indagini,* in www.archiviopenale.it, 2019.

is at risk from the criminal acts of another individual. This basic principle was for the first time affirmed in the leading case *Osman v. the United Kingdom*[4].

Having regard to the nature of the right protected by Article 2, a core right in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge.

According to the so called «Osman test» it must be established that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

The court held in *Osman* that the obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. This is a question which can only be answered in the light of all the circumstances of any particular case.

Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees contained in Articles 5 and 8 of the Convention.

3. The application of the Osman test in the context of domestic violence

After *Osman*, the case-law *Opuz v. Turkey*[5], and *Talpis v. Italy*[6], adapted and developed the application of the Osman test in the context of domestic violence.

According to these leading cases, children and other vulnerable individuals – into which category fall victims of domestic violence – in particular are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.

The fundamentals of domestic violence show that children are always affected when violence is acted in the family. Violence against children belonging to the

[4] ECtHR, 28 October 1998, application no. 87/1997/871/1083, *Osman v. the United Kingdom*. Regarding the spread of the so-called Osman Test in the argumentation of supranational courts and the difficulty of adapting it to different scenarios, see F.C. Ebert – R. I. Sijniensky, *Preventing violations of the right to line in the European and the Inter-American Human Rights Systems: from the Osman Test to a coherent doctrine on risk prevention?*, in *Human Rights Law Review* 2015, p. 343-368.

[5] ECtHR, 9 June 2009, application no. 33401/02, *Opuz v. Turkey*.

[6] ECtHR, 2 March 2017, application no. 41237/14, *Talpis v. Italy*. For a commentary on the ruling, *see P. Mazzina, La violenza domestica e le azioni positive (di secondo livello) dello Stato: brevi riflessioni costituzionali sulla recente sentenza della Corte edu Talpis c. Italia, in* www.archiviopenale.it, 2017; *G. Baldi, Re-thinking the (legal) limits of the state in the case of Talpis v Italy, in* G. Picelli – I. Kherkerulidze – A. Borroni (eds.), *Reconsidering gender-based violence and other forms of violence against women: comparative analysis in the light of the Istanbul Convention,* Bari, 2018.

common household, including deadly violence, may be used by perpetrators as the ultimate form of punishment against their partner. Intimate partner violence is never limited to the direct victim, which is why equal measures have to be taken to protect the children, even more so if the children had already been directly affected by violence and been the target of death threats.

The leading case *Kurt v. Austria*[7] clarified that the existence of a real and immediate risk to life must be assessed taking in due account the particular context of domestic violence.

In such a situation it is above all a question of the recurrence of successive episodes of violence within the family. It is well known that domestic violence is never a one-off event, as it often constitutes not just an isolated accident, but rather a continuous practice of intimidation and abuse.

In such case, as long as the offender is not successfully kept from contacting the victim, the risk of further violence remains. Therefore, the State authorities should react, with due diligence, to each and every act of domestic violence and take all necessary measures to make sure that such acts do not lead to more serious consequences. It follows that the duty to prevent and protect comes into play when the risk to life is present, even if it is not imminent.

Judge Pinto De Albuquerque expressed several years ago in his concurring opinion in the case of *Valiuliene v. Lithuania*[8] that «[r]ealistically speaking, at the stage of an «immediate risk» to the victim it is often too late for the State to intervene. In addition, the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk».

Consecutive cycles of domestic violence, often with an increase in frequency, intensity and danger over time, are frequently observed patterns in that context. The Explanatory Report to Article 52 of the Istanbul Convention clarifies that the term «immediate danger» in that provision refers to any situations of domestic violence in which harm is imminent or has already materialised and is likely to happen again.

Based on what is known today about the dynamics of domestic violence, the perpetrator's behaviour may become more predictable in situations of a clear escalation of such violence; indeed, a perpetrator with a record of domestic violence poses a significant risk of further and possibly deadly violence.

This means that special diligence is required from the authorities when dealing with cases of domestic violence. They have to take duly into account this general knowledge of domestic violence when they assess the risk of a further escalation of violence and take an immediate response to allegations of domestic violence.

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[7] ECtHR, [GC], 15 June 2021, application no. 62903/15, *Kurt v. Austria*. L.S. Rossi, *La tutela del diritto alla vita nell'ambito delle violenze domestiche: di nuovo al vaglio della Corte di Strasburgo i doveri e i limiti derivanti dall'art. 2 Cedu*, in *Riv. It. diritto e procedura penale* 2021, p. 1612 ff.: L.M. Weinberger, *Kurt v Austria: a missed chance to tackle intersectional discrimination and gender-based stereotyping in domestic violence cases*, in *Strasbourg Observers*, 18 August 2021.

[8] ECtHR, [GC], 26 March 2013, application no. 33234/07, *Valiuliene v. Lithuania*.

This falls under ECtHR jurisdiction: the court's case-law reiterates that an examination of the State's compliance with its duty under Article 2 must include an analysis of the adequacy of the assessment of risk conducted by the domestic authorities.

According to the catalogue of positive obligations held in *Kurt vs. Austria*:

a) an immediate response to allegations of domestic violence is required from the authorities.

b) the authorities must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment. The reality and immediacy of the risk must be assessed taking due account of the particular context of domestic violence cases.

c) if the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities' obligation to take preventive operational measures is triggered. Such measures are intended to avoid a dangerous situation as quickly as possible and must be adequate and proportionate to the level of the risk assessed.

Thus, an examination of the State's compliance with this duty under Article 2 must comprise an analysis of both the adequacy of the assessment of risk conducted by the domestic authorities and, where a relevant risk triggering the duty to act was or ought to have been identified, the adequacy of the preventive measures taken.

Where it has found that the authorities failed to act promptly after receiving a complaint of domestic violence, it has held that this failure to act deprived such complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of acts of violence.

4. The statement of the court in Landi v. Italy[9]

By lodging an application against the Italian State with the European Court of Human Rights, Ms Landi alleged that the Italian State had failed to take the requisite action to protect her and her two children from the domestic violence inflicted by her partner, which had led to the murder of her one-year-old son and her own and her daughter attempted murder.

In its ruling, the court noted that, despite the adequacy of the regulatory framework implemented in the Italian penal system[10], the national authorities had failed in their duty to conduct an immediate and proactive assessment of the risk of the recurrence of the violent acts committed against Ms Landi and her children, and

[9] ECtHR, 7 April 2022, application no. 10929/19, *Landi v. Italy*.

[10] R. Lopez, *Violenza domestica: strumenti normativi adeguati, ma spesso ignorati*, in *Processo penale e giustizia*, 2022, p. 841 ff.

to adopt operational and preventive measures to mitigate the risk and to protect those concerned, as well as to censure N.P.'s conduct.

The public prosecutors, in particular, had remained passive in front of the serious risk of ill-treatment of Ms Landi, and their inaction had enabled the applicant's partner to continue to threaten, harass and attack her unhindered and with impunity.

Whereas the Italian police (*Carabinieri*) carried out an independent, proactive and comprehensive risk assessment independently of the applicant's complaint and with due regard to the particular context of domestic violence cases, seeking, in light of the alleged existence of a real and immediate risk to the life of the applicant and her children, preventive measures, the prosecutors (whose task was to assess these proposals) did not show the particular diligence required in their immediate response to the applicant's allegations of domestic violence.

The court held that the national authorities had known, or should have known, the real and imminent risk for Ms Landi's and her children's lives. They should therefore have assessed the risk of further violence and taken appropriate and adequate action to protect the applicant and her children.

However, they had failed in that obligation, as they had reacted neither "immediately", as required in cases of domestic violence, nor at any other time.

The court held that, relying on the information known at the material time to the effect that there was a real and imminent risk of further violence against Ms Landi and her children, in the light of the allegations of escalating domestic violence submitted by the applicant and in view of N.P.'s mental health issues, the authorities had failed to show the requisite diligence.

They had not conducted a lethality risk assessment specifically designed for domestic violence, and in particular for the situation faced by the applicant and her children, which would have justified practical preventive measures to protect them from such a risk.

In blatant disregard of the wide range of protective measures directly available to them, the authorities, which could have implemented protective measures by alerting the social and psychological services and placing Ms Landi and her children in a women's refuge, had shown little diligence in preventing the violence against the applicant and her children, which had led to the attempted murder of the applicant and the actual murder of her son M.

In those circumstances, the court concluded that the authorities could not be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant and her son within the meaning of Article 2 of the Convention.

We must note, with specific reference to Italian State, that in Landi proceeding the Italian Government further contended that the applicant had failed to exhaust domestic remedies since she had never lodged a complaint with the Italian jurisdiction alleging a violation of her rights.

The court recalled that in its report on Italy, Grevio had urged the Italian authorities to fill the legislative void concerning the absence of effective civil remedies against any State authority failing in its duty to take the necessary preventive or protective measures in matters of domestic violence.

In these circumstances, the court considered that the applicant did not have a civil remedy to pursue in order to assert the State's failure to act. According to its well-established case-law, where no domestic remedy is available, the six-month period to submit the application runs from the date of the act complained of. This being so, the court noted that the applicant had submitted her application within six months of the killing of her son, which event might be considered as the time that she became aware of the ineffectiveness of the remedies in domestic law, as a result of the authorities' failure to stop N.P. committing further violence.

This means, as for Italy, that in the very moment in which a murder or another fact of violence happens the victim can lodge an application against the Italian State with the ECtHR – of course, only if the Italian authorities have failed their duty to protect her.

5. The adequacy of the assessment of risk conducted by domestic authorities

We must notice that, according to the jurisprudence of the court, the duty to conduct a «autonomous» and «proactive» risk assessment refers to the requirement for the authorities not to solely rely on the victim's perception of the risk, but to complement it by their own assessment.

Indeed, owing to the exceptional psychological situation in which victims of domestic violence find themselves, there is a duty on the part of the authorities examining the case to ask relevant questions in order to obtain all the relevant information, including from other State agencies, rather than relying on the victim to give all the relevant details.

In *Talpis*, the court did not accord decisive weight to the victim's own perception of risk of domestic violence (for instance the withdrawing of the complaint, the changing of statements, statements denying past violence, and the return of the victim to the perpetrator).

In *Opuz*, the court noted, in particular, that «once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim».

Any risk assessment or decision on the measures to be taken must therefore not depend on the victim's statements alone.

In *Landi,* the court rejected the argument of the Italian Government that, since Ms Landi had withdrawn her complaints and had decided to continue to live with N.P., the authorities had not known and could not have known that the applicant and her

son's lives were at risk, as there had been no tangible evidence that their lives were in imminent danger.

