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Restorative Justice as a Tool to Address Violence Against Women? An Assessment of the Italian Case in Light of the Practice of International Monitoring Bodies

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Abstract

This article examines the use of restorative justice (RJ) as an alternative to traditional retributive justice in addressing violence against women (VAW) in the Italian legal system. Amidst a broad crisis of retributive justice characterised by its abstract conceptualisation of retribution, restorative justice offers a personalised approach to repairing the harm between victim and offender. However, the implementation of RJ in VAW cases poses significant risks, including secondary victimisation, exposure to physical and psychological harm, and potential manipulation by offenders seeking to exploit RJ processes. This debate has been particularly pronounced in Italy following the adoption of the ‘Cartabia reform’, and previous legislation on mediation in family law. Against this background, the first part of the article analyses how international bodies such as the CEDAW Committee and GREVIO have assessed Italy’s international obligations under CEDAW and the Istanbul Convention in relation to alternative dispute resolution mechanisms. After providing an overview of VAW in Italy and the country’s interactions with international monitoring bodies, the article discusses the concept of RJ in the context of VAW, followed by a comparative analysis of GREVIO’s interpretation of the concept of ‘mandatory mediation’. The second part of the article focuses on Italian alternative dispute resolution methods and the ‘Cartabia reform’. The authors argue that, while RJ measures may be beneficial in some contexts, in the specific case of VAW they could worsen the situation if not properly managed. In particular, mandatory RJ could mislead society into seeing women as mere participants in solving the problem thus ignoring their victimhood and leading to their secondary victimisation. Rather, response to VAW in Italy should include risk analysis, funding for anti-violence centres, appropriate training for the judiciary and police, and educational policies to challenge gender stereotypes and foster cultural change.

Keywords: violence against women; restorative justice; CEDAW; GREVIO; Istanbul Convention; mandatory mediation, Italy

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1. Introductory remarks

During the year 2023, Italian public opinion was shocked by several cases of femicide to which the national media gave wide coverage. Two cases took on a strong symbolic value: the case of Giulia Tramontano, stabbed to death while pregnant by her cheating partner who had previously attempted to poison her, and the case of Giulia Cecchettin, kidnapped and stabbed to death by her partner, who was also a university friend.¹ The latter case, in particular, raised a lively debate on the reasons for femicide, with one part of public opinion unable to understand how a ‘very normal boy’ from a ‘very normal’ family could turn into a ‘monster’, and another part of public opinion, led by the public statements of the victim’s sister, asserting that the causes of such violence were to be found in the deep-rooted discrimination against women in Italian society, which was described as being profoundly conditioned by the logic of patriarchy.²

As often happens, strong social emotion was immediately seized upon by political forces. The leader of the main opposition party publicly called on the President of the Council of Ministers to unite forces in the fight against male violence against women and to pass a law introducing a campaign in schools to ‘eradicate the patriarchal culture that is embedded in our society’.³ President Meloni pointed out that a government bill was being discussed in Parliament to strengthen protection for women in danger, introducing measures such as stricter restraining orders, the arrest even in ‘deferred flagrante delicto’ and providing for a strict deadline - 20 days - for the judiciary to assess the risk and to apply precautionary measures.⁴

The government’s reaction thus seemed to perpetuate a pattern of political action by Italian executives that have long recognized the seriousness of violence against women (VAW) but have primarily focussed on revising legislation rather than on tackling the deeper cultural and economic roots of the problem. At the international level, Italy ratified the Istanbul Convention in 2013⁵ and has been a party to the CEDAW Convention⁶ since 1985. Over time, the country has developed a close interaction with the monitoring bodies overseeing the implementation of these conventions, regularly participating in the operation of the supervisory systems. The general picture that emerges from the monitoring of Italy shows a certain readiness on the part of governmental authorities to adopt legislative measures, but, at the same time, a chronic difficulty in tackling structural problems through concrete measures such as training of judicial and police bodies, adequate involvement of civil society, provision of adequate and regular funding, and uniform and coordinated data collection.

Faced with a challenge of this complexity for the Italian public authorities, the aim of this article is to discuss one of the most original and controversial legal tools to address gender-based violence, that is the trend to adopt restorative justice (RJ) processes as a potential alternative to retributive justice.

¹ ‘Giulia Cecchettin’s killing sparks Italian reckoning over femicide’, BBC News, 24 November 2023.

² Ibid.: ‘Filippo is often described as a monster, but he’s not a monster,’ the victim’s sister declared. ‘A monster is an exception, a person who’s outside society, a person for whom society doesn’t need to take responsibility’ whereas ‘monsters are healthy sons of the patriarchy and rape culture’, she added.

³ ‘Giulia Cecchettin, Meloni: «È già pronta una campagna di sensibilizzazione nelle scuole»’, Corriere della Sera, 19 November 2023.

⁴ The bill later entered into force as Law 24 November 2023, No. 168.

⁵ Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, opened for signature on 11 May 2011, entered into force on 1 August 2014: 39 parties, including the European Union, as of May 2024.

⁶ Convention on the Elimination of All Forms of Discrimination against Women, opened for signature on 18 December 1979, entered into force on 3 October 1981, 189 parties as of May 2024.

In a phase of broad crisis of the traditional models of retributive justice, which are based on an abstract conceptualisation of retribution, restorative justice addresses the relationship between victim and offender by attempting to remedy the harm created in an individualised way. Some have emphasised how the instrument can genuinely address the social fractures underlying the phenomenon by focusing on the human relationship between victim and perpetrator in their social context.⁷ Restorative justice in this area, however, entails several risks ranging from the secondary victimization of the victim through the exposure to physical and psychological risks, to the strategic behaviour of the offender aimed at obtaining the benefits of restorative justice processes without genuine involvement or even to manipulate the will of the victim.⁸ As will be seen, an open debate on restorative justice in cases of gender-based violence emerged in Italy with relation to the adoption of Legislative Decree 150/2022 (the so-called Cartabia reform) and previous legislation on mediation in family law matters.⁹ The adoption of these measures generated criticism from the CEDAW Committee and the Group of Experts of the Istanbul Convention (GREVIO), which feared the introduction of forms of mediation incompatible with Italy's international obligations and, specifically, with Article 48 of the Istanbul Convention on the prohibition of "mandatory alternative dispute resolution processes, including mediation and conciliation".

In light of the above, the article will address the problems posed by RJ in cases related to VAW both in general terms and with specific reference to the Italian legal system. Its structure will be as follows. Section 2 will provide a general overview on VAW in Italy and on the country's engagement with the main international monitoring bodies, that is the CEDAW Committee and the GREVIO. A general discussion of the concept of restorative justice in the context of VAW (section 3) will then lead to examine GREVIO's interpretation of the concept of 'mandatory mediation' (section 4). Finally, the Italian case will be addressed with reference to the issue of mediation in family law and restorative justice in criminal matters (section 5). Section 6 concludes and takes a position on the risks of using restorative justice in cases of violence against women.

2. Violence against Women in Italy: the scale of the problem and the main outstanding issues

It is not clear whether the very serious episodes referred to at the beginning of the previous section testify to an actual worsening of the phenomenon of VAW in Italy or whether, instead, they can simply be seen as key events which were capable of catalysing public attention. Despite a plurality of sources, it is not always easy to find harmonised and user-friendly data on violence against women in Italy.¹⁰ Indeed, creating the conditions for a systematic collection of data on gender-based violence is one of the aspects that the Italian government is called upon to improve by international monitoring bodies.¹¹

⁷ ELIAS, "Restorative Justice in Domestic Violence Cases", *DePaul Journal for Social Justice*, 2016, pp. 67 ff.

⁸ BURKEMPER, BALSAM, "Examining the Use of Restorative Justice Practices in Domestic Violence Cases", *Saint Louis University Public Law Review*, 2007, pp. 127-129. Cfr. *Legal Opinions on Gender-Based Violence by the Students of the School of International Studies, University of Trento*, 2023, pp. 25-60, https://www.direcontrolaviolenza.it/wp-content/uploads/2024/02/LEGAL-OPINIONS_2024_D.i.Re.pdf.

⁹ See *infra*, section 5.

¹⁰ Cfr. Upcoming recommendations of the Committee of the Parties in respect of Italy - Report from Italian women's NGOs coordinated by D.i.Re - Donne in Rete contro la violenza, April 2023, pp. 17-19.

¹¹ GREVIO, "Baseline Evaluation Report Italy", GREVIO/Inf(2019)18, 15 November 2019, paras. 9-10.

Various actions have been taken, such as collecting data on the application of the ‘Red Code’ legislation,¹² requests for help on the 1522 helpline,¹³ and monitoring the impact of Covid-19 on domestic violence.¹⁴ The need to create a comprehensive data collection system has been emphasized in documents and laws, but systematic data collection by important institutional sources in health, legal, and social fields is still lacking.¹⁵ The Action Plan against sexual and gender-based violence 2017-2020 aimed to establish an integrated data collection and processing system.¹⁶ An agreement between the Department for Equal Opportunities (DEO) and the Italian institute of statistics (ISTAT) tasked the latter with this project in 2017.¹⁷ In addition, the latest National Strategic Plan on Male Violence against Women (2021-2023) also stresses the need for integrated data on violence and envisages a new agreement between the DEO and ISTAT for data sharing.¹⁸ At present, however, the integrated data collection system is not entirely operational also because it relies heavily on data collected by anti-violence centres, which have limited human and financial resources.¹⁹

Furthermore, Article 2 of Law No. 53/2022 requires agencies, organisations and public and private entities involved in official statistical reporting to provide data for the national surveys outlined in the Statistical Programme, ensuring the collection, processing, and dissemination of gender-disaggregated data. The law requires all public health facilities, especially emergency rooms, to report data on violence against women and establishes a coordinated system between the Ministries of the Interior and Justice to collect data on criminal offences related to violence against women, focusing on details that shed light on the relationship between the perpetrator and the victim.

