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Cultural diversity and crime

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ABSTRACT: This paper aims to focus on migration movements in which women and children suffer violence as consequence of illegal traditions that are considered crimes in host countries. Such violence is specified in endemic practices such as forced marriages as well as child marriages and female genital mutilation/cutting. In this context, the concept of cultural crime arises which does not justify these behaviors.

This paper combines human rights, criminal law, culture, education and children protection perspectives.

KEY WORDS: Minors, Women, illegal traditions, forced marriages, female genital mutilation, cultural crimes, Criminal law, Human Rights.

SUMMARY: I. Migration movements II. Illegal traditions: forced marriage and female genital mutilation/cutting. III: Women rights perspective. IV. Forced marriage. Introduction. a) Sanctions against forced marriage: the European legal context. b) Child marriage as crime in the Spanish penal code. V. Female Genital Mutilation/Cutting. 1. From health perspectives 2. From legal perspectives. a) The crime of FGM in the SPC. VI. Cultural crimes. VII. Education for empowerment and intellectual development. Promote equality. VIII. Conclusions. IX. Bibliography.

I. Migration movements

Historically, population movement and immigration have had specific political, economic, and cultural consequences. In the second half of the previous century, the need for labor force in the expanding Western European economies brought many immigrant groups to rather racially homogenous national populations.

Nowadays wars and natural disasters make the headlines, at least initially. We live in a world where humanitarian crises extract mounting costs from economies, communities and individuals. Less visible but also costly are the crises of fragility, vulnerability and growing inequality, confining millions of people to the most tenuous hopes for peace and development. More than 100 million people are in need of humanitarian assistance. An estimated 26 million of them are women and adolescent girls¹.

That might explain why a considerable number of women and adolescents who, taking advantage of the migrant stream, seek to enter a country fleeing a situation of grave violation of human rights; sexual slavery², forced marriage³, sterilization, pregnancy, forced abortion, or female genital mutilation⁴ and ask for asylum.⁵

In addition, an influx of refugees and asylum seekers due to global instability, as well as population movement brought a game-changing number of ethnically and culturally different groups. These forces produced important changes in European demographics. As a result, in the last decades, European countries are occupied by young inhabitants that are second-generation ethnic minorities. This has resulted in a multi-ethnic, multi-cultural society in many of these countries.

Many European cities became a melting pot of ethnicities in metropolitan areas. Many members of these groups, however, were often undereducated and appropriate only for the evaporating industrial or for economically limited menial labor. The defense of certain traditions and customs, frequently rooted in their beliefs, it implies the realization of practices or behaviors that collide with values, principles and rights

¹ Cfr UNFPA, *Shelter From The Storm. A transformative agenda for women and girls in a crisis-prone world*. State of world population 2015.

² Cfr. PÉREZ ALONSO. E. (Ed.), *El Derecho ante las nuevas formas de esclavitud*, Valencia, 2017.

³ Cfr. CUADRADO RUIZ, M. Á., “Violence against women. Forced marriages” in The seventh session of the International Forum on Crime and Criminal Law in the Global Era. Paper Collection. pp. 234-248 Beijing, 2015 ; CUADRADO RUIZ, M. Á., “El delito de matrimonio forzado” in PÉREZ ALONSO, E., *op. cit.* Valencia 2017, pp.495-515.

⁴ Vid. SILVA CUESTA, A., *La mutilación genital femenina. Aspectos jurídico penales*. Granada, 2017, SILVA CUESTA, A., "La mutilación genital femenina: de los Derechos Humanos a la tipificación penal", *Revista General de Derecho Penal*. Iustel. Mayo 2016; CUADRADO RUIZ, M.Á., “Violencia contra las mujeres y niñas. La mutilación genital femenina”, in *Libro homenaje al Prof. Morillas Cueva*. Madrid, 2018.