The court stated that the authorities could have adopted the protective measures under Italian legislation whether or not there had been a complaint or any change in the victim's perception of the risk. Indeed, the authorities had failed to consider the specific context of domestic violence, as would have been required under the above-mentioned court's case-law.

We must underline that it is precisely the context of domestic violence that makes it unacceptable to blame the victim for hesitating to take action. Women in violent relationships often show ambivalent behaviour towards the offender. Emotional attachment, the hope for change, but particularly the ongoing fear could all be reasons for this ambivalence, which have an effect on women's attitudes concerning the criminal prosecution of the offender.

Being late in filing a report is one possible consequence. Grevio's reports indicate that women typically search protection orders after serious levels of victimization and after abuse over a significant length of time. In other words, any complaints of domestic violence are usually filed after several episodes of violence and often following a very violent incident which renders the continuation of the relationship unsustainable, intolerable (or even potentially lethal) for the victim.

Factors such as financial dependency, migrant status, disability and age could compound the abuse and impact the victim's ability to break away from the cycle of violence.

This, in turn, means that special requirements are imposed on the law-enforcement authorities when dealing with victims of domestic violence. Moreover, the assessment of risk and identification of safety measures should be conducted continuously and during all the phases of the procedure by police officers, prosecutors and judges from the first meeting with the victim all the way to a possible sentence, as the risk could change, and new information might need to be taken into account.

If risk management was not reliable and ongoing, victims might be lulled into a false sense of security, exposing them to greater risk. Crucially, the assessment must address systematically the risk not only for the woman concerned, but also for her children.

Thus, the responsibility for taking the appropriate operational measures should not be shifted from the authorities to the victim.

We must underline that is fundamental for the authorities dealing with victims of domestic violence to receive regular training and awareness-raising, particularly in respect of risk assessment tools, in order to understand the dynamics of domestic

violence, thus enabling them to better assess and evaluate any existing risk, respond appropriately and ensure prompt protection[11].

Grevio submitted that the legal system in place should make available clear guidelines and criteria governing action or intervention of the law enforcement officials in sensitive situations such as in domestic violence cases. In line with Article 15 of the Istanbul Convention, such training could significantly improve the understanding of the dynamics of domestic violence, as well as its links with harm to children.

The use of standardised checklists, which indicate specific risk factors and have been developed on the basis of sound criminological research and best practices in domestic violence cases, can contribute to the comprehensiveness of the authorities' risk assessment[12].

* * *

ABSTRACT: The European Court of Human Rights developed the positive obligation to secure the right to life under Article 2 of European Convention of Human Rights in the context of domestic violence, establishing that domestic authorities must carry out an immediate, autonomous, proactive and comprehensive assessment of the risk of the recurrence of violent acts committed against the victim. Furthermore, if the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities must take preventive operational measures that must be adequate and proportionate to the level of the risk assessed to avoid a dangerous situation as quickly as possible.

ABSTRACT: La Corte Europea dei Diritti dell'Uomo ha sviluppato l'obbligazione positiva di garantire il diritto alla vita ai sensi dell'articolo 2 della Convenzione Europea dei Diritti dell'Uomo nel contesto della violenza domestica, stabilendo che le autorità nazionali debbano effettuare una valutazione immediata, autonoma, proattiva e completa del rischio di reiterazione di atti violenti commessi nei confronti della vittima. Inoltre, se l'esito della valutazione dovesse consistere in un rischio reale e immediato per la vita, le autorità devono adottare misure operative preventive adeguate e

[11] Regarding the lack of specific training among the Italian justice professionals, see the Commissione parlamentare di inchiesta sul femminicidio nonchè su ogni forma di violenza di genere, Doc. XXII-bis n. 4, *Rapporto sulla violenza di genere e domestica nella realtà giudiziaria*, Roma 2021.

[12] On the topic see V. Bonini, *Protezione della vittima e valutazione del rischio nei procedimenti per violenza domestica tra indicazioni sovranazionali e deficit interni*, in www.sistemapenale.it, 2023; A. Marandola, *Perché la giornata internazionale per l'eliminazione della violenza contro le donne non sia commemorativa ma propositiva*, in www.sistemapenale.it, 2022.

proporzionate al livello del rischio valutato, al fine di scongiurare una situazione pericolosa nel minor tempo possibile.

KEYWORDS: domestic violence – victim's protection – right to life – Istanbul Convention – European Convention of Human Rights.

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RIVISTA DI
DIRITTI COMPARATI

Supporting victims of gender-based violence: A way to justice for victims*

Aleksandra Ivanković

TABLE OF CONTENTS: 1. The reality of victims. – 2. The human rights discourse. – 3. Rights of victims of crimes. – 4. Vision of victims. – 5. Needs of victims of gender-based violence. – 6. Conclusion.

1. The reality of victims

Seeking justice in a gendered world is a complicated affair. Justice is supposed to be blind, yet when justice systems are not able to factor in inequalities and struggles through which disadvantaged groups have to go through to approach justice systems, outcomes may be – unjust.

As most other things that are women into the fabric of our societies, crime too is a very gendered phenomenon. For example, even though they represent about 51% of the population, only 37% of intentional homicide victims in the EU were women[1]. Yet, two in three of the female victims of homicide were killed by family members or intimate partners. The statistics for murdered men victims of domestic abuse were not relevant to mention in the Eurostat report[2].

In another example, one in three women in the EU self-identify as victims of domestic violence over their lifetimes, even more – 44%, have been victims of psychological abuse. That's almost half of all European women[3]. However, unlike homicide that can hardly go unreported, psychological abuse is much harder to prove, much more complicated to even be recognised by the victim herself, and ultimately mostly goes unreported.

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* The article has been subjected to double blind peer review, as outlined in the journal's guidelines.

[1] Eurostat, *Crime statistics,* June 2022, available at : https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Crime_statistics#In_2020.2C_women_accounted_for_37_.25_of_the_victims_of_intentional_homicide.

[2] *Ibid.*

[3] EU Fundamental Rights Agency (FRA), *Violence against women: an EU-wide survey. Main results report*, March 2014, available at: https://fra.europa.eu/en/publication/2014/violence-against-women-eu-wide-survey-main-results-report.

Like domestic violence, women are much more likely to become victims of sexual violence. As with domestic violence, incidence of this type of crime is worryingly prevalent. According to the Eurostat data for 2015, 90% of victims of rape were female, while 99% of the persons convicted for rape were male[4]. During the same year, 2% of women above the age of 15 responded to have been sexually assaulted in the preceding 12 months[5]. Applied to the entirety of the total female population in the EU in the same year would indicate that about a total of 5,2 million women in the EU were victims of sexual violence over the course of the year. Yet, only 215,000 cases, or 4% of the total number of projected cases of sexual violence was reported to the authorities, according to Eurostat[6]. Further, at the same time period, only 16,500 cases of conviction for rape and sexual assault were recorded in the EU.

Meaning that only 0,3% of all victims of sexual violence achieved vindication in the criminal justice system[7]. So, a conclusion is imposing itself – justice systems are largely unequipped to recognise and accommodate the needs of victims of gender-based violence.

Let's take the example of a married woman, who has small children and who finds herself in a situation of coercive control[8], where there is no bruises, broken bones or other visible injuries. Very few legal systems criminalise coercive control, and even when they do, it is one crime that is very difficult to prove. The woman may be educated and aware of the jurisprudence, understanding that proving domestic violence by coercive control might be complicated.

She starts divorce proceedings, where she needs to face her (often manipulative) abuser. She needs to share custody of her small children with him. He might start manipulating children too, wanting to get back at her for daring to divorce him. He will normally put roadblocks on every step of her way to freedom from a harmful marriage, and will take his children hostages whenever possible and needed. In the divorce proceedings her allegations of violence get dismissed, as she never filed an official criminal complaint against her husband.

Her divorce proceedings take some time, her claim for the division of conjugal property even longer. The now ex-husband avoids paying maintenance, eventually

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[4] Eurostat, *Violent sexual crimes recorded in the EU,* 2017, available at: https://ec.europa.eu/eurostat/web/products-eurostat-news/-/EDN-20171123-1.

[5] FRA, *supra* note 3.

[6] Eurostat, *supra* note 4.

[7] It needs to be recognised that this type of calculation has its methodological limitations. The reality is that it is quite difficult to compare the crime, reporting and conviction rate captured during the same 12 months. To understand the real rate, longitudinal studies would need to be conducted, which observe crimes through time, as it is hardly unlikely that all convictions in one year are related to crimes that were committed, reported and prosecuted during the same 12 months.

[8] Coercive control is often defined as «an act or a pattern of acts of assault, threats, humiliation and intimidation or other abuse that is used to harm, punish, or frighten their victim». For more on coercive control see e.g. Woman's Aid, *What is coercive control?*, available at: https://www.womensaid.org.uk/information-support/what-is-domestic-abuse/coercive-control/.

moving to a different country in an attempt to hide his income. The woman needs to seek cross-border support to find out about his income. He starts avoiding reporting his income by setting up off-shore companies through which he does his business. He is seeing children sporadically, often enough to disturb their and their mother's life. She is now a life-long victim of economic and psychological abuse. She is helpless, having fallen within the cracks of tax evasion, absence of cross-border collaboration and the inability to pay the cost of legal representation in multiple countries, while she also needs to provide for her children all by herself.

Or, take another example in which a young woman goes out with her friends and wakes up in the middle of the night in an unknown room, being raped by three men. She starts screaming and they let her leave the apartment. She finds her way home and tells her sister about what happened. Her sister takes her to the hospital where a rape-kit was taken and blood tests run. By the time she came to the hospital, any rape drugs have already evaporated from her system, but DNA evidence was identified. The rapist was identified, but there was no prosecution, because in the absence of evidence that she was drugged, the legislation requires active resistance from the victim. And she could not resist because she was drugged.

In the former example, the victim actually never attained that standing, as she never filed a criminal complaint to the police – not being confident that the behaviour that was directed towards her had even been criminal. In the latter, the victim was certain that what had happened to her had been a criminal act, yet, the evidentiary requirement was not met and the conditions for the prosecution were not satisfied.

2. The human rights discourse

The modern human rights standards, which are grounded through the UN instruments, globally and reinforced for the Europeans through the Council of Europe framework have been built on the legacy of horrors of World War II. The main driver for getting a consensus behind the guarantees for rights and freedoms contained in the European Convention of Human Rights, or the two International Covenants was the political consensus of the time that horrors seen and experienced by millions in the first half of the century were never to be seen again. Human rights discourse was there to protect the individuals from the repercussions of the state, not to guard them from each other.