However, this law does not clearly specify the sources of data and fails to define the methods for data collection, leading to a lack of standardization and harmonization.²⁰ Moreover, the law does not allocate financial support to entities responsible for implementing data collection, hindering their integration into a single comprehensive system. Finally, it primarily focuses on enhancing statistical data collection on gender-based violence in criminal justice, disregarding data collection in civil cases.

Since 2014, ISTAT has not conducted or published any new general surveys on violence against women and girls, with the latest report on stereotypes and prejudice dating back to 2019.²¹ In particular, there remains a significant shortage of data and research on violence against girls and women with disabilities.²²

¹² Ministero dell’Interno, *Analisi criminologica della violenza di genere*, 2024. On the ‘Red Code’ legislation see *infra*, this section.

¹³ ISTAT releases weekly and quarterly data tables pertaining to the use of the public utility number 1522. These datasets are provided by the Department for Equal Opportunities of the Presidency of the Council of Ministers. The purpose of the number is to assist and support victims of gender-based violence and stalking. The number is toll-free, ensures anonymity, and is available in four additional languages besides Italian: English, French, Arabic, and Spanish. The datasets are available at: <https://www.istat.it/it/archivio/273774>.

¹⁴ ISTAT, *L’impatto della pandemia sulla violenza di genere*, 24 November 2021.

¹⁵ Report from Italian women’s NGOs coordinated by D.i.Re, *cit. supra* note 10, p. 17.

¹⁶ Presidenza del Consiglio dei Ministri, *Piano strategico nazionale sulla violenza maschile contro le donne (2017-2020)*, pp. 34-35.

¹⁷ *Accordo di collaborazione tra il Dipartimento per le pari opportunità e l’Istituto nazionale di statistica*, 21 March 2017.

¹⁸ Presidenza del Consiglio dei Ministri, *Piano strategico nazionale sulla violenza maschile contro le donne (2021-2023)*, pp. 46-47.

¹⁹ Report from Italian women’s NGOs coordinated by D.i.Re, *cit. supra* note 10, p. 17.

²⁰ *Ibid.*, pp. 17-18.

²¹ *Ibid.*

²² *Ibid.*

In this rather complex situation, to define the extent of the phenomenon and the main trend lines, one might make reference first of all to two comprehensive surveys on violence against women, conducted by ISTAT in 2006²³ and 2014.²⁴ At the time, comparing the five-year period before 2014 with that before 2006, ISTAT concluded that there were some signs of improvement.²⁵ Physical and sexual violence by current and former partners decreased, and sexual violence perpetrated by men other than partners also decreased (in particular, sexual harassment, from 6.5% to 4.3%). The research noted, however, that the hard core of violence in its most serious forms (rape and attempted rape) as well as physical violence by non-partners was not affected, while the severity of violence by partners increased. With regards to violence from partners and ex-partners the analysis showed an increase in women who suffered injuries, from 26.3% to 40.2%; women who suffered very or fairly severe violence, from 64% to 76.7%; women who feared for their lives as a result of the violence experienced, from 18.8% to 34.5%.

Also, the data collected more recently by the Ministry of Health on admissions to emergency rooms in the period 2017-2022 seem less than comforting.²⁶ They reveal that the share of admissions with an indication of violence per 10,000 total admissions has continued to increase from 14.1 in 2017 to 18.4 in 2021. In 2022 there was a slight decrease from 18.4 to 17.4, due not to a reduction in violence but to an increase in admissions for other causes.

Regarding more specifically femicides, recent data extracted from the Ministry of the Interior's database allow us to deduce that homicides against women are a quantitatively constant phenomenon over the 20-year period 2002-2022.²⁷ Based on this data, it is estimated that 101 femicides occurred in 2020 (more than 8 per month) out of 119 total murders of women that year.²⁸ In 2021, 106 alleged femicides are estimated out of 122 homicides with a female victim. In 2022, the estimate is 104 alleged femicides out of 122 murders of women, while in the year 2023 the figures seem to improve slightly with 97 female victims in the relational or family environment out of a total of 120 female victims. According to a recent report on voluntary homicides from the Criminal Analysis Service of the Central Criminal Police Directorate, updated as of April 7, 2024, there were 78 recorded homicides from January 1 to April 7, 2024, which is a 15% decrease compared to the same period in 2023 when there were 92 victims.²⁹ Among these victims, 28 were female, marking an 18% decrease from the previous year's count of 34 women killed. Within the family or affective sphere, 26 women were killed, showing a 21% decrease from the previous year's count of 33 victims, with 16 of them being killed by their partner or ex-partner, representing a 27% decrease from the previous year. The report on violence against women from the Criminal Analysis Service of the Central Criminal Police Directorate, updated as of March 8, 2024, indicates that in 2023, there were 6,062 victims of sexual violence, with 91% being women.³⁰

Data on legal proceedings related to violence against women are difficult to interpret due to the lack of systematic collection and disaggregated analysis by gender.³¹ The available data from the Ministry

²³ ISTAT, *La violenza contro le donne, Indagine multiscopo sulle famiglie*, 2006.

²⁴ ISTAT, *La violenza contro le donne dentro e fuori la famiglia*, 2015.

²⁵ *Ibid.*, pp. 8-15.

²⁶ ISTAT, *Gli accessi al pronto soccorso e i ricoveri ospedalieri delle donne vittime di violenza*, 5 May 2023.

²⁷ MURATORE, *I dati dell'Istat a supporto della conoscenza della violenza di genere*, 2023.

²⁸ Ministero dell'Interno, Dipartimento della pubblica sicurezza, *Analisi criminologica della violenza di genere*, 2024.

²⁹ Ministero dell'Interno, Dipartimento della pubblica sicurezza, *Omicidi volontari*, 8 April 2024.

³⁰ Ministero dell'Interno, Dipartimento della Pubblica Sicurezza, *Donne vittime di violenza*, 8 March 2024.

³¹ Report from Italian women's NGOs coordinated by D.i.Re, *cit. supra* note 10, pp. 17-19.

of Justice for the years 2019 to 2021 show that a significant number of cases related to violence against women are dismissed before prosecution.³² That is the case for approximately 50% of cases involving rape, sexual assault, ill-treatment, stalking, forced marriage, and illicit dissemination of sexually explicit images or videos. Also, conviction rates are alarmingly low. For instance, for rape and sexual assault, there are only around 1,000 convictions per year out of more than 7,000 registered cases annually. Similarly, for ill-treatment, convictions amount to only 2,500-3,000 per year out of more than 37,000 registered cases annually. It is thus crucial to investigate the reasons at the basis of this worrying combination of high dismissal rates and low conviction rates by improving data collection practices in line with the requirements of Article 11 of the Istanbul Convention, including gender-disaggregated data.³³

All in all, the available data show that violence against women in Italy is an alarming phenomenon that has not been significantly reduced by the public policies adopted by consecutive Italian governments. For Italian women, it can be stated without reservation that the most violent deaths occur within the couple and that the most serious forms of violence are perpetrated by partners, relatives, or friends.³⁴

As mentioned above, over time, also in response to the demands of the international monitoring bodies, Italy has demonstrated a degree of capacity to address the phenomenon of VAW through the adoption of legislative measures mainly in the field of criminal law.

Italian legislation on violence against women has been heavily influenced by the ratification of the Istanbul Convention through Law No. 77/2013.³⁵ Following ratification, Italy implemented an integrated strategy in line with the Convention's objectives. One of the initial interventions was Decree-Law No. 93/2013, enacted shortly after ratification, which introduced significant changes in criminal and procedural laws. This decree-law, converted into Law No. 119/2013, also mandated the periodic adoption of the action plans against gender-based violence.

The best-known measure adopted by the Italian legislators to combat gender-based violence is probably Law No. 69/2019, known as the 'Red Code', which strengthened procedural protections for victims of violent crimes, particularly sexual and domestic violence. This law introduced several new offences in the criminal code, including the crime of permanently disfiguring a person's face, illicit dissemination of sexually explicit images or videos, and coercion or inducement to marriage. It also increased penalties for offenses commonly committed against female victims, such as abuse, stalking, and sexual violence.

³² Disegno di legge 2530, 16 febbraio 2022, pp. 46-52.

³³ Baseline Evaluation Report Italy, *cit. supra* note 11, paras. 218-225. According to article 11 of the Istanbul Convention, parties shall undertake, *inter alia*, to: 'a) collect disaggregated relevant statistical data at regular intervals on cases of all forms of violence covered by the scope of this Convention; b) support research in the field of all forms of violence covered by the scope of this Convention in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention'.

³⁴ It is striking that 31.5% of individuals aged 16-70 (6.79 million people) have experienced physical or sexual violence in their lifetime: 20.2% (4.35 million) faced physical violence, 21% (4.52 million) endured sexual violence, and 5.4% (1.16 million) suffered the most severe forms of sexual violence, including rape (652,000) and attempted rape (746,000). Rape was predominantly committed by partners (62.7%), with relatives (3.6%) and friends (9.4%) also involved. Physical violence, such as slapping, kicking, punching, and biting, is mainly inflicted by partners or ex-partners. Strangers are primarily responsible for sexual harassment, accounting for 76.8% of such incidents. See ISTAT, Numero delle vittime e forme di violenza.

³⁵ For an overview of the Italian legislation on VAW, see Camera dei Deputati, Servizio Studi, *Violenza contro le donne*, 23 April 2024.

Additionally, the reform of criminal procedure (Law No. 134/2021) extended protections for victims of domestic and gender-based violence. Law No. 53/2022 enhanced the collection of statistical data on gender-based violence through better coordination among all involved parties.