⁵ Vid. NIETO GARCÍA, A.J.: “Derecho de asilo de menores, menores extranjeros no acompañados y otras personas vulnerables”, in *Diario La Ley*, Nº. 7597, Sección Doctrina, marzo de 2011; also related to cases of FGM. In Spain Act 12/2009 30th oct. regulates the right for asylum .

indiscriminately recognized and guaranteed by the legal system in western countries. Also, many of these groups had first-generation children adapting to what has been described as a culture shock. Conflicts between popular culture and mainstream culture created a strain for these new youth: “[i]mmigrant children, who found themselves caught between old-world communal practices of their parents and the norms of an often hostile host society, frequently got together in corner groups and gangs.”

Moreover immigration to Western countries is carried out for some parents without time to take such a radical change in their beliefs, which results in the imposition of a new marginal role: the one of being convicted due to the serious injuries sustained by their children⁶.

II. Illegal traditions: forced marriage and female genital mutilation.

A CASE OF STUDY OF CHILD MARRIAGE in New Delhi: Santadevi Meghwal, a brave teenager in Rajasthan, applied to court for the legal termination of her childhood marriage. Her parents conducted her marriage when she was barely 11-months-old. “It is part of a tradition in our village that when an elderly relative dies, a child in the family has to get married within 13 days,” Santadevi informed.

Though the marriage function is a small affair and the child bride and groom are only made to sit next to each other, the understanding is that a formal wedding would take place once the girl becomes an adolescent. The practice of child marriage is widespread in Rajasthan, Uttar Pradesh, Madhya Pradesh, Andhra Pradesh, Jharkhand, Bihar and Chhattisgarh.

These states have an average age of marriage below the legal limit of 18 for girls. While child marriage is banned in India, it is not ‘void’ and has to be annulled, should either partner wish to do so. In Santadevi’s case, on turning 16, she learnt about her marriage and protested vehemently. But when her so-called husband and in-laws refused to give in, she decided to fight for her rights and break free.

In the field of women and children trafficking, a special attention has to be given to forced marriages. In *General Recommendation No. 21* (13th session, 1994)¹, the Committee on Elimination of Discrimination against Women clarified the scope of Article 16 point 1) a) and b). Although most countries report that national constitutions and laws comply with the Convention, customs and traditions failure to apply such legislation, contravening the Convention in practice. In other countries that allow such practices, the marriage of a child is pursued for money or social advancement and, in others, women's poverty forces them to marry foreign nationals for financial security. It is known that there are countries which, on the basis of custom, religious beliefs or

⁶ROPERO CARRASCO, J.”Immigration, Integration and Diversity: A Critical Analysis Based on the Treatment of Female Genital Mutilation in the European Union”, in *Cuadernos Europeos de Deusto*, N. 57/2017, Bilbao, pp. 133-165.

ethnic origins of particular communities, allow marrying or remarrying with a forced marriage⁷.

In both cases -child marriage and female genital mutilation- those traditional practices belong to different and diverse cultures. However as attacks on the dignity, motherhood, health, and sexuality, they must not continue taking place in a badly understood of conservation of traditions. They cannot be accepted from a human rights perspective⁸.

It has been confirmed that issues of violence facing women and girls – be it child marriages, trafficking, bride kidnapping, sexual or domestic violence and economic violence – are endemic in various country contexts and merit a comprehensive response at the country levels. All these cases alarm and worry the population.

A plurality of people decisions have to be taken in this field. What international laws and policies are in place to address issues of gender violence against women? Does each country have a national action plan to combat violence against women?

III. Women rights perspective ⁹

Gender equalities have been included in numerous international instruments, universally and regionally. Seventy years after the Charter of the United Nations (hereinafter “The Charter”) was enacted, we are still facing numerous violations against women. The Charter sanctioned for the first time in general the principle of non-discrimination between men and women: while the Preamble affirms faith in the fundamental rights, in the equal rights of men and women, the articles introduce, among the purposes of NU, the “respect for human rights and fundamental freedoms for all human beings without distinction as to race, sex, language and religion¹⁰”.