So, just looking into Article 6 of the ECHR, which is presented as a right to a fair trial reveals an unbalanced picture. Its first paragraph gives a right to a fair and public hearing to all, in all proceedings dealing with their civil rights and obligations. But it also grants a fair and public hearing to all in the determination of criminal charges against them – hence granting a fair trial in criminal proceedings only to the perpetrator, not to the victim. Going further, this same provision contains two more paragraphs, establishing very specific rights in criminal proceedings – again only to the

perpetrator. Only perpetrator has the right to be informed, be represented or to be given appropriate time to prepare for trial.

Hence, victims of crimes had to be brought into this discourse through a back door – case-law. Over time, this has happened by means of the so-called procedural limb of the ECHR's substantive articles, such as right to life (Article 2), prohibition of torture (Article 3) and slavery or forced labour (Article 4) or freedom of thought, conscience and religion (Article 9).

This uneven protection consequently descended into national criminal legislation, where the offenders have a clear set of rights and guarantees and where a significant effort has been made to ensure that these rights function in practice. Because, the consequence of not respecting the rights of the offender are strict – there can be no prosecution, convictions may be quashed by human rights mechanisms, prisoners may be set free and awarded eye watering compensation amounts if their rights are not respected.

This is not to say that rights of persons criminally prosecuted by the state have to be removed to make space for the victim. Far from it. Those rights are there for a reason, and should not be infringed. Yet, if the presumption of innocence is granted to all of the accused, even to those who recorded themselves and then disseminated the harrowing recording of gang raping a young woman, we need to grant similar guarantees to all those to claim to have been harmed by a criminal act – to the young woman who was raped, to the victim of coercive control or to anyone else who might claim to have fallen victim of a crime. Presumption of victimisation could be made to coexist in the same courtroom with a presumption of victimisation.

3. Rights of victims of crimes

A change started happening for victims with the adoption of the UN Basic Principles of Justice for Victims of Crime and Abuse of Power in 1985[9]. But, as far as the UN is concerned, this is also where the change stopped. There has been no UN convention that would give more power to the basic principles, hence leaving rights of victims at the level of good intentions and weak action.

In the European Union, however, progress for all victims was more palpable. In 2001, the EU adopted the Framework Decision on the standing of victims in criminal proceedings, which was followed shortly by the 2004 Directive relating to compensation to crime victims.

Within the Council of Europe, a landmark instrument was adopted in 2011 – in the form of Convention on Preventing and Combating Violence Against Women and

[9] Full text of Basic principles is available here: https://www.ohchr.org/en/instruments-mechanisms/instruments/declaration-basic-principles-justice-victims-crime-and-abuse#:~:text=Victims%20should%20be%20treated%20with,harm%20that%20they%20have%20suffered.

Domestic Violence (the Istanbul Convention). The Istanbul Convention was the first comprehensive human rights instrument that put the victims of a certain type of crime within the center of the discourse.

The adoption of the Istanbul Convention was closely followed by the EU in 2012, when Directive establishing minimum standards on the rights, support and protection of victims of crime – the Victims' Rights Directive (hereinafter: «the Directive») – the first ever comprehensive instrument to guarantee rights to all victims of all crimes in Europe.

The Directive puts the victim at the center and for the first time ever grants specific, palpable rights to victims themselves – irrespective of whether they reported the crime or not, or of whether criminal proceedings are ongoing. However, this has only been a first step. Victim Support Europe (VSE) conducted EU-wide research in 2018, to look into the practical implementation of the Victims' Rights Directive across the EU. The research which went on for two years, and included in-depth consultations with almost 1,000 experts and stakeholders across the 26 Member States of the EU that implement the Directive[10], concluded not only that there was not a single state in the EU that fully implemented the Directive in practice, but also that not a single article of the Directive was fully implemented across all of the EU[11]. The Directive, while certainly having had effect in a number of Member States, where victims were more and more becoming part of the discourse, was simply not working for victims.

4. Vision for victims

In the gendered society, gender-based violence is often seen as a just consequence for victims' own infractions. She is asking for it – by not cooking lunch, by going out with her friends, by not resisting when she is being raped by three men who are each twice her size. Victims are thought by their surroundings to doubt themselves and to blame themselves first, before they start being blamed by their environment or even the people who are there to support them and help them. They are to blame for not having chosen a better partner[12] or for not making sure that their

[10] Denmark, holding a historic exemption from application of justice and home affairs policies and legislation remains in opt-out from the application of the Victims' Rights Directive and hence was not subject to the study.

[11] Victim Support Europe, *Vociare synthesis Report*, 2018, available at: https://victim-support.eu/wp-content/uploads/2021/02/VOCIARE_Synthesis_Report.pdf.

[12] Nezavisne novine, *Zašto nisi izabrala boljeg* (in Serbian: Why haven't you chosen better), 2007, available at: https://www.nezavisne.com/novosti/drustvo/Zasto-nisi-izabrala-boljeg/15401.

drinks were not spiked[13], it is their underwear that is being spread to all to see in courtrooms[14] where they are seeking justice from what had been done to them.

Rather than staying true to their commitment to ratify the Istanbul Convention[15], the European Union is currently working towards adopting a new Directive on violence against women[16] and is committed to adopt amendments to the Victims' Rights Directive to improve it, there is already a lot to be done within the existing legislative framework.

Victims' rights directive already recognises a number of rights, that if properly implemented would make victims' experiences much less agonising and traumatic. For example, Article 22 of the Directive, requires states to conduct an individual needs assessment for protection of all victims who enter criminal proceedings. This assessment is aimed at protecting victims from four elements: intimidation, retaliation, repeat victimisation and secondary victimisation.

In practice, two main obstacles have been identified for the implementation of this right: the reach and the scope. Regarding the former issue: the assessment should be done in a timely manner – meaning that it most cases it should be done by the police. While very few police forces are required to systematically do this assessment for all victims, victims of gender-based violence are 'lucky' that for them, individual needs assessment for protection is conducted more often than for other victims. However, this is only done for victims who report their crimes, and only within the framework of criminal proceedings, and even there it does not work for victim. Hence, our victim of coercive control who never reported the crime will never benefit from this protection, while our victim of rape will only have this protection for a very short period – until her charges were dropped. The victim of coercive control will have to go to a civil trial to claim divorce, child custody, maintenance or division of marital property. She might request to relinquish her married name in administrative proceedings. Those are all non-criminal environments, where the staff is routinely not

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[13] Get to Text, *Nina Fuchs: My nightmare only started after I was raped*, August 2020, available at: https://gettotext.com/nina-fuchs-my-nightmare-only-started-after-i-was-raped/.

[14] BBC, *Irish outcry over teenager's underwear used in rape trial*, November 2018, available at: https://www.bbc.com/news/world-europe-46207304.

[15] The process of EU accession began in 2015 but has been blocked in the Council since 2017, due to the failure to obtain consensus among the Member States. Namely, as six Member States have had strong objections against the Convention, which was not ratified within their national context, the Commission President committed to pursue a bespoke EU instrument as a compromise. See more at: European Parliament, *Violence against women: MEPs demand the EU ratify the Istanbul Convention*, February 2023, available at: https://www.europarl.europa.eu/news/en/press-room/20230210IPR74805/violence-against-women-meps-demand-the-eu-ratify-the-istanbul-convention#:~:text=Six%20years%20after%20the%20EU,agreement%20of%20all%20member%20states.

[16] European Parliament, Legislative train schedule, *Legislative proposal on combating violence against women and domestic violence*, available at: https://www.europarl.europa.eu/legislative-train/theme-a-new-push-for-european-democracy/file-legislative-proposal-on-gender-based-violence.

made aware of issues relevant to victims and where procedures are insensitive of any such issues.

Regarding the latter, the scope, while it appears to be correctly set out to the four elements of intimidation, repeat victimisation, retaliation and secondary victimisation, the final point seems to be an issue of contention, to say the least.

European Institute of Gender Equality (EIGE) defines secondary victimisation as «when the victim suffers further harm not as a direct result of the criminal act but due to the manner in which institutions and other individuals deal with the victim. Secondary victimisation may be caused, for instance, by repeated exposure of the victim to the perpetrator, repeated interrogation about the same facts, the use of inappropriate language or insensitive comments made by all those who come into contact with victims»[17]. As this is the type of consequence that the victim suffers by those who are supposed to protect her and as it is happening within an institutional framework – in a nutshell, reporting the crime causes secondary victimisation. This bears consequence to both victims and those who commit secondary victimisation. Victim become hesitant to report, motivated by the need to protect themselves when others will not. Those who commit it tend to become defensive, finding themselves to be blamed of not doing their jobs properly. Which stands true, even when this impropriety is done with the best of intentions to help the victim, or more often due to the over interpretation of the right of the offender.

In such an environment, a vicious circle is being created: victims are hesitant to report, as they are afraid of repercussions; when they report they are exposed to secondary victimisation, which causes them to experience the justice system negatively. Such victims are less likely to report the crime again, but so are also their friends and family who may become disillusioned about the justice system. This in turn may cause a circle of victims' supporters who are themselves being hesitant to report a crime when it happens to them. And happen it most likely will, because the estimate is that up to 15% of EU residents fall victim of serious crime every year[18].

To break the circle, systematically respecting all rights of victims at all times, comes with the potential of reducing secondary victimisation, more reporting, better evidence provision and more efficient justice systems.

5. Needs of victims of gender-based violence

Victim Rights Directive is built around the realisation that almost all victims demonstrate some level of the basic five needs: respect and recognition, support and

[17] EIGE Thesaurus, *Secondary victimisation*, available at: https://eige.europa.eu/thesaurus/terms/1358.

[18] European Union, *Victims' Rights in the EU: Victims' needs*, available at: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/criminal-justice/protecting-victims-rights/victims-rights-eu_en.

information, access to justice, protection and compensation or restoration. All of these need to be appropriately responded to, as victims recover from crime.

While all victims have some level of these different needs, it is possible to respond to certain types of victimisation by recognising specific needs of some victim groups. For victims of gender-based violence, these needs might include: being supported by a person of the same gender, having accommodation in a shelter, receiving support with finding employment, going to family therapy, having access to rape-crisis centers etc.

Finally, each individual victim will experience different types of needs and will have to have their individual care-plan, in line with their personal situation. This means, for example, that some women will have no regard for whether they are being supported by a male or a female psychologist, while some others might even prefer to be supported by a man. And while there might be situations in which victims' preferences cannot be fully responded to, it may be important to understand the level of these needs, prioritise them and plan in an effort to respect victim's preferences and allowing them to regain control over their lives also through allowing them to be the owners of their own recovery.