In 2023, three laws were passed to strengthen measures for preventing and combating violence against women. Firstly, Law No. 168/2023 amended the penal and criminal procedure codes, anti-mafia laws, and preventive measures laws to enhance the effectiveness of measures against violence against women. Secondly, Law No. 12/2023 established a Joint Parliamentary Commission of Inquiry on femicide and all forms of gender-based violence (the Commission was constituted on July 26, 2023). Previously, two other parliamentary commissions were established by the Senate of the Republic in 2017 and 2018. Finally, Law No. 122/2023 addressed proceedings for domestic and gender-based violence crimes, requiring the public prosecutor to gather information from the victim or the person who reported the crime within three days of registering the offense. If the prosecutor fails to meet this deadline, the Attorney General may revoke the assignment of the case to the designated magistrate and promptly gather information from the victim or the person who filed the complaint, either directly or by assigning the case to another magistrate.

Apart from these measures, which are primarily focused on preventing crimes and protecting victims while also increasing penalties for offenses classified as gender crimes, Italy seems to struggle more in addressing the structural causes of the phenomenon. There is a propensity in public policy to conceive of VAW as an emergency to be dealt with by the instrument of criminal law, while losing sight of the planning and design of more medium-term cultural and social changes. An enlightening example concerns the adoption of the above mentioned national strategic plans on violence against women.³⁶ These documents are drafted in a manner compatible with the aims of the Istanbul Convention but are often lacking on the side of practical implementation measures and in the regularity of funding for relevant actors.

The National Strategic Plan on Male Violence against Women 2021-2023, for instance, is formally in line with the goals of the Istanbul Convention. It is divided into axes corresponding to prevention, protection and support, prosecution and punishment and support and promotion, each with specific priorities. Evaluations of previous plans and data from various sources were used in the drafting process. It has been pointed out, however, that the plan lacks a detailed executive scheme outlining responsibilities, actions and resources.³⁷ Objectives are vaguely defined and there is no clear allocation of resources. Lessons from previous plans have not been fully implemented and, despite efforts to involve civil society, the role of women's specialised services and associations in implementation and evaluation is weak.

Another significant loophole in the policies adopted by Italy to counter VAW is the absence of comprehensive risk assessment procedures.³⁸ Although risk assessment is primarily carried out by law enforcement officers in criminal proceedings, the ultimate responsibility lies with the judge. In its reports, the Femicide Commission of the Italian Parliament points to the inadequate training and organisation of the judiciary in risk assessment.³⁹ Precisely in this respect, the European Court of

³⁶ According to article 5 of Decree Law No. 93/2013 national strategic plans must be adopted at least every three years in synergy with the objectives of the Istanbul Convention.

³⁷ Report from Italian women's NGOs coordinated by D.i.Re, *cit. supra* note 10, pp. 10-12.

³⁸ *Ibid.*, pp. 29-30.

³⁹ Commissione parlamentare di inchiesta sul femminicidio, Relazione su "la risposta giudiziaria ai femminicidi in Italia. Analisi delle indagini e delle sentenze. Il biennio 2017-2018", Doc. XXII-bis, n. 7, 18 novembre 2021, pp. 46-63. With reference to the lack of recognition of domestic violence in civil and juvenile courts and the absence of risk assessment

Human Rights (ECtHR) has criticised Italy for judicial inaction despite generally accurate risk assessments by police officers.⁴⁰ The Cartabia reform has introduced a section on ‘domestic and gender-based violence’ in the Code of Civil Procedure with measures such as the judge’s discretion to halve time limits and the exclusion of personal appearance at the hearing, but there is still a lack of provisions for risk assessment in recent reforms of the criminal justice system.⁴¹

The issue of risk assessment is connected to the broader issue of training of judges and, in general, of professionals working in the field of gender-based violence. This is one of the most pressing problems for Italy where, despite some sporadic initiatives, systematic action in public policy is still lacking.⁴² The seriousness of the problem has not only been recognised by international monitoring mechanisms,⁴³ but has also been the object of a ruling by the ECtHR which criticised the use of gender stereotypes in the motivations offered by Italian courts in a serious case of sexual violence.⁴⁴ Along similar lines, two recent decisions of the Italian Court of Cassation recognised the use of gender stereotypes in judgement motivations by lower courts as a source of secondary victimisation.⁴⁵

3. The concept of restorative justice and its application in the context of VAW

While there is no single definition of restorative justice (RJ),⁴⁶ this concept can be described as a process ‘whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.⁴⁷ The United Nations Office on Drugs and Crime (UNODC) defines RJ as:

‘an approach that offers offenders, victims and the community an alternative pathway to justice. It promotes the safe participation of victims in resolving the situation and offers people who accept responsibility for the harm caused by their actions an opportunity to make themselves accountable to those they have harmed. It is based on the recognition that criminal behaviour not only violates the law, but also harms victims and the community’.⁴⁸

procedures in separation and custody cases, see also: D.i.Re, Il (non) riconoscimento della violenza domestica nei tribunali civili e per i minorenni, 2021.

⁴⁰ ECtHR, *Talpis v Italy*, appl. No. 41237/14, 21 March 2017, paras. 107-131; ECtHR, *Landi v. Italy*, appl. No. 10929/19, 7 April 2022, paras. 79-94; ECtHR, *M.S. v. Italy*, appl. No. 32715/19, 7 July 2022, paras. 140-151.

⁴¹ See *infra*, section 5. One of the most interesting documents with relation to risk assessment in criminal law matters are the guidelines produced by the General Prosecutor’s Office at the Supreme Court, which incorporate the criteria of the SARA (Spousal Assault Risk Assessment) method. See Procura generale della Corte di Cassazione, Orientamenti in materia di violenza di genere, 3 May 2023.

⁴² Commissione parlamentare di inchiesta sul femminicidio, Rapporto sulla violenza di genere e domestica nella realtà giudiziaria, Doc. XXII-bis, n. 4, 23 June 2021, pp. 28-33.

⁴³ CEDAW, “Concluding observations on the eighth periodic report of Italy”, UN Doc. CEDAW/C/ITA/CO/8, 27 February 2024, paras 16, 28; GREVIO, “Baseline Evaluation Report Italy”, GREVIO/Inf(2019)18, 15 November 2019, paras. 100-107; see also, Committee against Torture, “Concluding observations on the combined fifth and sixth periodic reports of Italy, 18 December 2017, UN Doc. CAT/C/ITA/CO/5-6, para. 45.

⁴⁴ ECHR, *J.L. v. Italy*, appl. No. 5671/16, 27 May 2021, paras. 134-143.

⁴⁵ Cass. pen., sez. VI, 22 March 2023, No. 12066; Cass. pen., sez. VI, 4 April 2023, No. 14247.

⁴⁶ MCCOLD, “Restorative Justice: Variations on a Theme”, in WALGRAVE (ed.), *Restorative Justice for Juveniles: Potentialities, Risks and Problems for Research*, Leuven, 1998, pp. 19–53; DALY, “What is restorative justice? Fresh answers to a vexed question”, *Victims & Offenders*, 2016, p. 9 ff.

⁴⁷ MARSHALL, “Restorative Justice: An Overview”, Home Office, Research, Development and Statistics, 1999, p. 5.

⁴⁸ United Nations Office on Drugs and Crime, “Handbook on Restorative Justice Programmes”, 2nd ed., 2020, , p. 4.

Rooted in non-Western approaches to criminal justice,⁴⁹ restorative justice is an ‘umbrella term’ that includes forms of justice aimed primarily at repairing the social bond damaged by the crime through methods alternative to punishment and retribution.

In international law, the concept of RJ has gained prominence mostly in transitional justice contexts and against the framework of rules of international criminal law. In post-conflict contexts, the literature has widely explored the potential for RJ mechanisms and their application in practice – the emphasis on reconciliation, collective forms of reparation and the more humane approach to victims, perpetrators and communities – also from a critical perspective.⁵⁰ The extent to which RJ responses may benefit victims’ right to reparation and society at large is a problem that has also arisen in relation to international criminal trials and the work of international courts and tribunals.⁵¹

Over the past two decades, some international legal instruments have encouraged States to revisit their policies regarding criminal and civil matters and develop alternative forms of justice inspired by the concept of RJ. Starting from the early 2000s, the United Nations issued a number of documents supporting the use by member States of RJ responses to crimes,⁵² including the *UN Basic principles on the use of restorative justice programmes in criminal matters*, adopted by the UN Economic and Social Council in 2002.⁵³ In Europe, recommendations concerning mediation in family civil proceedings⁵⁴ and in criminal ones⁵⁵ were followed in 2018 by the adoption by the Committee of Ministers of the Council of Europe of a *Recommendation concerning restorative justice in criminal matters*, which calls upon States to make RJ mechanisms available and to increase knowledge about RJ.⁵⁶ At the EU level, Directive 2008/52/EC of 21 May 2008 *on certain aspects of mediation in civil and commercial matters* and Directive 2012/29/EU of 25 October 2012 *on minimum standards on the rights, support and protection of victims of crime* provide respectively for Member States’ obligations to facilitate access to alternative dispute resolution mechanisms and for obligations to ensure that appropriate information, support and protection is guaranteed to victims of crimes participating in restorative justice services.⁵⁷

The attention placed on RJ is based on two main concerns. RJ models overturn traditional approaches, which construe adversarial justice structures and retribution as the fundamental responses to the crime. At the core of RJ mechanisms lies the conviction that punishment alone is ineffective in changing the offender’s behaviour. The crime is, in fact, an offence against another person and the

⁴⁹ MAXWELL, “Crossing cultural boundaries: Implementing restorative justice in international and indigenous contexts”, in MILLER (ed.), *Restorative Justice: From Theory to Practice*, Leeds, 2008, pp. 81 ff.

⁵⁰ ZINSSTAG, “Sexual Violence against Women in Armed Conflicts and Restorative Justice: An Exploratory Analysis”, in FINEMAN and ZINSSTAG (eds.), *Feminist Perspectives on Transitional Justice: From International and Criminal to Alternative Forms of Justice*, Cambridge, 2020, p. 189; EVANS (ed.), *Transitional and Transformative Justice: Critical and International Perspectives*, London, 2019; MUTUA, “What is the Future of Transitional Justice?”, *International Journal of Transitional Justice*, 2015, pp. 1 ff.; DOAK and O’MAHONY, “Transitional Justice and Restorative Justice”, *International Criminal Law Review*, 2012, p. 305.