The Universal Declaration of Human Rights of 1948 (hereinafter the "Universal Declaration") developed in practice the prohibition of discrimination based on gender (art. 2) within the family, marriage and motherhood, political rights and work¹¹. Subsequently, the two International Covenants of 1966 on Civil and Political Rights

⁷ CUADRADO RUIZ, M. Á., Forced marriages. IFCCCLGE, Paper collection, 2015; CUADRADO RUIZ, “El delito de matrimonio forzado”, en PÉREZ ALONSO, E. (Ed.) 2017, pp. 595 and ss.

⁸ ROPERO CARRASCO, J., en “El Derecho penal ante la mutilación genital femenina”, in Rev. *La Ley*, num. 5383, 26 sept. 2001, p. 2. See also supra notes 3 and 4.

⁹ See STAIANO, M. F., “Gender issues in an international perspective under the light of the new White Paper on Women of the People's Republic of China.”, in CUADRADO RUIZ, M. Á., Forced marriages. IFCCCLGE, Paper collection, 2015,

¹⁰ UN Charter, art. 1.

¹¹ *The Universal Declaration of Human Rights*, Art. 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is independent, trust, non-self-governing or under any other limitation of sovereignty.

(particularly articles 2, 3, 23, 26) and on Economic Social and Cultural Rights (especially articles 2, 3, 7, 10) have intended to stress more strongly the commitment of all States to ensure equality in the enjoyment of rights, translating into legal binding the rights enshrined in the Universal Declaration. These regulatory tools general have an essential contribution to the affirmation of the principle of non-discrimination against women.

However, over the years all the limits presented by the adoption of a general anti-discriminatory perspective came out, in terms of the pursuit of substantial gender equality. The need matured over the years has been to develop legislative instruments designed to detect and counteract fully the initial disadvantage suffered by women in many areas of social life and the specific violations of which they are still victims, adopting a transversal vision of gender equality in economic, social, cultural, political and environmental issues. In this sense, it is important to emphasize the fundamental role since the mid-seventies developed by the World Conferences on Women (Mexico City in 1975, Copenhagen in 1980, Nairobi in 1985, Beijing in 1995, New York 2000) that allowed negotiating a minimum core of common policies in key areas for the advancement of the status of women.

The approval of the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter "CEDAW" or "Convention"), adopted by the General Assembly on the 18th December 1979 and entered into force on the 3rd September 1981, has certainly represented the most significant international act on gender equality. This Convention codifies all previous instruments concerning human rights in general and women's human rights specifically. Until then, many in the international community relegated violence against women to the "private" sphere. In the Convention instead this view was overcome, considering all forms of violence, including domestic violence, as human rights violations, thus making them amenable to the responsibilities of States and the international community. This tool therefore provides a valid guarantee for gender equality and freedom from all forms of discrimination by the States and by private agents. The elimination of discrimination is demanded in all spheres of human existence without distinction. The definition of discrimination which is provided from the CEDAW is: "For the purposes of the [...] Convention, the term *discrimination against women* shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field"¹².

The rights contained in the Convention can be classified into three different categories, depending on the type of actions that are required by the State: a) a first group of rules grants a specific right, focusing on civil and political rights; b) others require the State to adopt appropriate measures, for example, in order to change discriminatory patterns and behavior patterns; c) others require Member States to implement actions aimed at achieving a certain purpose, in particular towards the respect of economic and social rights. The peculiar character of the Convention is represented by a desire to reconcile the mere recognition of the right to enjoy equal

12 UN, *Convention on the Elimination of All Forms of Discrimination against Women*, art. 1.

treatment with respect to men, providing a clear obligation on States to adopt positive measures that, in derogation from the principle of formal equality, enable to pursue the goal of equality of women with men, in terms of effectiveness.