As such, victims' needs can be presented through a pyramid:

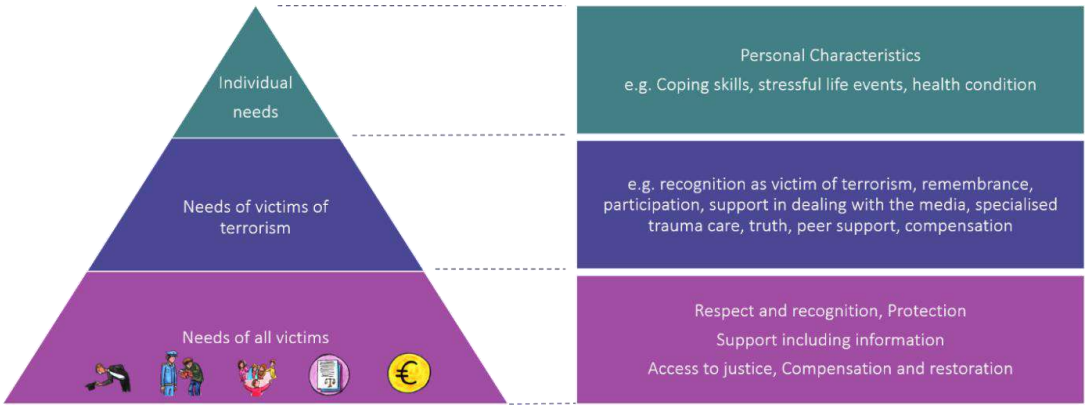

Image 1: the pyramid of victims' needs[19]

5. National framework for victim support[20]

Victim Support Europe has worked relentlessly since their foundation in 1990 to improve experiences of victims of crimes – though making victims' rights a reality

[19] VSE, *supra* note 11.

[20] For a detailed description and more information on the national support framework, see VSE, National Framework for Comprehensive Victim Support, November 2022, available at: https://victim-

not just in legislative instruments but also in practice. One important part of that vision is building national victim support frameworks which are able to respond to all needs of victims – regardless of what those needs are and of who is expect to respond to them.

While the framework involves almost all sectors of a society: law enforcement, judiciary, private sector, or societal services such as education, health or social services, the main pillar of responding to the needs of victims is a robust system of services that are built to specifically support victims. The Victims' Rights Directive grants victims this right – mainly through Articles 8 and 9, but also throughout the text of the directive.

A satisfactory national victim support framework should be built on a basis of a robust and well-resourced nation-wide system of generic victim support services. Such services should be able to receive and provide basic support to all victims of all crimes – reported or unreported, and also available to conduct an assessment of victims' support needs depending on their individual situation. This generalist support should then be complemented by a number of specialist service providers who are able to respond to specific needs of victims, depending on their personal situation. These specialist services can be organised around a number of criteria, such as: the type of crime (terrorism, cybercrime, homicide etc.), type of support (e.g. legal aid, psychological support), type of victim – which is the type of services where victims of gender-based violence will receive the majority of support; or inter-agency multi-factor services which require several criteria and which are deployed in complex cases (for example MARACs – multi-agency risk assessment centers, where victims of domestic violence at high risk of reoffending benefit from a specific approach in which a number of agencies collaborate to ensure support).

The image below indicates how a national victim support framework should look like:

support.eu/wpcontent/files_mf/1673427018NationalFrameworkforComprehensiveVictimSupportcompressed.pdf.

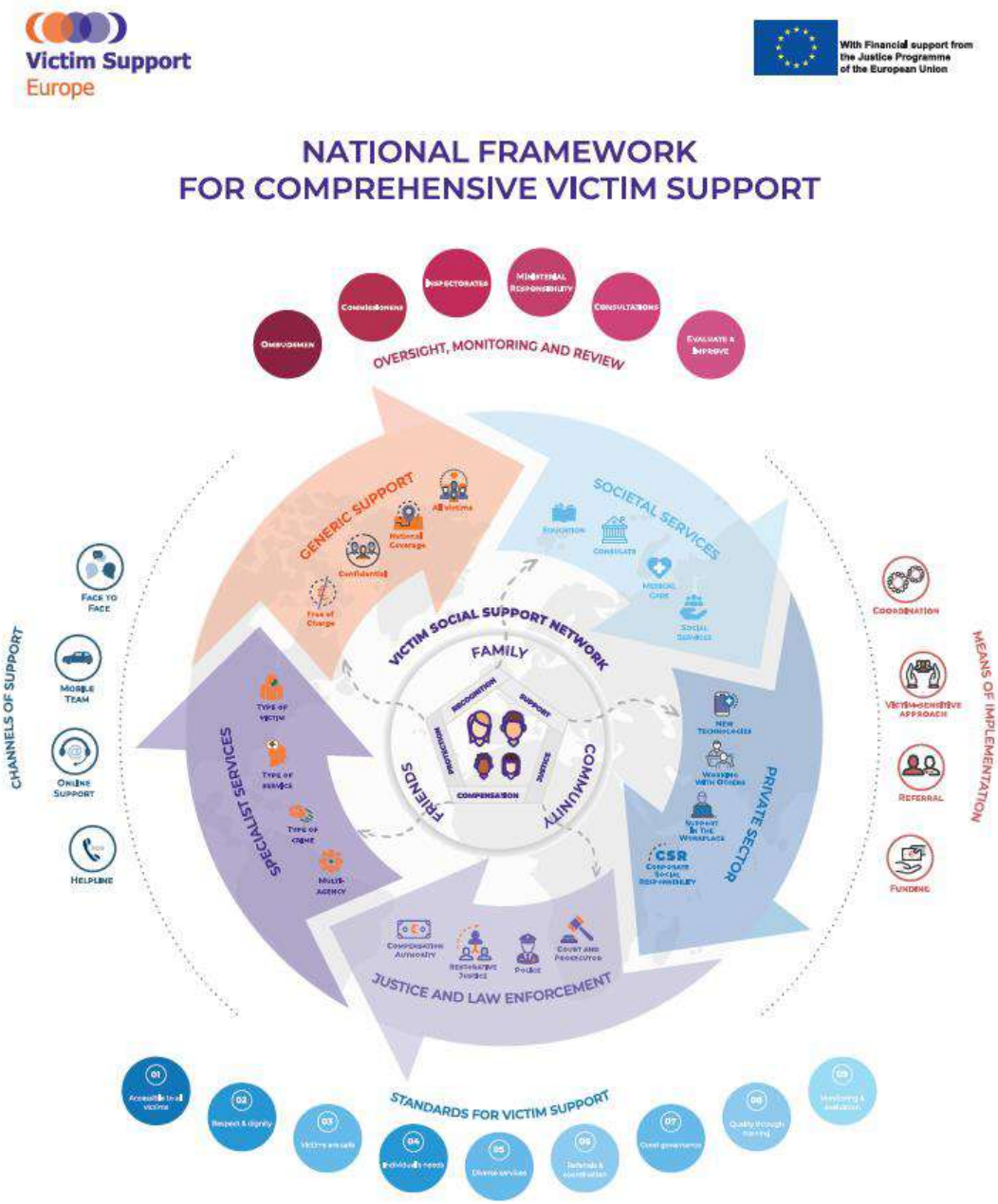

Image 2: the victim support framework infographic[21]

[21] VSE, *Ibid.*

Both generalist and specialist organisations have their role in supporting victims of gender-based violence. Sometimes, victims of gender-based violence may feel more comfortable going to a generalist support, simply to avoid identifying themselves or having to prove as belonging to a specific gender. This is particularly pertinent for transgender persons, but also for those who want to avoid being labelled as victims of, say, domestic abuse, by going to an organisation that specialises in domestic violence. At other times, they may be a victim of a generic, non-gendered crime. However, the background of her being a victim of gender-based violence may be factored in the support that she will need. For example, a woman may be a victim of bank fraud through a scam scheme, but her situation may be exacerbated by the fact that she is anxious if her husband finds out about her losing the money and subjecting her to abuse. She might not be ready to report the coercive control, or physical violence but is just looking for ways to recover her lost money. In such a situation, a generalist organisation may be better suited to support her, at least partly, while she herself is reckoning with the fact that the fraud was not the only crime she was subject to.

Obviously, a well-developed national system would have a good structure of both generalist and specialist organisations, which both do their share of supporting victims of gender-based violence. Only through such a collaborative approach can the support needs of victims of domestic violence be fully responded to.

6. Conclusion

Women are disproportionately affected by certain types of crime, which requires putting into place a system of victim support which is able to respond to their specific needs. This requires a thorough understanding of the entirety of their needs, including the need for support.

Support needs to be provided in a variety of ways: through independent associations, court-based support or victim specialists in the police and other law enforcement agencies. Victims of gender-based violence need to be empowered to seek support but also able to choose where this support will come from.

What is important is to ensure that this support is available readily, free of charge and for as long as the victim might need it.

The European Union is getting ready in the near future to adopt a set of new legislative measures to that effect – a generalist and a specialist directive. These two instruments should drive the national frameworks to be developed in line with the understanding that only through a robust generalist-specialist collaboration all victims, and in particular victims of gender-based violence can be fully and completely supported. It will, however, be up to national systems to create the best solutions that will work in any specific legal environment. In the hope that with joint action, more victims will come out, more victims will be recognised, supported, protected, given access to justice and eventually be granted compensation or restoration they deserve.

* * *

ABSTRACT: Women have disproportionately subject to certain types of crimes. Human rights discourse has largely been unable to fully address the rights of victims of crime, and in particular women, given that historically the human rights instruments were aimed at protecting individuals from the state repression and not from each other. Victims of gender-based violence have specific needs for support, that might differentiate also relative to the type of crime they are subject to. National victim support frameworks need to be built to capture those needs and respond to them, to ensure the best possible environment for women to recover. The forthcoming EU legislation ensuring both rights of women victims and all victims of crime, including women and other victims of gender-based violence is the move in the right direction.

ABSTRACT: Le donne sono soggette in modo sproporzionato a certi tipi di crimini. Il discorso incentrato sui diritti umani è stato in larga parte incapace di sostenere pienamente i diritti delle vittime di reati, e in particolare delle donne, posto che, storicamente, gli strumenti per i diritti umani miravano a proteggere gli individui dalla repressione dello Stato e non gli uni dagli altri. Le vittime di violenza di genere presentano esigenze specifiche di sostegno, che possono differenziarsi anche in relazione al tipo di reato a cui sono soggette. È necessario creare quadri nazionali di sostegno alle vittime per centrare tali bisogni e rispondere ad essi, nonché per garantire il miglior ambiente possibile per le donne. L'imminente legislazione dell'UE che garantisce i diritti delle donne vittime e di tutte le vittime di reato, comprese le donne e altre vittime di violenza di genere, pare muoversi nella giusta direzione.