⁵¹ See, for instance, FUNK, *Victims’ Rights and Advocacy at the International Criminal Court*, Oxford, 2010.

⁵² UNODC, ‘Handbook on Restorative Justice Programmes’, *cit. supra* note 48.

⁵³ UN Economic and Social Council, “Basic principles on the use of restorative justice programmes in criminal matters”, 2002, UN Doc. E/CN.15/2002/L.2/Rev.1, see esp. para. 12.

⁵⁴ Council of Europe, Recommendation No. R(98)1 on family mediation, 21 January 1998.

⁵⁵ Council of Europe, Recommendation No. R(99)19 concerning mediation in penal matter, 15 September 1999.

⁵⁶ Council of Europe, Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters, 3 October 2018.

⁵⁷ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of the victims of crime, and replacing Council Framework Decision 2001/220/JHA, Article 12.

community and, only in the second instance, an act violating the law.⁵⁸ Since the crime disrupts the social bond between the offender and the larger community, reparation must be sought primarily within the community and not in the criminal justice system.⁵⁹ To restore the relationship between the offender, the victim of the crime and their communities, participatory and inclusive approaches should be adopted, which aim at giving the offender a chance to recognize the consequences of their behaviour and put the victim in the condition to attain a sense of satisfaction and justice.⁶⁰ While RJ mechanisms include a vast range of practices, the supporters of RJ typically underline the following aspects: i) a focus on the harmful consequences of offender's behaviour while placing emphasis on the future; ii) a less antagonising process of justice creating the conditions for the offender's acknowledgement of responsibility; iii) the fundamental role of victims, which should be active participants in the process.

At the same time, reasons of judicial economy have also driven the push, at the international level, for alternative dispute resolution models. RJ mechanisms indeed provide a tool for States to mitigate the tasks devolved to judges.⁶¹ This may be especially useful when the subject of the dispute does not necessarily concern criminal behaviour but regards a family matter, be it a separation, a divorce proceeding or the custody of children.⁶² Understanding the conflict as essentially "private" justifies the recourse to RJ tools.

Given the tension between RJ's transformative purposes and RJ's potential for streamlining the justice system, one understands why opposing views have characterized the feminist legal scholarly debate on this matter. On the one hand, the premises of RJ models match the expectations of advocates of women's rights when addressing violence against women. As the CEDAW Committee has noted, gender-based violence is a 'social, political and economic' problem which is rooted in 'social norms regarding masculinity and the need to assert male control or power'.⁶³ Accordingly, as empirical socio-legal research has also shown,⁶⁴ traditional retributive mechanisms aimed only at prosecuting VAW and securing a criminal conviction for offenders do not adequately respond to victims and society's demands nor make offenders acknowledge what they have done. A different approach is needed, one 'creating space for women's voices, fostering women's autonomy and empowerment, engaging community, avoiding gender essentialism (...) [and] transforming patriarchal structures'.⁶⁵ RJ mechanisms can offer these tools: by allowing VAW victims to confront and dialogue with the

⁵⁸ CRAWFORD and NEWBURN, *Youth Offending and Restorative Justice*, London, 2003.

⁵⁹ MILLER (ed.), *Restorative Justice: From Theory to Practice*, *cit. supra* note 49, p. x.

⁶⁰ VAN NESS, STRONG, DERBY and PARKER, *Restoring Justice; An Introduction to Restorative Justice*, 5th ed., London, 2015, p. 49.

⁶¹ See CEDAW Committee, "General Recommendation No. 33 on women's access to justice", 3 August 2015, UN Doc. CEDAW/C/GC/33, para. 57.

⁶² Council of Europe, Recommendation No. R(98)1 on family mediation, *cit. supra* note 54, para. 2: 'Recognising the growing number of family disputes (...) and noting the detrimental consequences of conflict for families and the high social and economic cost to states'; see also para 7: 'family mediation has the potential to (...) lower the social and economic costs of separation and divorce for the parties themselves and states'.

⁶³ CEDAW Committee, "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19", 26 July 2017, UN Doc. CEDAW/C/GC/35, paras. 10, 19.

⁶⁴ ZINSSTAG and KEENAN, "Restorative responses to sexual violence: legal, social and therapeutic dimensions" in GAVRIELIDES (ed.), *Routledge International Handbook on Restorative Justice*, 2018, London, p. 197.

⁶⁵ GOODMARK, "Restorative justice as a feminist practice", *The International Journal of Restorative Justice*, 2018, p. 374.

offender; by appreciating victims' agency⁶⁶ and giving them an active role in the proceeding; or by situating the crime and its consequences broadly within the community.⁶⁷

On the other hand, feminist legal scholars have also highlighted several concerns regarding the use of RJ in cases of VAW, especially in cases of domestic and intimate partner violence⁶⁸. First of all, the idea that RJ models work well for matters such as family disputes risks relegating cases of domestic violence to the private sphere. The re-privatization of VAW - i.e. the process whereby the latter is no longer conceived as a problem concerning the public sphere and shifts to the realm of the private⁶⁹ - is indeed one of the main criticisms put forth by the feminist scholarly debate on RJ.⁷⁰

Furthermore, it has been observed that RJ is intimately tied to the exercise of patriarchal power. For example, due to the power imbalance underpinning the relationship between victims of VAW and their offenders, women participating in RJ processes may feel coerced or pressured into these mechanisms in place of formal adjudication. Women may also feel unsafe when confronting their offender, especially if the facilitator lacks training in and an understanding of the dynamics of gender-based violence. The risk of being manipulated by perpetrators, families or professionals to participate in the restorative justice meetings may be a further problem.⁷¹

These concerns explain why, at the international level, human rights instruments and monitoring bodies have been cautious about RJ in the context of VAW. As for CEDAW, the Convention does not explicitly address the issue of violence against women and, consequently, the question of States' obligations to provide reparation for acts of VAW. However, the CEDAW Committee has extensively elaborated on the concept of VAW⁷² and the obligations arising for States concerning remedies appropriate for victims. The Committee has acknowledged, for instance, that States' duties to provide remedies for women whose rights have been violated may include 'public apologies, public memorials and guarantees of non-repetition' and other measures of satisfaction going beyond 'traditional' forms of justice like compensation or criminal conviction of VAW offenders.⁷³ This is in line with the approach of other human rights bodies, which have also hinted at RJ mechanisms like

⁶⁶ Agency can be defined as the right to make decisions about how to live one's life and to have others believe that the individual can make ethical decisions about how to live, JAMIESON, *Real choices: Feminism, freedom, and the limits of law*, Philadelphia, 2001.

⁶⁷ For instance, 'restorative conferences' create a setting where peers and family of the perpetrator, who may share attitudes and model behaviour that constitute a violence-supportive environment, are exposed to an anti-violence message.

⁶⁸ See, Explanatory Report to the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Council of Europe Treaty Series 210, paras. 251-253.

⁶⁹ For a critical account of the public/private divide in international law see ROMANY, "State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law", in COOK (ed.), *Human Rights of Women: National and International Perspectives*, Philadelphia, 1994; CHARLESWORTH, CHINKIN and WRIGHT, "Feminist Approaches to International Law", *AJIL*, 1992, pp. 613 ff.

⁷⁰ PTACEK, "Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work", in PTACEK (ed.), *Restorative Justice and Violence Against Women*, Oxford, 2010, pp. 55 ff.

⁷¹ KEENAN and ZINSSTAG, *Sexual Violence and Restorative Justice*, Oxford, 2022, p. 14.

⁷² CEDAW Committee, "General recommendation No. 19: Violence against Women", 30 January 1992, UN Doc. A/47/38; "General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19", *cit. supra* note 63.

⁷³ CEDAW Committee, "General recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women", 16 December 2010, UN Doc. CEDAW/C/GC/28, para. 32.

truth-telling as crucial elements for reparation of serious violations of human rights to women, such as torture.⁷⁴

Yet, in General Recommendation No. 33 on women's access to justice, the Committee warned that RJ mechanisms shall not be used as substitutes for investigations and prosecutions of perpetrators of VAW. The Committee has noted that alternative dispute resolution processes applying particularly in the area of family law or domestic violence, such as conciliation, mediation, collaborative resolutions of disputes, or interest-based negotiations, may 'lead to further violations of (...) [women's] rights and impunity for perpetrators because they often operate on the basis of patriarchal values, thereby having a negative impact on women's access to judicial review and remedies'.⁷⁵

For instance, in the Concluding observations on Bulgaria, the Committee has expressed concern over the priority given to mediation and reconciliation procedures in cases involving gender-based violence.⁷⁶ Similarly, in the case of Finland, the Committee has sanctioned the fact that mediation remains a possibility for the parties in cases of intimate partner violence.⁷⁷

Accordingly, the Committee has invited State parties to guarantee that alternative dispute settlement procedures do not restrict women's access to judicial or other remedies in any area of the law. It has even stated that cases of VAW, including domestic violence, should under no circumstances be referred to any alternative dispute resolution procedures.⁷⁸

In the European landscape, the Istanbul Convention contains the most vigorous opposition to RJ mechanisms in cases of VAW. Article 48(1) prohibits mandatory alternative resolution processes, including mediation and conciliation, to all forms of violence covered by the Convention. The explanatory report justifies this prohibition by pointing to the power imbalance that underpins the relationship between the victim of VAW and the offender and the re-privatization of domestic violence.⁷⁹

While Article 48(1) establishes that the limit for RJ processes is their mandatory nature, GREVIO's practice has shown that the potential scope of application of this provision is, in fact, very broad. Thus, the next section explores how GREVIO has interpreted the substance of Article 48(1) and introduces some comparative perspectives on the use of alternative dispute resolution mechanisms in some European States.