There are other important documents, though without a legal value, that are worth mentioning. The *Declaration and Program of Action of Vienna*¹³ of 1993. An entire section of this document is reserved for women's human rights. In this document human rights of the woman and the child were defined as inalienable, integral and indivisible components of universal human rights (Art. 18). The *Declaration and Platform of Action of Beijing* of 1995 became in practice an agenda on women's human rights. The idea that “women's rights are human rights” is widely held in this document. Five years later – **in Beijing + 5 – also the crimes of honor, forced marriages and sexual violence by husbands were defined human rights violations.**

These documents, together with others such as the *Declaration on the Elimination of Discrimination against Women*, the *Declaration on the elimination of violence against women*¹⁴, adopted by the UN General Assembly Resolution 48/104 of 20/12/1993, and the *Declaration on the protection of women and children in situations of emergency and armed conflict*¹⁵ are not legally binding but have ethical and political weight and can be used to achieve local, national and regional objectives. In addition, the documents of the Conference may serve to consolidate and interpret international treaties, such as the International Covenant on Civil and Political Rights¹⁶ and the Covenant on Social, Economic and Cultural Rights¹⁷. These documents, when they are signed by a nation, have international legal status and can be used by judges who are dedicated to the issues of justice for human rights violations (Bunch-Frost).

In July 2010, the General Assembly of the United Nations has established *UN Women*, a new UN body for the promotion and protection of women's rights which brings together into one four previous UN offices that dealt with gender equality (Division for the Advancement of Women - DAW, International Research and Training Institute for the Advancement of Women - INSTRAW, Office of the Special Adviser on Gender Issues and the Advancement of Women, the UN Fund for Women's Development - UNIFEM).

In Europe, the agreement of the Council of Europe, signed in Istanbul, in 2011, on "prevention and fight against violence against women and domestic violence ", which devotes its art. 42 to the "Unacceptable justification of criminal offenses, including crimes allegedly committed in the name of "honor":

"1. The Parties shall adopt the necessary legislative or other measures to ensure that, in the criminal proceedings opened by the commission of one of the acts of violence included in the scope of application of this Convention, do not consider culture,

13 Available at <http://www.ohchr.org/english/law/vienna.htm>

14 Available at <http://www.ohchr.org/english/law/eliminationvaw.htm>

15 Available at <http://www.ohchr.org/english/law/protectionwomen.htm>

16 Available at <http://www.ohchr.org/english/law/ccpr.htm>

17 Available at <http://www.ohchr.org/english/law/cescr.htm>

custom, religion, the tradition or the supposed "honor" as justification of said acts. It covers, in particular, allegations that the victim would have transgressed cultural, religious, social or traditional norms or customs relating to appropriate behavior.

In Spain, "the entry into force of the L.O. 1/2004, of December 28, "of measures comprehensive protection against gender based violence", has promoted multiple actions to combat this phenomenon. In this sense, institutions and agencies, such as observatories, courts and specialized prosecutor's offices in the matter, together with the establishment of records and statistics are fighting against such type of violence.

The purpose of this Organic Law is set out in Article 1 .1: "The purpose of this Law is to act against violence, which as a manifestation of discrimination, the situation of inequality and the power relations of men over women, is exercised on these by those who are or have been spouses or who are or have been linked to them by similar relationships of affectivity, even without coexistence. In this context, the concept of domestic violence is first separated from that of gender violence. FGM could be considered violence in the domestic sphere but not gender violence to be able to apply the measures of the Integral Law.

From my point of view, it is evident that this is a reason for the modification of this Law to be carried out promptly in order to comply with the European guidelines. Thus, the European Parliament Resolution of 5 April 2011 on the priorities and general guidelines for combating gender-based violence expressly mentions FGM together with gender violence and domestic violence as a basis for future legislative instruments in the field of Criminal Law Likewise, Directive 2012/29 / EU urges the Member States to improve their legislation and describes gender violence as a form of discrimination and a violation of the fundamental freedoms of the victim ... and includes, but is not limited to ... sexual violence, rape, aggression and sexual harassment, human trafficking and slavery and other harmful practices such as forced marriages and FGM. As can be seen, at a European level gender violence includes these harmful practices and, however, with the current wording of the Spanish Law on the Comprehensive Protection of Gender Violence, in its art. 1.1. IT IS LEFT OUT OF ITS FIELD OF ACTION to the FGM. That is why I propose to "convert" FGM into a gender crime through the application of gender aggravation, art. 22.4 Cp, aggravating circumstance introduced in the Penal Reform of 2015; this is "Committing crime for reasons of gender", for being a woman, which is what happens in FGM¹⁸.