KEYWORDS: victims – EU Victims' Rights Directive – gender-based violence – victims' needs – national framework for victim support

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Restorative justice: Offering access to justice for victims of gender-based violence*

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1. The critique of restorative justice engaging with gender-based violence

In September 2022 a group 28 individual women and women representing 30 organisations sent a letter to the Scottish Government opposing the Government's proposals to implement Restorative Justice processes in domestic abuse and sexual violence crimes[1]. They described themselves as «a group of violence against women (VAW) organisations and professional individuals working in Scotland who are recognised experts in this field. We work in a range of settings including advocacy and front-line services, the criminal justice system, teaching, research, knowledge exchange and policy. Some of us are survivors of domestic abuse, sexual violence and other forms of Violence Against Women».

Their arguments against the application of restorative justice were based on the nature of the harm that domestic abuse/coercive control/intimate partner violence may cause victims. These crimes are «not one-off events but courses of conduct, whose frequency and severity can escalate over time and reach across private and public space». There are real risks of re-victimisation or serious violence. The letter includes concern over the lack of risk management tools for restorative processes in Scotland.

* The article has been subjected to double blind peer review, as outlined in the journal's guidelines.

[1] https://www.womensgrid.org.uk/?p=20193 accessed 12 March 2023.

The signatories of the letter are concerned that restorative processes will have a negative impact on women's recovery from trauma and may re-traumatise them. The control and manipulation, which is integral to domestic abuse, «significantly challenges the appropriateness of restorative justice». The women believe with Acorn[2] that apology and forgiveness are the primary method of restorative repair and can be used to inflict further harm and to sustain oppression and control[3].

The letter concludes that restorative justice fails to see the complexity of women's lives and «may in fact limit women's agency and opportunities for independence and work to the benefit of her abuser» and is «not suitable for the vast majority of sexual violence cases, if at all. It cannot be removed from the overall landscape for women in a patriarchal society».

This letter exemplifies the contentious nature of the discourse concerning the application of restorative justice to cases of domestic violence. Arguments generally focus on the risks that restorative processes may generate: diminishing and privatising what is both a serious crime and a public issue, re-traumatising vulnerable victims and threatening their future safety[4]. Cameron[5], like the Scottish women who wrote the letter, considers these risks as reckless of women's lives and calls for a moratorium on new restorative initiatives addressing domestic abuse.

These risks are perceived as emanating from a lack of understanding of the nature of domestic abuse among restorative practitioners. They do not know how to engage effectively and safely with oppressive power imbalances, with the subtleties of coercive control, and the complexity of trauma. The critics do not believe that restorative processes engage with what really matters to victims of domestic abuse such as safety, justice, validation and vindication[6].

There is no other area of practice in which restorative justice is subject to such a severe and uncompromising critique. Restorative justice is not adversarial. Restorative practitioners seek to understand the other and to discover common ground on which to build solidarity. This article seeks to respond to these criticisms respectfully and in a spirit of responsibility.

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[2] A. Acorn, *Compulsory Compassion: a Critique of Restorative Justice*, Vancouver, 2004, p. 17.

[3] C. Humphreys – K. Diemer – A. Bornemisza – A. Spiteri-Staines – R. Kaspiew – B. Horsfall, *More present than absent: Men who use domestic violence and their fathering*, in *Child & Family Social Work*, 2018.

[4] A. Acorn, *Compulsory Compassion*, cit.

[5] A. Cameron, *Stopping the Violence: Canadian Feminist Debates on Restorative Justice and Intimate Violence*, in *Theoretical Criminology,* 2006, p. 49-66.

[6] J. Stubbs, *Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice*, in *Journal of Criminology and Criminal Justice,* 2007, p.169-187.

2. What restorative justice shares with those who criticise it. A focus on the harm that gender-based violence causes

Restorative justice does not define gender-based violence as an assortment of offences against the criminal law. Rather it focuses on the harmful impact of these crimes, their injustice and the suffering that they cause. Distinguishing the harm from person responsible for the harm enables practitioners to be rigorous in their condemnation of all forms of gender-based violence. Restorative justice practitioners stand in solidarity with those who campaign against gender-based violence, strive to hold perpetrators accountable and seek to protect victims.

2.1. A recognition of the systemic nature of gender-based violence

Restorative justice, unlike the formal criminal justice process, allows not only the harmful behaviour to be addressed but also the context in which it took place. Because of the relational nature of restorative justice, practitioners and participants can become more aware of the presence and risks of imbalances of power in very concrete and specific ways through participation in restorative processes. The time spent with the victim listening and understanding what happened and what matters to her, reviewing with her the risks and benefits of participating in a restorative meeting and ensuring that the meeting is both safe and effective, enables the lived experience of patriarchal structures, institutional sexism, misogyny and rape culture to be rigorously examined and challenged. Addressing the specifics of the harm with the people most affected by it also exposes how the intersectionality of oppressive power structures impact on the experience of the victim and the perpetrator of the harm.

2.2. A trauma informed approach

Practitioners in restorative justice are becoming much more aware of trauma and recovery as training in trauma informed practice becomes more available. There is clearly an overlap between restorative practices and trauma informed practice informed by research into this area. Herman[7] outlines a recovery process of safety, the integration of narratives, community and justice which complements the restorative process of designing and facilitating a safe space to tell one's story and to reconnect with others.

[7] J. Herman, *Trauma and Recovery: The Aftermath of Violence. From Domestic Abuse to Political Terror*, New York, 2015, *Truth and Repair: How Trauma Survivors Envision Justice*, London, 2023.

2.3. Aiming to increase victims' access to justice

Critically, restorative justice increases access to a lived experience of justice for victims. Given the ineffectiveness of the criminal justice system in relation to gender-based violence, this is an important contribution that restorative justice can make.

In relation to domestic abuse in England and Wales[8] (2021 – 2022), the Crime Survey for England and Wales estimated that 5.0% of adults (6.9% women and 3.0% men) aged 16 years and over experienced domestic abuse in the year ending March 2022. This represents an estimated 2.4 million adults (1.7 million women and 699,000 men). Approximately 25% of women and 10% men have experienced partner abuse since the age of 16 years. Of all crimes recorded by the police in the year ending March 2022, 17.1% were related to domestic abuse.

The number of police recorded domestic abuse-related crimes in England and Wales increased by 7.7% compared with the previous year, to 910,980 in the year ending March 2022. Among the 41 police forces that supplied data in both years, the police made 31.3 arrests per 100 domestic abuse-related crimes in the year ending March 2022, a decrease from 32.6 in the previous year. 6.7% of domestic abuse crimes resulted in charges. The number of suspects of domestic abuse-related crimes referred by the police to the Crown Prosecution Service (CPS) for a charging decision decreased from 77,812 in the year ending March 2021 to 67,063 in the year ending March 2022. 51% were not charged because the victim did not support the action. This compares to a rate of 26% of victims not supporting prosecution for non-domestic abuse crimes. 76.4% of domestic abuse-related prosecutions were successful in securing a conviction in the year ending March 2022. This is approximately 2.7% of women who experienced domestic abuse.

In the year 2020 - 2021, there were 114 domestic murders. 67 victims were killed by a partner or ex-partner (down from 74), 27 were killed by a parent, son or daughter (down from 32) and 20 were killed by another family member (up from 15). Almost half of adult female murder victims were killed in a domestic homicide. Of the 75 female victims, 72 were killed by a male suspect. Only 10% (39) of male homicides were domestic related.

In relation to sexual crime, we will look at the statistics in relation to rape[9]. It is difficult to estimate the number of rapes that occurred, yet were not reported to the police. We can safely assume it by far exceeds the official statistics. The recorded number of rape offences has nearly doubled in the past six years, from 36,320 in 2015-2016 to 70,330 in the year to March. Yet in the past four years, rape prosecutions in

[8] Office for National Statistics Overview of Domestic Abuse November 2022. accessed 29 December 2022 https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandandwalesoverview/november2022#main-points.

[9] https://www.gov.uk/government/statistics/crime-outcomes-in-england-and-wales-2021-to-2022/crime-outcomes-in-england-and-wales-2021-to-2022.

England and Wales have fallen by 70%. In five years, the percentage of victims withdrawing support for prosecutions has increased from 42% in 2016 to 57% in 2020. In the year to September 2021, just 1.3% of rape cases recorded by police resulted in a suspect being charged (or receiving a summons). This compares to a 7.1% charge rate for all other recorded crimes in the same period.

These statistics demonstrate that the criminal justice system neither assures the safety of women nor offers them effective access to justice. Most women are choosing not to report crimes and, when they do report them, most women choose not to support the prosecution of the case. Victims of gender-based violence need access to forms of justice which enable them to exercise more choice and control over the process.

In conclusion, restorative justice practitioners should be seen as allies of women and partners of those that represent their needs and interests.

3. How restorative justice has contributed to the critique

The proponents of restorative justice must take some responsibility for proving some of the evidence which informs the critique. Two aspects of how restorative justice presents itself to the public provokes legitimate concerns among those committed to protecting women from gender-based violence; associating restorative justice with mediation and an idealistic view of restorative justice.

3.1. The association with mediation

Mediation is a private and confidential process in which an impartial and neutral third party assists people to resolve conflict. It has proved to be very effective in a variety of contexts including family, workplace, commercial, and neighbourhoods. Victim offender mediation has been the predominant method used in restorative justice in most parts of the world.

From the point of view of the critics, the words «private», «impartial», «neutral» and «resolve conflict» are not compatible with their understanding of gender-based violence. For them gender-based violence is a public issue that is sustained by privacy. They would assert that it is not appropriate in such cases to be impartial in relation to the victim and the perpetrator of such serious harm and certainly not to be neutral in one's position on gender-based violence. Most of all, serious crimes such as rape and domestic violence cannot be conceived as conflicts requiring resolution and/or reconciliation.

3.2. An idealistic view of restorative justice

Restorative justice tends to be promoted as a means of addressing the impact of harmful behaviour on relationships. Much attention is given to building, strengthening and repairing relationships[10]. Practitioners are more comfortable extolling the «power of relationships» than engaging with relations of power.