4. Comparative perspectives on the use of RJ mechanisms in the European context and GREVIO's understanding of 'mandatory mediation'

When it comes to criminal cases regarding domestic violence and, more generally, VAW, many European States parties to the Istanbul Convention set in their legislation the prohibition of compulsory RJ mechanisms. For example, in Denmark, mediation in all criminal law cases is

⁷⁴ See Committee against Torture, "General Comment No. 3 (2012): Implementation of Article 14 by State Parties", 13 December 2012, UN Doc. CAT/C/GC/3, para. 16; NOWAK, "Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", 10 March 2008, UN Doc. A/HRC/7/3Add.7, p. 23 para. 67.

⁷⁵ CEDAW Committee, "General Recommendation No. 33 on Women's Access to Justice", *cit. supra* note 61, para. 57.

⁷⁶ CEDAW Committee, "Concluding observations on the eighth periodic report on Bulgaria", 10 March 2020, UN Doc. CEDAW/C/BGR/CO/8, para. 11; the Committee's observations were quoted and taken into account by the ECtHR in the case *Y and others v. Bulgaria*, appl. No. 9077/18, 5 September 2022, pp. 16-17.

⁷⁷ CEDAW Committee, "Concluding observations on the eighth periodic report on Finland", 1 November 2022, UN Doc. CEDAW/C/FIN/CO/8, para. 23(b).

⁷⁸ CEDAW Committee, "General Recommendation No. 33 on Women's Access to Justice", *cit. supra* note 61, para. 58(c).

⁷⁹ Explanatory Report, *cit. supra* note 68, paras. 251–253.

voluntary and can be withdrawn anytime.⁸⁰ In France, criminal mediation is always based on the parties' agreement and is excluded in domestic violence cases.⁸¹ In the Netherlands, RJ is a voluntary process carried out by trained mediators,⁸² while in Belgium, in situations of intimate partner violence, the choice of the victim to resort to voluntary mediation must be considered carefully.⁸³ Spain has one of the strictest laws in terms of prohibition of alternative dispute resolution mechanisms, as it prohibits mediation in cases of intimate partner violence in an absolute manner both in criminal and civil proceedings.⁸⁴

While the explicit prohibition of compulsory mediation in criminal cases is clearly in line with Article 48(1), GREVIO's understanding of the *types* of proceedings covered by the prohibition of mandatory RJ is larger. Article 48(1) speaks of a general prohibition of mandatory alternative resolution processes without qualifying the proceeding involved, which indicates that both criminal and civil cases concerning VAW fall within the scope of the provision.⁸⁵ Furthermore, GREVIO has interpreted this prohibition as covering not only proceedings that directly address VAW, but also proceedings on other matters which may be permeated by VAW indirectly. Accordingly, GREVIO has cautioned against recourse to mediation and conciliation in situations of separation, divorce, or custody of children, which may not *prima facie* deal with domestic or intimate partner violence.⁸⁶

For example, in Spain, where GREVIO has noted with satisfaction the absolute prohibition of mediation in intimate partner violence cases, it has nonetheless pointed to the risk of mediation being proposed in civil proceedings concerning divorce, where women may not have disclosed their experience of violence. Accordingly:

‘[f]or women victims of intimate partner violence who have until that point not disclosed their experiences, this effectively bars them from signalling abusive behaviour that happened in the past and that may have ramifications for the mediation process. This results in the unfortunate situation where prior experiences of abuse do not surface, and no framework exists to ensure that it can be addressed’.⁸⁷

In Norway, mandatory mediation before the Family Counselling Offices is required for at least one hour for all separating couples with children under the age of sixteen and from one to seven hours for separating couples in which one parent intends to instigate child custody proceedings at court.⁸⁸ In Germany, referrals to court-based joint counselling and mediation are the rule in child custody proceedings. In the Netherlands, when the divorce concerns custody arrangements for underage children, the law requires the parties to draw up a parental plan, which is, in some cases, done through mediation.⁸⁹ In all these scenarios, GREVIO has noted with dissatisfaction the lack of legal provisions setting exceptions to mediation for victims of intimate partner violence, stressing that ‘practices

⁸⁰ GREVIO, “Baseline Evaluation Report Denmark”, GREVIO/Inf(2017)14, 24 November 2017, para. 184.

⁸¹ GREVIO, “Baseline Evaluation Report France”, GREVIO/Inf(2019)16, 28 October 2019, para. 211.

⁸² GREVIO, “Baseline Evaluation Report Netherlands”, GREVIO/Inf(2019)19, 15 November 2019, para. 241.

⁸³ Belgium, Code of Criminal Procedure, Law COL 4/2006, Article 216*ter*. See also GREVIO, “Baseline Evaluation Report Norway”, GREVIO /Inf(2022)30, 13 October 2022, paras. 211-212.

⁸⁴ Organic Act No. 1/2004 of 28 December on Integrated Protection Measures against Gender Violence, BOE No. 313, 29 December 2004, Article 44, para. 5.

⁸⁵ See also Explanatory Report, *cit. supra* note 68, para. 251.

⁸⁶ GREVIO, “Baseline Evaluation Report Monaco”, GREVIO/Inf(2017)3, 27 November 2017, para. 140.

⁸⁷ GREVIO, “Baseline Evaluation Report Spain”, GREVIO/Inf(2020)19, 15 October 2020, para. 90.

⁸⁸ Baseline Evaluation Report Norway, *cit. supra* note 83, para. 214.

⁸⁹ Baseline Evaluation Report Netherlands, *cit. supra* note 82, para. 241.

requiring a joint meeting with the abusive parent in order to reach a decision on child custody, residence or visitation rights may be tantamount to mandatory mediation'.⁹⁰

If the interpretation of which proceedings fall within the prohibition of Article 48(1) is broad, the understanding of what amounts to 'mandatory alternative dispute resolution processes' is even broader. To begin with, to identify the mechanisms falling under the umbrella of 'alternative dispute resolution processes', GREVIO deems the qualification done by domestic law irrelevant. For instance, under Danish law, parents disagreeing on the arrangements for the custody of their children must attend a joint meeting with the State Administration. This meeting aims to reach mutually acceptable decisions guided by the case worker of the State Administration. Although the process 'is not formally recognised as a mediation process', GREVIO has construed it as 'falling within the scope of Article 48(1)'.⁹¹

Furthermore, GREVIO has underlined that there may be cases in which victims of domestic violence may be subject to *de facto* mandatory mediation,⁹² even though the law does not formally require it. In this regard, an overview of GREVIO's baseline reports of Western European States indicates that *de facto* mandatory mediation may occur mainly in three different situations.

The first scenario concerns proceedings regarding parental rights, divorce and visitation arrangements, all of which do not directly address VAW. As illustrated above, practice across States shows that parties may be requested to participate in mediation processes in these cases and may face negative repercussions if they refuse to do so. GREVIO has noted that when such proceedings occur in the context of intimate partner violence that has not been disclosed, victims may feel pressured or constrained to attend mediation, leading to situations of *de facto* mandatory RJ.

For example, in Denmark, where separating parents disagreeing on the custody of their children are requested to attend a meeting before the State Administration, attendance is considered quasi-mandatory: refusals are often viewed as a lack of cooperation concerning the child, with a bearing on the State Administration's assessment of parental ability. In these circumstances, if a party victim of domestic violence has 'legitimate reasons to avoid any encounter with their abusive ex-partner (...) the practice of insisting on joint meetings between the abusive and non-abusive parent to reach an agreement on child custody/residence/visitation could be considered as *de facto* mandatory mediation'.⁹³

GREVIO has made similar considerations about other States.⁹⁴ In Germany, concern has been voiced over reports of women experiencing serious repercussions, like being considered unfit for parenting, for refusing to attend joint family court-based counselling and mediation for child custody arrangements out of fear for their safety and because they cannot enter the process on an equal footing with their partner.⁹⁵

⁹⁰ GREVIO, "Baseline Evaluation Report Germany", GREVIO/Inf(2022)21, 24 June 2022, para. 286. Baseline Evaluation Report Norway, *cit. supra* note 83, para. 214, noting that 'it does not appear that cases of domestic abuses or intimate partner violence are taken into account, and the threshold for having an exception on mediation is very high'. See also Baseline Evaluation Report France, *cit. supra* note 81, para. 214; 'Family mediation proceedings that entail an obligation for the parties to participate in it raise a problem of compatibility with Article 48 of the Convention'.

⁹¹ Baseline Evaluation Report Denmark, *cit. supra* note 80, para. 185.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ GREVIO, "Baseline Evaluation Report Belgium", GREVIO/Inf(2020)14, 26 June 2020, para. 172.

⁹⁵ Baseline Evaluation Report Germany, *cit. supra* note 90, paras. 286-287.

A second possibility for *de facto* mandatory mediation may occur when the *onus probandi* for being exempted from alternative dispute resolution processes is on the victim of VAW. Portuguese civil law provides for mandatory conciliation in divorce proceedings, but it includes exceptions in cases involving domestic violence. However, this safe clause is meaningless unless authorities actively screen divorce cases. For GREVIO, ‘placing the onus of disclosing incidents of domestic violence on the victim would disregard victims’ reluctance to speak out, be it for fear of not being believed, losing custody over their children or of incurring further violence’.⁹⁶ Similarly, in Iceland, a new 2022 regulation on counselling, mediation and conversation establishes that parents are, in principle, obliged to attend mediation meetings together. However, if a parent invokes facts of violence or if the mediator believes that there is a risk of violence, the regulation sets the possibility of attending the mediation meeting separately. GREVIO has noted that there is no active screening by the authorities for a history of abuse in the relationship.⁹⁷ This places the burden of proof on the victim and leads to a situation in which women fearing their abusive partner may not have the courage to speak up, finding themselves forced to attend mediation proceedings.