At the same time, training of professionals is encouraged to detect these behaviors. Also, the creation of protocols¹⁹ has been very important for prevention of these behaviors.

¹⁸ CUADRADO RUIZ, M.A., "Violencia contra las mujeres y niñas. La mutilación genital femenina", in Libro homenaje al Prof. Morillas Cueva. Madrid, 2018.

¹⁹ In Spain The Protocol was published on February 6, 2015, as an action to fight against Gender Violence (although, as I have stated, this crime does not fall within the scope of application of the Comprehensive Law against Gender Violence of 2004), against the violence that is exerted against women to combat Female Genital Mutilation.

IV. Forced marriage. Introduction

National and international communities are increasingly recognizing child marriage as a serious problem, both as a violation of girls' human rights and as a hindrance to key development outcomes. Although there are countries that allow the marriage of a woman where it is combined for money or social advancement²⁰.

Forced marriages are usually classified into two categories: adult, those in which both parties are adults and child marriages, those in which both parties are minors. Clearly, in the case of child marriages there is a disvalue action, and to exercise violence or intimidation to compel consent is easier in cases where the victim is a minor. In such cases there is also a greater impairment of value of result, since the effects that occur in these cases are more severe in those marriages in which the victim is a minor.

Efforts to address child marriage in many parts of the world date back to the 1920s. For example, the first legislative attempt to end child marriage in India was through the passage of the "Sarda Act" in 1929 (Mukherjee 2006). More recently, legal reform began to gain ground in the 1970s and 1980s, as countries such as Bangladesh, India and Indonesia established or raised the legal minimum age of marriage to 18 for girls.

During the same period, human rights activists and the United Nations launched efforts to address harmful traditional practices affecting women. However, programmatic interventions to eradicate this practice have only gained momentum since the 1990s, coinciding with the attention to adolescent reproductive health at the Cairo International Conference on Population and Development in 1994 and the assertion of women's and girls' human rights at the UN International Conference on Women in Beijing in 1995 (UNICEF 2001).²¹

1) Sanctions against forced marriage: the European legal context

In many countries in Africa and Asia child marriage falls into what amounts to a sanction's limbo. It may be prohibited in the existing civil or common law, but also widely condoned by customary and religious laws and practice. This is usual where marriages take place according to customary rites and remain unregistered. The situation is further complicated in countries where legislation was introduced by the colonizing power on the understanding that many customary practices would continue even if they were inconsistent with new laws²².

In Europe the Directive 2011/36 / EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims, includes forced marriage between behaviors that can lead to exploitation of people.

²⁰ CUADRADO RUIZ, M. Á., Violence against women. Forced marriages. IFCCCLGE, 2015; CUADRADO RUIZ, "El delito de matrimonio forzado", en PÉREZ ALONSO, E. (Ed.) 2017, pp. 595 y ss.

²¹ ANJUM ALHOTRA/ANN WARNER/ALLISON MCGONAGLE/SUSAN LEE - RIFE, *Solutions to End Child Marriage WHAT THE EVIDENCE SHOWS*. ICRW, 2011

²² UNICEF, INNOCENTI Digest, n°7 2001, *Early marriage. Child spouses*, p.8. UNICEF,

Countries such as France, Denmark, UK, Germany and Norway include child marriage as a crime. The French Criminal Code, meanwhile, referred to forced marriages in its Article 222-14-4 and provides for the imprisonment of three years and a fine of € 45,000. In the UK, the Anti-social Behavior, Crime and Policing Act 2014 makes forcing someone to marry (including abroad) a criminal offense and provides in its Part 1 a prison sentence of up to seven years. The law came into effect in June 2014 in England and Wales and in October 2014 in Scotland. In Northern Ireland, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 criminalizes forced marriage (section 16 - Offence of forced marriage). In Portugal, where Bill 647 / XII reform introduces this criminal offense, and the penalty is imprisonment of up to five years.