This generates a real anxiety that restorative justice processes will recreate the dynamics of abuse – harmful and oppressive actions leading to expressions of remorse and apology, forgiveness and reconciliation. In practice, most restorative processes addressing serious gender-based violence are designed to resolve outstanding issues and questions involved in restoring power, control and ending relationships.

In conclusion, the restorative justice movement has not yet fully understood and engaged with the risks inherent in gender-based violence. This article argues that an engagement with the reality of sexual violence and domestic abuse will not only benefit many women but also enable restorative justice develop its understanding of and its responses to a wider range of harmful and unjust behaviours.

4. Radical engagement with the reality of gender-based violence

Giddens[11] describes four «adaptive reactions» to the risks experienced in complex modern societies. The four adaptive reactions are sustained optimism, cynical pessimism, pragmatic acceptance, and radical engagement. One of the reasons that restorative justice attracts criticism is the sustained optimism that springs from its advocates. This positivity is useful when striving to gain the attention of those whose support a movement requires. However, it tends to evade serious inquiry into the social complexities of imbalances and abuses of power.

As a result, sustained optimism is often met with «cynical pessimism». According to Giddens[12] «this presumes a direct involvement with the anxieties provoked by high consequent anxieties». Cynicism both causes and is sustained by inaction. «Pragmatic acceptance» is a strategy for survival «which maintains a focus on day-to-day problems and tasks», based on «the belief that much that goes on in the modern world is outside anyone's control, so that temporary gains are all that can be planned or hoped for»[13]. In practice, practitioners adopt a pragmatic approach to sustain their employment and find themselves engaging in many practices that may be described as restorative but have drifted away from the fundamental values and principles of restorative justice.

[10] M. Finnis, *Restorative Practice*, Carmarthen, 2021.
[11] A. Giddens, *The Consequences of Modernity*, Stanford, 1990, p. 134 and p. 137.
[12] *Ibidem*, p. 136.
[13] *Ibidem*, p. 135.

For Giddens[14], «radical engagement» is «an attitude of practical contestation towards perceived sources of danger. Those taking a stance of radical engagement hold that, although we are beset by major problems, we can and should mobilize either to reduce their impact or to transcend them». It represents an engagement with reality on the understanding that «the production of reality has never been finished, its outcome has never been made decisive. Something is always in the balance. Reality is always in need»[15]. Both the power and control of victims and the responsibility and accountability of perpetrators can be restored. But such a reality is, at least in part, in need of collaborative action between the movement against violence against women and girls and the restorative justice movement.

As Westmarland et al[16] urge, there needs to be a constructive dialogue between feminist academics, activists and practitioners and the restorative justice movement. Restorative justice is currently being applied in many countries. People, who are committed to both protecting victims and enabling them to reclaim and exercise their power, are needed to ensure that restorative processes are safe, trauma informed and effective.

5. Restorative justice practice based upon radical engagement

5.1. Radical engagement is built on evidence

Restorative justice is often criticised for having little evidence for its effectiveness in the area of gender-based violence. Of course, when there is so much opposition, it is difficult to generate enough cases to evaluate. Nevertheless, some brief literature reviews[17] have managed to discover some studies.

Coker's research[18] identified benefits for victims including challenging the perpetrator's abuse and maintaining family relationships. Coker also found some evidence of coercion of women and of the rehabilitation of the perpetrator taking priority over what mattered to victims. McGlynn et al[19] concluded that for victim-survivors who wish to participate, restorative justice may offer the opportunity to have one's voice heard and to experience justice. Kingi et al[20] reported that victims

[14] *Ibidem*, p. 137.

[15] J. Berger, *Sense of Sight*, New York, 1993, p. 275.

[16] N. Westmarland – C. McGlynn – C. Humphreys, *Using restorative justice approaches to police domestic violence and abuse*, in *Journal of Gender-Based Violence,* 2018, p. 339-358.

[17] *Ibidem*.

[18] D. Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, in *UCLA Law Review,* 1999, p. 1-111.

[19] C. McGlynn – N. Westmarland – N. Godden, *'I Just Wanted Him to Hear Me': Sexual Violence and the Possibilities of Restorative Justice*, in *Journal of Law and Society,* 2012, 213-240.

[20] V. Kingi – J. Paulin – L. Porima, *Delivery of Restorative Justice in Family Violence Cases by Providers funded by the Ministry of* Justice, Ministry of Justice, New Zealand, 2008.

appreciated being accorded respect and being heard. Based upon her research into the use of mediation in cases of domestic abuse, Pelikan[21] concluded that mediation supported and reinforced processes of regaining power or liberation that were already under way in women's lives, and that the reformation of the perpetrator is rare. She summarised her findings as «Men don't get better, but women get stronger».

These studies offer a glimpse of what restorative justice can offer and what it should avoid. It is important that there is a commitment to expand research-based evidence on the quality and effectiveness of restorative justice in relation to gender-based violence. Keenan and Zinsstag[22] have recently provided a comprehensive research-based study of the value of restorative justice in cases of sexual violence.

5.2. Radical engagement involves recognising the diversity of gender-based violence and of the harm that it causes

Restorative justice is based upon focusing on the harm, suffering and injustice that gender-based violence causes. When considering the application of restorative justice to such offences, practitioners should understand the wide range of types and severity of harms caused by domestic abuse and sexual violence and that such crimes can lead to more serious harm in the future.

There is a wide range sexual offences such as sexual harassment, inappropriate physical contact, indecent exposure, sexual assault, child sexual abuse, incest, and rape. While each involves abuse of power, in other respects they may need different responses. Domestic abuse, according to Johnson's typology[23], also takes distinctly different forms, situational violence, violent resistance, and intimate terrorism. Furthermore, the harm that these forms of abuse and violence cause may vary. In addition to physical and sexual violence, a victim often suffers psychological oppression through humiliation, «gaslighting», and economic control leading to dependence upon the abuser. In some cases, the abuser may use a form of spiritual abuse in which religious or cultural values and beliefs can be used to control or silence the victim. Physical and/or technological surveillance is a common form of coercive control. In conclusion, there are many variations of how domestic abuse is experienced.

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[21] C. Pelikan, *Victim-Offender Mediation in Domestic Violence Cases — A Research Report*, United Nations Crime Congress, Ancillary Meeting, Vienna, 2000, http://www.restorativejustice.org/rj3/UNBasicPrinciples/AncillaryMeetings/Papers/RJ_UN_CPelikan.htm.

[22] M. Keenan – E. Zinsstag, *Sexual Violence and Restorative Justice: Addressing the Justice Gap*, Oxford, 2022.

[23] M. P. Johnson, *A Typology of Domestic Violence: Intimate terrorism, violent resistance, and situational couple violence*, Boston Hanover, New Hampshire, 2008.

Practitioners should understand that these crimes are facilitated by structural power and misogynist beliefs and values and be aware of the impact of imbalances of power and that «bystanders» (strangers and family and friends) may passively or actively support and/or protect the perpetrator or blame the victim.

Practitioners should recognise «secondary victimisation» through how the criminal justice system responds to victims and understand why many victims are reluctant to report offences to the police. The intersectionality of these harms may create conflicts for victims as they may believe that to report a crime may be disloyal and reinforce stereotypes, thus exacerbating their social isolation and invisibility.

Practitioners need to understand the traumatisation of victims and the wider harmful impact on those associated with the victims, such as their children. Gender-based violence also has a wider social impact on women causing fear and restricting their freedom and autonomy.

5.3. Radical engagement involves recognising the diversity of victims and perpetrators of gender-based violence

Restorative justice practice focuses on the problem of harm and how to restore the damage, loss and violations caused the harmful action. Restorative processes examine each person's relation to the harm and explores how this relation can be transformed. Each person's relation to harm is identified and defined by their lived experience as described by their chosen narrative. Victims may have experienced the same harm, yet they will have different narratives of the experience and what is important to them. Perpetrators may be responsible for the same harm, yet the story which accounts for their actions will be different.

Restorative justice, as its name suggests, is a process of restoring justice. From this point of view the problem of gender-based violence is not «a woman's problem» but a «man's problem». The harm is the man's responsibility and the process places great emphasis on the man's accountability for the harm, for responding to the victim's questions and requests and for taking steps to avoid further harmful actions.

This diversity means that cases of gender-based violence are complex and that a restorative response to such cases must be sensitive to these complexities.

5.4. Radical engagement involves recognising that there is no one restorative process that fits all cases

The European Forum for Restorative Justice defines restorative justice as an inclusive approach of addressing harm or the risk of harm through engaging all those

affected in coming to a common understanding and agreement on how the harm or wrongdoing can be repaired and justice achieved[24].

The method of mediation is not the only restorative justice process. For instance, the restorative justice paradigm does not see gender-based violence as a conflict to be resolved. Domestic and sexual violence are injustices and oppressive violations of human rights. Restorative practitioners are not neutral about such harmful behaviour. The restorative justice process is not impartial. It focuses on the harm and suffering experienced by the victim so as recognise and understand the violation and to repair the damage and to alleviate the suffering caused by the harm. In doing so it seeks to develop the accountability of perpetrators and to support their desistance from further harmful behaviour. The restorative process does not aim to achieve forgiveness or apology.

This places a responsibility on the restorative practitioner to design a safe and effective restorative process specific to each case rather than have a standard «fits all» restorative process into which only appropriate parties should fit. While some European countries have restricted the use of restorative justice, many other countries are offering restorative justice routinely in cases of gender-based violence.

For any restorative process to be initiated and completed, there must be evidence of certain conditions being met.

1. All participants must give their permission free from any pressure or coercion and based on understanding accurate information of the process and the risks of participation.
2. The perpetrator must freely and honestly admit responsibility for harming the victim.
3. The facilitator, and, where appropriate the organisation providing the restorative justice service, must have been diligent in assuring that all steps have been taken to ensure the process is safe, just and free from any domination by any participant.

In the spirit of restoring power and control, the practitioner should involve the participants in actively co-designing the process so that they are satisfied that it will be safe, respectful and fair. There are many variables that can influence the design.

The restorative justice process builds the scaffolding which supports strong, safe platforms on which the participants do the difficult and sometimes fearful work to repair the harm. This «scaffolding» structure of practice is grounded in the context and lived experience of harm, is built upon and bound by strong values and is supported by evidence-based principles of practice that generate a positive experience of justice for all parties.

These values and principles apply to every restorative process. However, in engaging with domestic abuse and sexual violence cases, the practitioner must take special care to move at the participants' pace and enable them to have as much control

[24] https://www.euforumrj.org/en/restorative-justice-nutshell.

and choice throughout the process as possible. This helps them to self-regulate their emotions and develop trust in the practitioner.