Finally, a third scenario of *de facto* mandatory RJ includes criminal cases regarding VAW where investigators or judicial authorities can defer prosecution or suggest deferral. In France, while criminal mediation is based on the agreement between the parties and prohibited in domestic violence cases, the magistrates may still propose it. For GREVIO, ‘[i]n such circumstances, the risk is that a victim’s acceptance of mediation may conceal her inability or reluctance to refuse, for fear of future violence or retaliation by the perpetrator’.⁹⁸ In the Netherlands, where mediation in criminal law is, in principle, a voluntary process, Public Prosecutor Services may still defer prosecution and issue a non-consensual “penalty order” in less serious cases and without the victim’s consent. This kind of deferral is often encouraged in practice regarding VAW, because of the authorities’ conviction that alternatives to criminal proceedings can be more effective than traditional court hearings given that victims often retract their statements and professionals can provide a more balanced view of the situation than victims. This ‘sends the worrying message that domestic violence is not a crime fit for criminal conviction’, amounting to a form of mandatory alternative dispute resolution. In Finland, the law provides the police and the prosecution with the power to propose mediation in criminal proceedings. GREVIO has noted that, with the police proposing the majority of mediation cases, often as early as the moment when the crime is reported, many women accept mediation in order to see any outcome at all.⁹⁹

Overall, this brief analysis demonstrates that GREVIO’s interpretation of Article 48 is very broad; the Group of Experts understands such a provision as establishing a quasi-absolute prohibition of mediation in situations of violence.¹⁰⁰ This may pose a question of scope insofar as extending the prohibition of mandatory mediation to any circumstance potentially involving VAW implies a duty on the authorities to take measures to detect violence, especially in cases where the latter may not be *prima facie* established. However, how and the extent to which such a duty shall be enforced remains unclear.

⁹⁶ GREVIO, “Baseline Evaluation Report Portugal”, GREVIO/Inf(2018)16, 21 January 2019, para. 182. See also Baseline Evaluation Report France, *cit. supra* note 8181, para. 215.

⁹⁷ GREVIO, “Baseline Evaluation Report Iceland”, GREVIO/Inf(2022)26, 22 October 2022, para. 238.

⁹⁸ Baseline Evaluation Report France, *cit. supra* note 81, para. 211.

⁹⁹ GREVIO, “Baseline Evaluation Report Finland”, GREVIO/Inf(2019)9, 2 September 2019, para. 191.

¹⁰⁰ See also PICHARD, “Article 48”, in DE VIDO, FRULLI (eds.), *Preventing and Combating Violence against Women and Domestic Violence: A Commentary on the Istanbul Convention*, Cheltenham, 2023, pp. 572-573.

At the moment, one component seems to counterbalance the quasi-absolute prohibition of mediation. According to GREVIO, to prevent violations of Article 48 and to ensure that alternative dispute resolution mechanisms do not harm victims of VAW, it is essential for legal professionals, judges and mediators involved in the decision regarding mediation to be trained about the dynamics and risks of VAW.¹⁰¹ In this regard, adequate training is seen as the tool allowing the relevant professionals to identify cases of VAW and distinguish between circumstances of intimate partner violence – in which mediation shall be avoided *tout court* – from situations of conflict in which mediation may be desirable in light of the parties’ interest.

5. The Italian case: mediation in family law and the new reform on RJ in the criminal context

Italy has no mandatory alternative dispute resolution processes in criminal and civil legislation. Concerning family law, mediation and conciliation are available to the parties in cases of separation, divorce and custody rights proceedings and are always voluntary.

As for the criminal legal framework, RJ mechanisms have been introduced recently with the so-called “Cartabia reform”. Article 42 of the Legislative Decree 150/2022 introduces the concept of restorative justice into the Italian criminal legal system. It defines restorative justice as ‘any programme enabling the victim of the offence, the person named as the offender and others in the community to participate freely, consensually, actively and voluntarily, in the resolution of issues arising from the offence, with the help of an impartial, appropriately trained third party known as a mediator’.¹⁰² As stressed by the definition, access to RJ mechanisms remains voluntary.

In family law, the absence of mandatory RJ under Italian legislation has not prevented the CEDAW Committee and GREVIO from expressing concerns over Italian judicial practices, which may amount to violations of the CEDAW (Articles 2(c), 3, 5(a), 15) and Article 48 of the Istanbul Convention.

Law No. 54/2006 introduced the principle of shared custody of children as the default solution for separation and divorce cases and the institute of mediation as the preferred mechanism to reach an agreement between the parents. Under Article 330 paragraph 2 of the Civil Code as modified by Law No. 219/2012 and the Legislative Decree No. 154/2013, courts can decide the forfeiture of parental authority only when a parent violated or neglected their parental duties, causing serious prejudice to the child.¹⁰³ There is no clear definition of serious prejudice to the child. VAW does not feature as a ground for determining children’s custody and visitation rights. According to the 2011 Shadow Report of D.i.Re presented to the CEDAW Committee, between 2007 and 2011 shared custody had a pretty high implementation rate, ranging from 72,1% to 83,3% in consensual separation proceedings and from 52,1% to 62,1% in divorce cases.¹⁰⁴ According to ISTAT, in 2015, 89% of decisions in separation and divorce cases awarded shared custody, whereas exclusive custody was conferred to mothers in

¹⁰¹ Baseline Evaluation Report France, *cit. supra* note 81, para. 212; “Baseline Evaluation Report Belgium”, *cit. supra* note 94, para. 170.

¹⁰² Legislative Decree 150, adopted on 10 October 2022, implementing Law No. 134, adopted on 21 September 2021, *Delegating the Government to improve the efficiency of criminal proceedings, address restorative justice and introduce provisions for a swift resolution of criminal proceedings* (transl. by the author).

¹⁰³ Article 330 of Italian Civil Code: “a judge may declare the forfeiture of parental authority when a parent violates or neglects his parental duties or abuses of his parental authority by prejudicing the child” (transl. by the author).

¹⁰⁴ Italy Shadow Report to the 6th Periodic report on the implementation of CEDAW submitted by the Italian Government, “30 Years CEDAW: work in progress”, June 2011, pp. 108-109.

8.9% of cases.¹⁰⁵ According to a report published in May 2022 by the Senate Joint Committee of Inquiry on Femicide, in 96% of separation cases involving VAW, courts did not consider violence relevant for child custody.¹⁰⁶

As for mediation in separation proceedings involving child custody, voluntary mediation was initially introduced by Law No. 54/2006. Until 2022, Article 337*octies* of the Civil Code, as modified by the Legislative Decree No. 154/2013, established that in proceedings regarding child custody, the court could suspend the adoption of judicial decision and refer the parents, with their consent, to mediation.¹⁰⁷

GREVIO has been very critical of this normative landscape, stressing how the implementation of such laws has contributed to secondary victimization and *de facto* mandatory mediation, in contrast with Article 48 of the Convention.

In the Baseline evaluation report of 2020, GREVIO stressed how ‘a system based on parents reaching agreements in the best interests of their children (...) is not appropriate for couples whose relationships have been marred by violence’.¹⁰⁸ First, gender-based violence does not figure nor is treated as a condition prejudicing ‘the interest of the child’.¹⁰⁹ the risk is not only to expose the child himself to a prolonged situation of abuse within the family but also to discredit the instances of VAW as situations of conflict between the parents, with a bearing on the outcome of the custody proceeding.¹¹⁰ Indeed, GREVIO underscored in 2020 that Italian courts had hardly adopted the provision depriving of parental authority: ‘the system in place, rather than affording protection to victims and their children, “backfires” on mothers who seek to protect their children by reporting the violence’.¹¹¹ The Committee noted that certain civil courts would often either fail to detect instances of violence or dismiss them as a form of family conflict, with mothers being blamed for their children’s reluctance to meet their violent fathers.¹¹² On numerous occasions, both the CEDAW Committee and GREVIO have found particularly disquieting the dismissal by certain civil courts of claims of domestic abuse as instances of the so-called ‘Parental Alienation Syndrome’ (PAS). PAS refers to a highly contested strategy,¹¹³ according to which one parent (usually the mother)

¹⁰⁵ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 180, note 149.

¹⁰⁶ Italian Senate of the Republic, Parliamentary Commission of Inquiry on Femicide and any Form of Domestic Violence, “Relazione sulla vittimizzazione secondaria delle donne che subiscono violenza e dei loro figli nei procedimenti che disciplinano l’affidamento e la responsabilità genitoriale”, 20 April 2022, pp. 26 ff.

¹⁰⁷ Italian Civil Code, Article 337*octies*(2): “Whenever the judge sees fit, after hearing the parties and with their consent, he may refer to the adoption of measures arising out of Article 337*ter* to allow the parties, with the support of experts, to attempt mediation in order to reach an agreement, particularly in the moral and material interest of the child” (trans. by the author).

¹⁰⁸ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 184. Critical of this legal change was also CEDAW, “Concluding observations of the Committee on the Elimination of Discrimination against Women, Italy”, 2 August 2022, UN Doc. CEDAW/C/ITA/CO/6, para. 50.

¹⁰⁹ With the concept ‘interest of the child’, GREVIO refers to the interpretation provided by Italian domestic judges of Article 330, para. 2, of the Italian Civil Code, and not to the notion of ‘best interest of the child’ as developed by the Committee of the Rights of the Child and other international bodies.

¹¹⁰ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 162.

¹¹¹ *Ibid.*, para. 181.

¹¹² *Ibid.*, paras. 182-184.

¹¹³ “Parental Alienation Syndrome” is a term coined by Psychiatrist Richard Gardner in 1985 to describe a “child disorder” arising in the context of child-custody disputes and consisting in a “child’s campaign of denigration against a good, loving parent” resulting from “the combination of a programming (brainwashing) parent’s indoctrinations and the child’s own contributions to the vilification of the target parent”, see GARDNER, *Child Custody Litigation: A Guide for Parents and Mental Health Professionals*, New Jersey, 1985. The syndrome was removed in 2020 from the International Classification of Diseases by the World Health Organization, and is rejected in some national legislations, such as Spain. The Italian Court of Cassation has recently affirmed that the PAS lacks scientific validity and, therefore, courts cannot base their

intentionally displaces the child with unjustified negativity towards the other parent.¹¹⁴ For GREVIO, unqualified reference to PAS in judicial decisions testifies to the absence of a proper understanding of the phenomenon of VAW, exposing women to secondary victimization.