Imprisonment of six months to five years is expected in the German Penal Code in its paragraph 237 (1) and also contemplates in paragraph 237 (4) the possibility of punishing the facts with imprisonment up to three years or a fine in the less serious cases²³.

2) In the Spanish Penal Code

Up until 2015, the Spanish Criminal Code did not include this crime, and then article 172 bis was added in the Spanish Criminal Code, with the following content:

"1. Whoever with serious intimidation or violence compels another person into marriage shall be punished with imprisonment of six months to three years and six months or a fine of twelve to twenty four months, depending on the severity of coercion or the means employed.

2. The same penalty shall be imposed on anyone who, in order to commit the offenses in the preceding paragraph uses violence, severe intimidation or deception to force another to leave Spanish territory or to impede to return to it.

3. Penalties are imposed in their upper half when the victim is minor."

We can say, therefore, that in this particular aspect the Spanish Criminal Code is among the less "harsh".

The reason to raise the penalty in such cases is because the victim is a child. Clearly, in the case of child marriage there is a disvalue action: to exercise violence or intimidation to compel consent is easier in cases where the victim is a minor and the effects that occur in these cases are more serious. In addition, when the victim is a minor, marriage without consent will be considered null as who should consent does not have the capacity required to do so.

Spanish legislation includes the condition of violence or serious intimidation. Family pressures are critical when the victim contracts marriage. The relatives of the victim are usually those who put pressure to contract marriage, and therefore they will respond as immediate perpetrators of the crime.

However, in countries of origin, the practice, as was related by Santadevi Meghwal, shows that there is no violence or serious intimidation in cases of child

²³ CUADRADO RUIZ, M. Á., "Violence against women. Forced marriages", IFCCCLGE, 2015, Paper collection.

marriage. It is a custom, a tradition admitted and the child future spouse is often months or few years old.

On the other side, in Spain like in other European countries²⁴, the role of the other spouse is also relevant in the criminal conduct, as he or she can be the one who compels the victim to marry, and will therefore, respond as the immediate author of the crime, but it might also be relatives who compel the victim. In this mode of behavior intervention of the future husband will also be relevant for the application of criminal law. That is, if one is aware of the lack of consent of the future spouse, and considering the consent is a condition *sine qua non* to for marriage to effectively take place, the participation in the crime will be qualified as necessary cooperator and definitively considered as author. In the same sense this would apply to whom officiates the marriage ceremony knowing the lack of consent of one of the spouses.

I should emphasize the influence that an early marriage has on the right of the education of the child. Once married, girls become domestic servants in their early age which implies it would deprive the victims of school. Another direct consequence of lack of training is that wives are economically dependent on their husbands and it costs them more rebelling against this situation of bonded labor. This should be added to other attacks on physical and moral integrity such as being battered by their husbands during the marriage, in addition to being forced to practice sexual relations without consent. What will also be considered in European countries gender based violence²⁵ or even sexual crimes, if the girl refuses to sexual relations.

V. Female Genital Mutilation/Cutting

Reports of genital mutilation of girls,²⁶ neglect sexual abuse and other forms of physical or psychological violence against children and women have long been recorded, but the grave and urgent nature of this global problem has recently been revealed.

²⁴ This crime was also regulated in other countries such as France, Denmark, UK, Germany and Norway. The French Criminal Code, meanwhile, referred to forced marriages in its Article 222-14-4 and provides for the imprisonment of three years and a fine of € 45,000. In the UK, the Anti-social Behavior, Crime and Policing Act 2014 makes forcing someone to marry (including abroad) a criminal offense and provides in its Part 1 a prison sentence of up to seven years. The law came into effect in June 2014 in England and Wales and in October 2014 in Scotland. In Northern Ireland, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 criminalizes forced marriage (section 16 - Offence of forced marriage). In Portugal, where Bill 647 / XII reform introduces this criminal offense, and the penalty is imprisonment of up to five years.