The values supporting restorative justice enable the practitioner to build trust and to develop relationships based upon respect with participants in a restorative justice process. They also provide indicators of what has been damaged, lose or violated by gender-based violence and of what needs to be restored for each person.

The value of respect for human dignity is clearly violated in a deeply damaging way by any gender-based violence as it often includes the deliberate degradation and humiliation of the victim. The restorative process can offer the victim the opportunity to discharge any shame that they may feel and to place it consciously where it belongs, within the perpetrator's responsibility for the harm. Such crimes are often perceived as a serious breach of the solidarity that women have a right to expect from society, from men, from the criminal justice system and, sometimes, even from their families. The process can restore people's social obligations to each other. Crucially, restorative justice is designed to undo the injustice that the victim has experienced by holding the perpetrator of the wrong personally and directly accountable to the person whom they have harmed. This is achieved by a safe process of dialogue which should be free from any coercive control to facilitate each person to say what they wish. This dialogue is a means to inquire into the truth of what has happened and to reach an agreement on what needs to be done to restore what matters to the victim arising from the experience of being harmed.

Through this practice, values are transformed from abstract concepts to tangible actions and outcomes which restore social relations to how they should be, just, safe, respectful and honest. Restorative justice aspires to make this ideal a reality if only with a small group in one place at a specific time.

5.5. Radical engagement involves changing the context in which the harm of gender-based violence is addressed

The experience of domestic abuse and sexual violence represents a violation of human dignity and a disrespect of the victim's rights and wishes. This loss of control can be prolonged by continued coercive control, trauma, and shame. The restorative process should be designed to restore power and control to the victim. This requires the practitioner to respect the authority of the victim over her life, narrative and choices.

The principle of inclusion is almost always seen from the vantage point of the authority which wishes to invite a person or social group to participate in a process of decision making or to benefit from a service or resource. The organisation or person who issues the invitation retains the power and control over the activity or resource. The restorative approach transfers the authority as much as possible to the people who choose to participate. Partly this is because being in control of one's choices and

actions is of critical importance to people who have experienced the trauma of a crime in which perpetrators have imposed their power and control of them. It is also based upon a deep respect for their human dignity and for the importance of their lived experience. Above all, restorative practitioners should avoid the attitude that bell hooks[25] warns against: «no need to hear your voice when I can talk about you better than you can speak about yourself. No need to hear your voice. Only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in such a way that it has become mine, my own. Rewriting you I write myself anew. I am still author, authority. I am still the coloniser, the speaking subject and you are now at the centre of my talk».

It follows that the restorative practitioner is in realty seeking the permission of a person to be admitted into their life and for the restorative process to be included in their narrative of overcoming harm. If this approach is adopted, practitioners must strive to be aware of their unconscious bias of being the authority and the expert. This generates a very different orientation to practice, communication and relationship.

The practice of inclusion will be influenced by who has requested the restorative justice process. Referrals may come from the criminal justice system, usually made by a judge, prosecutor or the police. In some cases, a perpetrator of harm may seek to initiate the process. Ideally the process should be initiated by the victim or someone close to the person who has been harmed. However, this source of referral is usually the least common as there are rarely effective systems established to inform and support victims so that they can take the initiative.

Restorative justice initiated by the criminal justice system runs the risk of being offender-centric and less sensitive to victims. There may also be pressure on the practitioner to comply with bureaucratic procedures and professional interests rather than the needs and interests of the participants.

Restorative justice processes initiated by perpetrators need to be approached with particular care in sensitive and complex cases of harm. Perpetrators may wish to sustain a narrative of victim blaming or *gaslighting*[26] to avoid authentic accountability. They may wish to sustain power and control over the victim in subtle or blatant ways. Restorative justice can only take place if the perpetrator takes responsibility for committing an act that caused harm. This does not necessarily mean that guilt of a crime has been proved in court. There are levels of responsibility. So, for example a

[25] B. Hooks, *Choosing the Margin as a Space of Radical Openness*, in *Framework: The Journal of Cinema and Media*, 1989, p. 22.

[26] Gaslighting is a form of manipulation that often occurs in abusive relationships. It is a covert type of emotional abuse where the bully or abuser misleads the target, creating a false narrative and making them question their judgments and reality. Ultimately, the victim of gaslighting starts to feel unsure about their perceptions of the world and even wonder if they are losing their sanity, see https://www.verywellmind.com/identify-and-cope-with-emotional-abuse-4156673.

process can proceed even when the perpetrator shows little or no remorse if the victim is aware of this and wishes to proceed.

Participants will consider it more respectful (and effective) if the practitioner listens to their account of what happened and understand what matters to them before they seek their permission to facilitate a restorative process with them. The task for the practitioner is to enable the individual to articulate their own authentic narrative of the harm. This is achieved through allowing each person to tell their story in their own words, starting and ending it where they choose.

This requires the practitioner to invite her or him to tell their story. «What happened?» is a more open question than «What happened to you» which places people as victims of events and leaves little space for them to describe their choices and actions. Listening without assumptions and judgements exemplifies the value of respecting human dignity. It sends a message that what happened is more than an *incident;* it is an important *event* because you are important. At this stage the focus is on the facts and understanding the concrete nature of the harm that has taken place. This can begin the process of gaining the trust of the person.

A value-led approach to restorative justice strives to enable participants to discover and act upon their power to participate in a process which leads to the restoration of what matters to them. It supports people to move towards what causes them anger, fear, shame or anxiety with the guidance and support of the practitioner and to work through the distressing experience of harm and to restore themselves by addressing what matters to them.

There are distinctions between harm, the suffering it causes and the injustice that is experienced. While objectively two people can experience the same harm, their suffering and sense of being wronged are unique to each person. It is the narrative of their life before the harm and their values that cause this distinctive uniqueness. This is why premature expressions of empathy can seem superficial to people and lead them to withdraw rather than engage. The story does not always start with the harm or when restorative justice arrived on the scene.

The conversation proceeds to explore the subjective *experience* of the harm to understand its impact on the person's emotions, behaviours and moral thinking. The practitioner is moving at the person's pace towards enabling her or him to formulate the problem to be addressed. This involves assisting the person to articulate in their own words *what matters* arising from the harm.

Rather than fit people into a prescribed process, they are more likely to engage if the process is designed to fit them. The invitation to participate in a restorative process should be compatible and attuned with the narratives of harm of both the victim and the perpetrator. Once you know what matters to the person and what they want, ask yourself, «how can the process be designed to address what matters and what this person wants».

For some, what matters is an experience of justice. For others it is safety. Many want to get their lives back under their control and a significant number wish to relieve

themselves of shame. Each of these can be experienced by both the victim and the perpetrator. Often what really matters takes the form of a question. For many victims unanswered questions are very important and only the person who has caused them so much suffering can answer them.

At a restorative meeting, victims are invited to present their narrative of harm and the questions and requests that arise from it. Perpetrators are invited to present their narrative of accountability and the questions and requests that arise from it. Through this process of narrative and dialogue participants have an opportunity to restore their personal integrity and autonomy and to restore just relations with each other (though rarely a resumption of a close personal relationship).

5.6. Radical engagement requires a practice that is trauma informed

To be a victim of a serious harm such as domestic abuse is often to experience trauma. A traumatic event can be a recent, single event (e.g., violent assault), a single event that occurred in the past (e.g., a sexual assault) or a long-term, chronic series of events (e.g., sexual or domestic abuse). A person who has experienced a traumatic event might develop either simple or complex post-traumatic stress disorder (PTSD). Experiencing a single traumatic event is most likely to lead to simple PTSD. Complex PTSD tends to result from long-term, chronic trauma.

Trauma can be conceived of as a disconnection from or rupture of the elements of life that sustain a person's security and well-being. Trauma can disrupt and disconnect people from the narratives of their lives, their sense of control, their emotions, their values and beliefs and their relationships with others. Being the victim of a harm due to an imbalance of power and the consequent impact of trauma can cause severe psychological pain and overwhelming and distressing emotions such as shame, fear, anger and anxiety. In such circumstances people often seek a variety of methods to reduce the pain and to numb the feelings. These may include self-medication through alcohol and/or drugs, compulsive eating or sexual activity, high risk activities, self-harm, self-blame, violence, avoidance of people and withdrawal from social interaction, and even moving to another country. People who have been traumatised may also experience hyper arousal or hypervigilance for any perceived threat and these responses may result in sleeping difficulties. They may lose belief in a safe and just world, distrust other people and become pessimistic or fatalistic about their future. They often feel different and do not believe that others will understand them. Dissociation, a cognitive process that disconnects a person from their thoughts, feelings, and actions, may leave the victim feeling that they have lost a sense of who they are. Dissociation helps distance the distress of the trauma from the individual and seems to support survival. There is also considerable evidence that many people who engage in patterns of coercive control and violence have themselves experienced

trauma in their lives. If trauma causes disconnection, the response is to restore connection.

According to Herman[27], the stages of recovery are establishing safety, reconstructing the trauma narrative, and restoring connection to the community. These stages can be integrated into the restorative process.

Post-traumatic growth is defined as «positive psychological change experienced as a result of the struggle with highly challenging life circumstances»[28]. Research suggests that between 30-70% of people who have experienced traumatic harm report positive changes coming out of the experience[29]. Post-traumatic growth is experienced as a greater appreciation of life, as improved social relationships, as greater confidence in one's strengths, and as being motivated by strong spiritual and/or moral values. These combine to generate within the individual's imagination new possibilities in life. This does not mean that the person no longer has distressing feelings such as sadness, anger, or anxiety when they think of what happened. They have a stronger sense of being able to cope with these feelings through a greater understanding of what matters. There are key factors associated with post traumatic growth: a strong support system and a sense of community, openness to expressing emotions, to considering new beliefs and to taking new actions and the ability to integrate the traumatic experience into the individual's life.

The impact of traumatic harm is different for each individual. it is important to be realistic rather than naively optimistic. Growth will not be experienced by every victim and a restorative process is no substitute for therapy. Timing is also important. Some evidence suggests that victims of serious trauma may require two years to be ready for growth.

Ten principles for trauma-informed services for women[30]:

1. Trauma-informed services recognise the impact of violence and victimisation on development and coping strategies.
2. Trauma-informed services identify recovery from trauma as a primary goal.
3. Trauma-informed services employ an empowerment model.
4. Trauma-informed services strive to maximize a woman's choices and control over her recovery.
5. Trauma-informed services are based in a relational collaboration.
6. Trauma-informed services create an atmosphere that is respectful of survivors' need for safety, respect, and acceptance.