But there is more. Secondary victimization and lack of explicit prohibition of mediation in VAW cases may conceal *de facto* mandatory mediation. Gender-based and domestic violence always underline a power imbalance in the relationship between the two partners. Therefore, if, in a custody proceeding, a claim of domestic abuse suffered by a woman is dismissed as a situation of conflict between the parents, '[j]oint meetings between the abusive and non-abusive parent for the purpose of reaching an agreement on custody decisions can be seen as mandatory mediation since the victim has no choice but to attend in order to arrive at an agreement'.¹¹⁵ Furthermore, mediation may also be perceived as *de facto* mandatory when a mother would be labelled as 'uncooperative' or 'unfitting' for refusing to attend meetings on custody or visitation rights on the grounds of claims of domestic violence.¹¹⁶ In the 2020 Baseline Evaluation Report, GREVIO indeed 'found ample evidence that mediation processes are *de facto* enforced upon victims during child custody processes, running counter to the requirement of Article 48 of the convention'.¹¹⁷

In light of such criticism,¹¹⁸ the Cartabia reform, and especially the Legislative decree 149/2022 concerning civil law and the civil process, has introduced some of 2020 GREVIO's recommendations. Taking into account, in particular, the recommendation to ensure the consideration of VAW cases in custody and visitation rights,¹¹⁹ the reform has established new special provisions applying to proceedings involving family abuse of domestic or gender-based violence. The new Title IV *bis*, Book II of the Code of Civil Procedure, sets provisions for proceedings regarding persons, minors and families. Article 473*bis* introduces rules inspired by RJ mechanisms and establishes mediation as a practice to be resorted to by the parties voluntarily and at any moment of the proceeding, including child custody and visitation rights. However, special rules are provided for cases concerning domestic abuse or gender-based violence (Chapter III, Section I). In particular, Article 473*bis* sets an absolute prohibition of mediation when a criminal decision or penalties have been enforced toward one of the parties or when a criminal proceeding concerning VAW is pending. Furthermore, mediation must terminate if, during the mediation process, evidence of domestic abuses or VAW emerges.

While the law's entry into force in June 2023 makes it unfeasible to evaluate its impact on VAW and prohibition of mandatory RJ, GREVIO and the CEDAW Committee have nonetheless appreciated

decisions and findings on this theory, see Corte di Cassazione, sez. civ., 24/03/2022, [n. 9691](#). For a critical assessment of how this practice impacts VAW, ALSALEM, "Report of the Special Rapporteur on violence against women and girls, its causes and consequences: Custody, violence against women and violence against children", 25 April 2023, UN Doc. A/HRC/53/36, pp. 3 ff.

¹¹⁴ *Ibid.*, paras. 13-14, 19; Baseline Evaluation Report Italy, *cit. supra* note 11, paras. 36, 187; CEDAW, "Concluding observations of the Committee on the Elimination of Discrimination against Women, Italy", *cit. supra* note 108, para. 50, CEDAW, "Concluding observations on the seventh periodic report of Italy", 24 July 2017, UN Doc. CEDAW/C/ITA/CO/7, para. 51.

¹¹⁵ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 184.

¹¹⁶ *Ibid.*, para. 185.

¹¹⁷ *Ibid.*, para. 209.

¹¹⁸ See "Reply by Italy to the reporting form on the implementation of the Recommendation of the Committee of the Parties adopted on 30 November 2020", 1 March 2023, IC-CP/Inf(2023)5, para. 22.1.

¹¹⁹ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 14(b).

these developments and welcomed, in particular, the express prohibition of mediation in cases of domestic violence.¹²⁰

Some considerations should also be dedicated to mechanisms of RJ concerning criminal matters. Before the Cartabia Reform, the criminal normative framework did not envisage formal RJ mechanisms.¹²¹

The main changes the reform provides to the Criminal Code and the Code of Criminal Procedure are as follows: as to substantive law, Article 42 of the Legislative Decree No. 150/2022 introduces the very concept of restorative justice in the criminal law system.¹²² Article 53 establishes that programmes of RJ include: a) mediation between the author of the crime and the victim of the crime, and possibly the family members, or mediation between the author of the crime and the victim of a crime different from the one object of RJ; b) the so-called ‘restorative dialogue’; c) any other programme aimed at dialoguing, guided by mediators and carried out in the interests of the victim of the crime and its author.

Programmes of RJ can be ordered by the competent court for any crime, regardless of the typology or the gravity.¹²³ As for the effects of these programmes on the outcome of the criminal proceeding and the conviction, the positive conclusion of a RJ program before the final sentencing constitutes a ‘generic’ mitigating circumstance.¹²⁴ Furthermore, a RJ programme positively concluded may give rise to the suspension of the conviction when the criminal sentence is less than one year¹²⁵ and may constitute, for certain types of crimes, an element in the court’s assessment of the so-called ‘special tenuity’ of the criminal conduct, which provides for non-punishability.¹²⁶ Procedurally speaking, under Article 129*bis* of the Code of Criminal Procedure, the judicial authority can, at any moment, refer the author of the crime and the victim to the RJ program, either upon the offender’s or the victim’s request or upon its initiative.

The voluntary nature makes the RJ model *prima facie* in line with international instruments on gender-based violence. Yet, some aspects of the reform may raise questions of compatibility with CEDAW and the Istanbul Convention, and their application in practice will need careful monitoring.

First, albeit not mandatory, RJ programmes under the Cartabia Reform are accessible for any crime, with no exceptions for domestic abuses and VAW. Except for Article 131*bis*, para 3, no. 3 of the Criminal Code – which excludes from the qualification of ‘special tenuity’ crimes like sexual assault,

¹²⁰ GREVIO, “Conclusions on the Implementation of Recommendations in respect of Italy adopted by the Committee of the Parties to the Istanbul Convention”, 1 June 2023, IC-CP/Inf(2023)9, p. 2 letter A; CEDAW, “Concluding observations on the eighth periodic report of Italy”, *cit. supra* note 43, para. 27.

¹²¹ Admittedly, some have argued that Article 162*ter*, para. 1, “Extinction of the crime owing to restorative conduct”, constituted a form of restorative justice mechanism. This provision establishes that, in cases of crimes whose prosecution depends on the submission of a complaint by the injured person (*reati procedibili a querela soggetta a remissione*), the judge may declare the crime extinguished if the offender has fully repaired the damage caused before the formal opening of the substantive proceeding. Article 162*ter* states that the extinction of the crime may be declared when the amount of reparation is adequate and regardless of the acceptance of the victim. The application of such provision has been criticized in relation to the crime of stalking, see CEDAW, “Concluding observations on the seventh periodic report of Italy”, *cit. supra* note 114, para. 27(d), leading to the adoption, with Fiscal Degree L. 172/2017, of Article 162*ter*, paragraph 1*bis*, according to which extinction of the crime cannot operate in case of stalking. In any matter, there are doubts upon the qualification of Article 162*ter* as a form of RJ model, see FERRANTI, “Giustizia riparativa e stalking: qualche riflessione a margine delle recenti polemiche”, *Diritto penale contemporaneo*, 2017, p. 3 ff.

¹²² See *supra*.

¹²³ Article 44 of Legislative Decree 150/2022.

¹²⁴ Article 62 Italian Criminal Code.

¹²⁵ *Ibid.*, Article 163.

¹²⁶ *Ibid.*, Article 131*bis*.

sexual crimes involving minors and sexual harassment, including stalking¹²⁷ - there is no other indication on how RJ should be implemented in cases of VAW. This may prove troubling since RJ programmes may be ordered by the judge at any moment of the proceeding and without the victim's consent. While participation in an RJ programme for the victim remains voluntary, the law allows the judicial authority to refer the offender to RJ programmes before "surrogate victims" different from the actual victim of the crime.¹²⁸

In this regard, there is a trade-off in expanding RJ beyond cases involving the participation of the "direct" victim of the crime. On the one hand, RJ programmes based on "surrogate victims" may be useful tools, for example, in all those situations in which a surrogate victim who had suffered a similar offence may get the possibility to participate in the process. On the other hand, "surrogate victims" programmes may also carry the risk that the rehabilitation of the offender will take priority over the victim's needs.¹²⁹ Victims of crimes may decline participation in the RJ programme out of fear of the offender, because they are emotionally unready or because of the time and effort involved. If the process of "surrogate victims" is not conducted by balancing all the interests at stake, the worry is that RJ will lose sight of the goal of healing and restoring victims, and privilege only the offender – e.g. by offering reductions in the sentence for those who successfully concluded the programme.

From the perspective of VAW, "surrogate victim" programmes may expose victims to secondary victimisation and limit their access to justice. A VAW offender may indeed be referred to a RJ programme without the victim's consent and before the conclusion of the trial, with a bearing on the final sentence and penalty determination. Italian NGOs working on VAW have voiced these concerns¹³⁰ and in its newly adopted Concluding observations on the eighth periodic report of Italy, the CEDAW Committee has indeed recommended that Italy assess the impact of the new measures and ensure that RJ mechanisms are not given priority over effective prosecution.¹³¹

Finally, like in family law cases, the major obstacle to implementing RJ programmes remains the lack of adequate training of the judicial authority in understanding the dynamics of gender-based violence. It is noteworthy that one of the first applications of the Cartabia Reform on RJ, indeed, concerned a gender-based violence case, sparking criticism both within public opinion and by advocates of women's rights. The decision is one of the first examples of how the application of RJ mechanisms under the reform may negatively impact women's rights and further exacerbate gender-based violence against women.