²⁵ PERAL LÓPEZ, M.C., “El supremo interés del menor. Víctimas de la violencia de género”, in CUADRADO RUIZ, M.Á. (Ed.) *Cuestiones penales. A propósito de la Reforma penal de 2015*, Madrid, 2016, pp. 55-66.

²⁶ CUADRADO RUIZ, M.A., “Violencia contra las mujeres y niñas. La mutilación genital femenina”, in Libro homenaje al Prof. Morillas Cueva. Madrid, 2018; CUADRADO RUIZ, “Violencia contra las mujeres en la mutilación genital femenina”, in 8º Congreso para el estudio de la violencia contra las mujeres, Sevilla 24-25th Oct, 2017.

Migratory movements have brought with them the practice of FGM in groups of immigrants from places where there is a settled tradition.

Hence, the concern about FGM at the international level.

1) From a health perspective²⁷

The World Health Organization (WHO) defines female genital mutilation (FGM) as all procedures that intentionally alter or cause injury to the female genital organs (ex. involve partial or total removal of the external female genitalia, or other injury) for non-medical reasons. This practice is mostly carried out by traditional circumcisers, who often play other central roles in communities.

The WHO recognizes a FGM classification into 4 major types:

- Type 1: Often referred to as clitoridectomy, this is the partial or total removal of the clitoris (a small, sensitive and erectile part of the female genitals), and in very rare cases, only the prepuce (the fold of skin surrounding the clitoris).
- Type 2: Often referred to as excision, this is the partial or total removal of the clitoris and the labia minora (the inner folds of the vulva), with or without excision of the labia majora (the outer folds of skin of the vulva).
- Type 3: Often referred to as infibulations, this is the narrowing of the vaginal opening through the creation of a covering seal. The seal is formed by cutting and repositioning the labia minora, or labia majora, sometimes through stitching, with or without removal of the clitoris (clitoridectomy).
- Type 4: This includes all other harmful procedures to the female genitalia for non-medical purposes, e.g. pricking, piercing, incising, scraping and cauterizing the genital area.

It is demonstrated that this procedure has no health benefits for girls and women, and increases the short and long term health risks of women and girls. The instruments used may be old, rusty knives, razors, scissors, or heated pebbles, which are rarely washed between procedures, these actions put at risk to acquire any transmissible infection: viral as human immunodeficiency virus (HIV) or viral hepatitis C or B, or bacterial infection as tetanus. Homeostasis is assured by catgut sutures, thorns, or homemade adhesive concoctions such as sugar, egg, or animal excrement. The girl's legs are bound around the ankles and thighs for approximately one week after the procedure, and she is kept in bed.

FGM is unacceptable from a human rights and health perspectives, and of course the right to life when the procedure results in death.

It was mentioned that some severe damage can be developed when FGM is carried out. There is also the need to take into account other circumstances, for example:

²⁷ Medical considerations are made by VALIENTE, A., Medical specialist in infectious diseases and microbiology. Andalusian Health Service. Virgen Macarena Hospital in Seville, Spain.

* Anesthesia and antibiotics are rarely administered. This issue implies pain and a high variety type of infections due to the lack of supply antimicrobial prophylaxis, and to not test for multidrug resistant microorganism in order to avoid infections due to them (eg: penicillin-resistant *S.aureus*, Extended spectrum beta-lactamase (ESBL)-producing *Enterobacteriaceae*, *Klebsiella pneumoniae* carbapenemase (KPC)-producing, etc...)

* Periprocedural complications. In this case surgical precision can be compromised by lack of anesthesia, the struggles of the child held forcibly in the lithotomic position, and the experience of the operator. Success is often dependent upon chance, rather than accuracy. Early post-procedure complications thus include hemorrhage, infection, Liguria, and sepsis

* Short and long term infections: surgical site infection. It is an infection that occurs after surgery in the part of the body where the surgery took place. Surgical site infections can sometimes be superficial infections involving the skin only (wound infections). Other surgical site infections are more serious and can involve tissues under the skin and organs, for example: endometritis (infection of the uterine lining), sepsis and pelvic inflammatory disease (PID), these clinical situations are potentially life threatening pathologies.