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[27] J. Herman, *op. cit.*

[28] R.G. Tedeschi – C.G. Calhoun, *Posttraumatic growth: Conceptual foundations and empirical evidence*, in *Psychological Inquiry*, 2004, p. 1-18.

[29] S. Joseph – L.D. Butler, *Positive changes following adversity*, in *PTSD Research Quarterly,* 2010, p. 17.

[30] D.E. Elliot – P. Bjelajac – R.D. Fallot – L.S. Markoff – B.G. Reed, *Trauma-Informed or Trauma-Denied: Principles and Implementation of Trauma-Informed Services for Women*, in *Journal of Community Psychology*, 2005, p.461-477.

7. Trauma-informed services emphasise women's strengths, highlighting adaptations over symptoms and resilience over pathology.
8. The goal of trauma-informed services is to minimise the possibilities of re-traumatisation.
9. Trauma-informed services strive to be culturally competent and to understand each woman in the context of her life experiences and cultural background.
10. Trauma-informed agencies solicit consumer input and involve consumers in designing and evaluating services.

It is important that the restorative process enables participants to experience safety, justice, respect and a sense of control over their choices and their environment. The restorative process should generate a space in which people can talk about their suffering on their own terms and be in control of how their experience is presented to others. Through this, victims become visible and their lived experiences are heard, and their questions are answered. The perpetrator observes and listens and is asked to understand the consequences of his choices and actions. This experience may stimulate accountability, remorse and a commitment to avoid harming women again.

Participation in a safe, controlled restorative process can contribute to the individual experiencing their own self-efficacy, and to finding a purpose and meaning to life that leads them to a positive adaptation to their trauma. Sherman and Strang[31] found that restorative processes were especially beneficial to victims of serious harm. Angel et al.[32] measured the effect of participation in restorative processes on post-traumatic stress symptoms in cases of aggravated burglary.

Based upon an understanding of the impact of trauma on an individual, practitioners should consider the following guidance on how they should engage. Let the person take their own time. Avoid hurrying them or the temptation to take short-cuts. Let them lead the conversation. Avoid an over-structured or scripted approach which might seem more like an interview or interrogation than a dialogue. Avoid trying to reassure, to rescue or to solve the problem so that they lose control of what happens next. Listen with curiosity, compassion and courage paying attention to emotions and details that point towards what really matters to the person. Respect and nurture the individual's capabilities, strengths and virtues. Avoid judgement even of the perpetrator or the person's family. Avoid any suggestion that the person should be ashamed whatever they say. Remember – it is not your story. Do not get caught up in the drama.

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[31] L. W. Sherman – H. Strang, *Restorative justice as evidence-based sentencing*, in J. Petersilia – K. Reitz (eds.), *The Oxford Handbook of Sentencing and Corrections*, Oxford, 2012, p. 215-243.

[32] C.M. Angel – L. W. Sherman – H. Strang – B. Ariel – S. Bennett – N. Inkpen – A. Keane – T. S. Richmond, *Short-term effects of Restorative Justice conferences on post-traumatic stress symptoms among robbery and burglary victims: a randomized controlled trial* in *Journal of Experimental Criminology*, 2014, p. 291–307.

5.7. Radical engagement strives to offer a safe process

Restorative justice in cases of gender-based violence can and does result in very satisfactory outcomes for victims, perpetrators and society. Restorative processes can enable victims to reclaim and restore the power and control over their lives that serious harm has violated. The support, through a restorative process, to have their suffering heard and understood, to ask questions and to make requests for reparation may counter the humiliation, disempowerment, lack of information, and loss of control that the harm has caused, and which tends to be reinforced in formal criminal justice processes. Restorative justice can also be effective in challenging perpetrators' attitudes and behaviours which have resulted in serious crimes[33]. Participation in restorative processes may enable perpetrators to take responsibility for their harmful actions and to engage in actions to prevent further harm.

For these benefits to occur the process must be safe and facilitated skilfully. Engaging participants in considering questions of risk and safety enhances and develops the participants' experience of power and control over the process.

The approach to risk adopted in this course is not mechanistic assuming that certain factors are mechanisms for increasing risk of further harm. It is not actuarial, scoring factors to assess the level of risk. The approach is designed to complement restorative values, principles and practices. It is contextual, placing areas of possible concern in the context of the lived reality of the participants and it is systemic, examining how different factors interact to raise or lower risk. It is inclusive and participative, engaging the participants in a co-design process through which they are creating a process that is highly likely to be effective and safe for them. In doing this the practitioner invites the participant to examine potential areas of concern and, where appropriate asks «What if?» looking at various scenarios. The practitioner is stimulating realistic and critical thinking and is acting as a sounding board.

There are two risks that the practitioner must address with the participants: the risk of further harm during or after the restorative process and the risk of what could happen if the restorative process does not go ahead. In other words, there is no risk-free choice.

It is important when considering the merits of restorative justice in relation to serious crime, not to assume that the process will be an alternative to the due process of the law or an alternative to punishment. It can be in addition to prosecution and sentencing. Victim involvement in a restorative justice process following a serious crime can occur at various stages of the criminal justice system including while the perpetrator is serving a custodial sentence.

It is also important not to assume that a restorative justice process always involves a face-to-face meeting. The restorative process can use a range of methods of communication between the victim and the perpetrator. This may include written

[33] L. W. Sherman – H. Strang, *op. cit.*

exchanges, video or audio recordings, representatives passing on messages, video conferences, and communication through one-way screens.

The practitioner should engage participants into an inquiry into what needs to be present in a process through which participants can safely address what matters to them. It is useful to consider this stage of the restorative process in terms of co-designing safety rather than risk management. This involves adopting a *design thinking* approach. This methodology involves focusing on complex problems from the participants' point of view and designing a practical process which is technically feasible, economically viable and importantly engages with what is important to the participants.

By now the practitioner should have a shared understanding with the participants of what happened, what matters to them and whether they would like to consider some sort of restorative process. Furthermore, there should now be the foundations of a collaborative way of working. The answers to questions of risk will depend to a large extent upon what matters to each individual. If safety is the overall priority to one person, they will have different views to another person for whom justice is what matters. For many victims, restoring control is very important. So, they must feel in control at each stage of the process and have their choices respected.

Areas of potential risk that should be examined with the victim include the perpetrator's history of violence and abuse and level of responsibility for the harm and restoration, the motivation of both parties to participate in a restorative process, the nature and quality of any current relationship between the victim and the perpetrator and each person's capacity to participate fully in a restorative process. Areas that increase safety should also be identified such as the availability of support, the individual's resilience and courage, protocols designed to protect safety, respect and fairness and authoritative facilitation.

The purpose of co-designing a safe and effective restorative meeting is to change the context in which the harm took place into a context in which there can be respectful and honest dialogue free from coercive control. This involves a plan for the meeting which excludes power imbalances, domination, misogynist and sexist language and behaviours, and anything that could trigger re-traumatisation.

If this is achieved, there is the possibility of a unique meeting between specific people in a specific place for a specific period of time with the purpose of addressing what matters to them through active participation in a fair process of dialogue facilitated by a trained practitioner following agreed protocols which keep participants safe, respectful and honest.

Each of the words beginning with P are the elements that are present at a restorative meeting organised to address and restore social obligations which have been breached. Within each element there are many variations and choices to be made to assure a safe and effective meeting for the victim and the perpetrator of a specific unjust harm or pattern of harmful behaviour over time:

1. people – who should be present to address what matters arising from the harm and to ensure it is safe to do so?
2. purpose – are the participants fully willing to participate and clear about what they want within the restorative process?
3. place – should the participants be in one place? If so, where would be safe? If not, where will they be? How will the space be arranged?
4. period – at what stage of the criminal justice process will the meeting take place, when will all the participants be ready to participate, what time suits everyone to meet and what date?
5. process – will the process be face to face, online, shuttle, etc? What structure will serve the purpose best? Who will speak first etc? Are there things that one person is not willing to talk about? Have the others been informed and are they willing to proceed on that understanding?
6. protocols – what commitments need to be made by all participants to avoid domination, manipulation or intimidation of any person by any participant so that the process will be safe, respectful, and fair and so that all participants can speak freely and honestly? What will be excluded from dialogue (e.g., description of the harm, expression of remorse) and has that been agreed by all parties? What will happen if someone does not comply with these commitments?
7. participation – are the participants prepared fully to say what they want, to ask their questions, to make their requests, to listen and to respond to others' statements, questions and requests. Will their participation be hindered by the impact of trauma? If any obstacles to communication have been identified, have they been attended to satisfactorily?
8. practitioner – do the participants trust the practitioner's ability to keep them safe and support them to say what they wish?

6. Conclusion

This means that each meeting is tailored to address what matters to the victim and to ensure that the victim is safe to participate. This article has argued that there is no one gender-based violence, no one victim, no one perpetrator, and no one restorative justice. It has outlined a series of practices led by the authority, the choices and the permission of victims at every step. As each meeting will be unique, it is a challenge to state that restorative justice is never appropriate for the full range of types of gender-based violence.

This article is also an invitation to those who care about women being safe and becoming stronger to see the restorative justice movement as allies and partners. We are ready to engage radically to restore what has been damaged, lost and violated by gender-based violence and to enable men to become more responsible and more just.

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ABSTRACT: There is a compelling critique of the application of restorative justice in cases of gender-based violence. This article addresses this critique, arguing that the restorative justice movement should be considered allies and partners of those who campaign against violence against women and girls. Using Giddens adaptive reactions to risk, the adoption of a «radical engagement» approach to restorative justice practice demonstrates that there is no one gender-based violence, no one victim, no one perpetrator and, consequently, no one restorative justice. Practices based upon the authority, permission and choices of victims enable the design and implementation of safe and effective restorative processes tailored to their wishes.

ABSTRACT: Vi è una critica incalzante rispetto all'applicazione della giustizia riparativa nei casi di violenza di genere. Questo articolo affronta questa critica, sostenendo che il movimento per la giustizia riparativa dovrebbe essere considerato alleato e partner di coloro che si battono contro la violenza contro le donne e le ragazze. Utilizzando le reazioni adattative al rischio di Giddens, l'adozione di un approccio di «impegno radicale» alla pratica della giustizia riparativa dimostra che non esiste un concetto unico di violenza di genere, di vittima, di carnefice e, di conseguenza, di giustizia riparativa. Le pratiche basate sull'autorità, sul permesso e sulle scelte delle vittime consentono la progettazione e l'implementazione di processi riparativi sicuri ed efficaci, commisurati alle loro aspirazioni.

KEYWORDS: violence against women – restorative justice – radical engagement – trauma informed strategies.

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