The case of Carol Maltesi concerned the brutal killing of a woman by her former partner who, unable to let go of their former romantic and sexual relationship, killed her by hammering, cut her dead body into pieces, and eventually confessed to the crime. The court of the first instance condemned him for "homicide" and "destruction, suppression and misappropriation of the body" without recognising, however, the aggravating circumstances of "cruelty" and "futile and appealing motives".¹³² In fact, some parts of the judges' motivations for the decision stand out for gender stereotyping and a

¹²⁷ The inclusion of stalking follows a critical debate since, at the beginning, the Reform did not envisage it, see D.i.Re, <https://www.direcontrolaviolenza.it/riforma-processo-penale-correggere-urgentemente-le-modifiche-che-penalizzano-le-donne-che-hanno-subito-violenza/>.

¹²⁸ See "Relazione illustrativa al decreto legislativo 10 ottobre 2022 n. 150", Gazzetta Ufficiale, Serie Generale n. 245 del 19 ottobre 2022 Suppl. Straordinario n. 5, 19 October 2022, p. 366.

¹²⁹ LANNI, "Taking Restorative Justice Seriously", Buffalo Law Review, 2021, pp. 666 ff.

¹³⁰ See Report by "Italian civil society organizations for CEDAW", 87th Session CEDAW, January 2024, paras. 20-24, 29(d).

¹³¹ CEDAW, "Concluding observations on the eighth periodic report of Italy", *cit. supra* note 43, para. 28(f).

¹³² Corte d'Assise di Busto Arsizio, sentenza 1/23, 5 July 2023, pp. 35-36.

somewhat negative moral judgement on the victim.¹³³ After the first degree sentence and within the terms to present appeal, the author of the crime requested the Court of Busto Arsizio to access an RJ programme in light of his desire to provide reparation to the victim's family. The latter opposed this request along with the prosecution. Yet, the Court finally accepted it and ordered the offender's referral to a programme of RJ before a surrogate victim. The Court based its motivation on the fact that RJ programmes are meant to repair the relationship between the offender and the victim and the bond between the offender and society at large. Thus, the RJ programme may be carried out even without the victim's family's consent, provided that there are no concrete risks to their safety.¹³⁴

6. Concluding Remarks

Under international law, there is no outright prohibition on the use of RJ measures in cases related to VAW. The legal instrument that most clearly formulates a critical view of restorative justice is the Istanbul Convention, which only states that processes of this kind must not be compulsory. However, the analysis of the practice of the monitoring bodies shows that there is wide consensus on the need of caution when employing these tools.

The main concerns, as highlighted by both the CEDAW Committee and GREVIO, are related to the re-victimization of women which may be exposed to physical and psychological risks. Such risks are emphasised when the process is handled by mediators who are unable to identify the multiple manifestations of violence against women and have no interest in advising against the use of restorative justice. In addition, mediation before judgment may be seen as potentially hindering ongoing investigations. Both the CEDAW Committee and GREVIO thus urge states to implement national legislation in a manner that upholds women's rights and prevents perpetrators from evading punishment.¹³⁵ In sum, the practice of monitoring bodies indicates that best practices in utilising restorative justice measures should meet the following conditions: 1) prioritise the free will of the victim, ensuring that the use of restorative justice measures is genuinely voluntary;¹³⁶ 2) ensure the priority of prosecution over mediation preventing mediation from halting criminal investigation and prosecution;¹³⁷ 3) provide high-quality and comprehensive training for mediators involved in victim-

¹³³ *Ibid.*, p. 25: 'Davide Fontana probably realised that the young and uninhibited Carol Maltesi had to some extent used him to better pursue her personal and professional interests (...). From Fontana's point of view, the murder was a way - certainly not agreeable and disproportionate according to common belief - to come out of the no longer bearable condition of uncertainty and suffering, triggered by the decision of the stimulating beloved woman to move away from him' (transl. by the author).

¹³⁴ Corte d'Assise di Busto Arsizio, ordinanza, 19 September 2023.

¹³⁵ Greater concerns are raised in countries that frequently use restorative justice in domestic violence cases, such as Finland (Baseline Evaluation Report Finland, *cit. supra* note 99, para. 189), compared to those that rarely employ it, such as Denmark (Baseline Evaluation Report Denmark, *cit. supra* note 80, paras. 184-185). GREVIO's Baseline Evaluation Reports highlight Austria's respect for women's free will through the introduction of a risk assessment tool to evaluate the suitability of cases for mediation (Baseline Evaluation Report Austria, GREVIO/Inf/2017/4, 27 September 2017, para. 167). In Spain, GREVIO acknowledged compliance with Article 48 through the adoption of Organic Law 1/2004, explicitly prohibiting mediation in cases of intimate partner violence (Baseline Evaluation Report Spain, *cit. supra* note 87 para. 243).

¹³⁶ Baseline Evaluation Report Netherlands, *cit. supra* note 82, paras. 201, 247; Baseline Evaluation Report Belgium, *cit. supra* note 94, para. 92.

¹³⁷ CEDAW, "Concluding observations on the eighth periodic report of Italy", *cit. supra* note 43, para. 28; CEDAW, "Concluding observations on the eighth periodic report on Finland", *cit. supra* note 77, para. 24.

offender mediation;¹³⁸ 4) adopt adequate safeguard measures to protect victims who take part in RJ processes.¹³⁹

In Italy, the Cartabia reform has not formally excluded the use of restorative justice in criminal cases related to VAW. Moreover, the risk of pushing victims of gender-based violence into RJ processes can occur in various situations within civil trials.

In cases involving divorce, separation or child custody disputes, victims of gender-based violence may feel pressure to engage in mediation or conciliation processes as part of civil proceedings.¹⁴⁰ In this regard, Italian NGOs speak of a ‘de facto policy of recommending alternative dispute resolutions or mediation, particularly in cases of child custody’ⁱ. This pressure may come from legal professionals, court personnel or even family members who emphasize the importance of avoiding prolonged litigation. Where property or financial matters are at stake, victims of gender-based violence may be encouraged to pursue mediation or negotiation to reach a settlement with the perpetrator. This could happen in situations where the victim seeks financial compensation or asset division as part of a civil claim related to the violence experienced.

In line with the best practices emerging from the international monitoring systems, it is essential to ensure that victims of gender-based violence receive comprehensive support, information and legal representation to make informed decisions about their participation in RJ processes without being coerced or pressured.¹⁴¹

It should also be noted that adequate training for professionals involved in RJ mechanisms is key to guarantee a process in line with international standards. What emerges from Italian practice is the picture of a State in which legislative reforms work in contrast to a culture among judges, mediators and counsellors that is largely unaware of the dynamics of VAW and its consequences. In family law, concepts such as PAS and perceptions of domestic abuses as instances of family conflicts demonstrate that women may suffer second victimization even when the law is formally “neutral” or does not *prima facie* contrast with international requirements. In criminal law, persistent practices of stereotyping by judges, as testified by the case of Carol Maltesi and confirmed by recent ECtHR judgments,¹⁴² show that the potentials of RJ mechanisms may actually work to the detriment of victims of VAW. Yet, as CEDAW and the Istanbul Convention demand, State parties are under the obligation to “modify the social and cultural patterns (...) with a view to achieving the elimination of prejudices and customary and all other practices which are based on (...) stereotyped roles for men and women”¹⁴³ and to “take the necessary measures to promote changes in the social and cultural patterns of behaviour (...) with a view to eradicating prejudices, customs, traditions (...) based on stereotyped roles for women and men”.¹⁴⁴ The enforcement of such positive duties seems to be

¹³⁸ Baseline Evaluation Report Belgium, *cit. supra* note 94, para. 119; Baseline Evaluation Report Finland, *cit. supra* note 99, para. 189.

¹³⁹ Baseline Evaluation Report Austria, *cit. supra* note 134, para. 166.

¹⁴⁰ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 185; see also, ECtHR, *I.M. and Others v. Italy*, appl. No. 25426/20, 10 November 2022, paras. 137-138, where the ECtHR cited GREVIO’s concerns about the practice of qualifying mothers who refuse to attend contact sessions between their children and the father in cases of domestic violence as “uncooperative” and “unfit”. Cf. D.i.Re, *Il (non) riconoscimento della violenza domestica*, *cit. supra* note 39, pp. 25-26.

¹⁴¹ Baseline Evaluation Report Italy, *cit. supra* note 11, para. 188.

¹⁴² ECtHR, *J.L v Italy*, *cit. supra* note 44; *Talpis v Italy*, *cit. supra* note 40.

¹⁴³ CEDAW, Article 5.

¹⁴⁴ Istanbul Convention, Article 12.

lacking, leading to negative consequences also in the context of reparation and alternative dispute resolution processes.

The horrific femicides of 2023 and the subsequent public debate that shocked the conscience of public opinion in Italy underscore the need to address violence against women as a social problem rooted in gender-based power imbalances and social cleavages. Faced with persistent and alarming data that confirm the magnitude of the phenomenon, relying mainly on criminal law measures for deterrence appears a totally insufficient strategy. Restorative justice may thus initially appear as a potential alternative to criminal retribution as it seems to address violence against women more comprehensively considering, *inter alia*, also the need to rehabilitate the perpetrator.

It is doubtful, however, whether RJ measures can effectively respond to the magnitude of this problem. To the contrary, the view can be taken that, if not properly managed, they might even backfire. In the worst-case scenario, there is the risk that recourse to restorative justice, made *de facto* compulsory, may generate the misperception that the woman victim of violence is not even a victim, but simply a social actor who must take an active part in the search for a solution for the benefit of the offender and society as a whole. Exposing women to a serious risk of secondary victimisation does not seem to be an acceptable policy to address society's problems. Victims cannot be expected to once again bear the cost of the social imbalances that contributed to creating the conditions for their suffering. The fight on violence against women requires the adoption of much more complex and multifaceted strategies, including risk analysis measures, adequate funding of anti-violence centres and adequate training of the judiciary and police forces, without neglecting educational policies leading to cultural change and the challenging of gender stereotypes in society.

ⁱ Italian civil society for CEDAW coordinated by D.i.Re, Suggested List of Issues Prior to Reporting Relating to Issues, 80 (Virtual PSWG) Session of the CEDAW Pre-Sessional Working Group, 1 February 2021, p. 10.