* Long-term gynecological issues. Women or girls who have undergone type II or III female genital cutting tend to suffer more long-term complications than those who have undergone type I or IV. The most commonest are dysmenorrheal, dyspareunia, and chronic vaginal infections. Other complications are related with scarring and included: fibrosis, keloids, sebaceous (epidermal) cysts, vulvae abscesses, and partial or total fusion of the labia minora or majora. The latter complication can lead to hematometra or hematocolpos. An a very important clinical and dramatically situation as a result of FGM is that the infertility rate is higher in circumcised women and girls compared to the general population (25 to 30 versus 8 to 14 percent). The frequency of infertility appears to correlate with the anatomical extent of female genital cutting.

Besides, there is another major problem and that is the erroneous belief that the procedure is safer when medicalized instead of performed by local traditional circumcisers and for this reason it is very important that health professionals do not to perform such procedures.

It is imperative that health providers understand the health and social issues related to female genital mutilation/cutting so that they can manage the immediate and long-term complications of the procedure because of high rate of morbid-mortality.

2) From a legal perspective.

FGM is unacceptable. A series of measures aiming to combat FGM has been taken. The resolution of the European Parliament of 11 June 1986 in its article 47 refers to "Women belonging to minorities", recommends combat ablation and infibulation through national legislation of each State Member State. But the two most important European instruments are the Resolution of the 2001 European Parliament / 2035, of 20 September 2001 on female genital mutilation, which considered FGM as an attack to human rights and a form of violence against women and Resolution 2008 / 2071, May

16 that requests to States members to impose penalties in cases of injuries caused by FGM. In March 2009, the European Parliament approved Resolution 2008 / 2071 on the fight against FGM in the European Union to achieve the highest degree of harmonization among laws of the Member States²⁸.

In April 2009 the Parliamentary Assembly of the Council of Europe adopted a Resolution by which I invite States members to adapt their national legislation to prohibit and punish forced marriages, female genital mutilation and other violations of human rights by gender based violence.

a) The crime of female genital mutilation/cutting in the Spanish penal code

In the exhibition of motives of the Act 11/2003 it was explained that: (...) reform arises from the recognition that with the social integration of foreigners in Spain we have new realities for which Criminal Law must give adequate response. Thus, as an equally remarkable novelty is the crime of genital mutilation or ablation. This is because the genital mutilation of women and girls is a practice that must be fought with the firmest, that cannot be justified on supposedly religious or cultural grounds. (...) In the current reform article 149 of the criminal code was amended, expressly mentioning genital mutilation, in any of its manifestations, as a behavior qualified as an injury which is punished with imprisonment of six to twelve years.

The organic Act 11/2003 of 29th September which adopted concrete measures in the field of public safety, domestic violence and social integration of foreigners, introduced a new paragraph in article 149 SPC, referred to serious injuries, with the following text:

article 149. (...) 2. *"who will cause a genital mutilation in any of its manifestations to another shall be punished with imprisonment of six to twelve years. If the victim was minor or disable, will apply the penalty of disqualification for the exercise of parental authority, guardianship, curatorship, guardian, or foster care for four to ten years time, if the judge is deemed suitable to the interests of the child or disable person.*

It seems clear that the reform was introduced to refer the ablation, but ignoring the male genital mutilation²⁹.

Consent: Article 155 of the Spanish criminal code establishes "consent granted by a minor, a disabled person or a person in need of special protection won't be valid". So, there is no valid consent in the case of children. If a girl consents to female genital mutilation it is clear that her consent has no efficiency, has not existed. By the ages in which FGM is practiced, usually babies, or even in childhood, it is evident that parents are in guarantor position of their life and health. Giving their daughters to be maimed through the ancient ritual of FGM made them responsible of this crime.

²⁸ SILVA CUESTA, A., *La mutilación genital femenina. Aspectos jurídico penales*. Granada, 2017.

²⁹ SILVA CUESTA, A., "La mutilación genital femenina: de los Derechos Humanos a la tipificación penal", *Revista General de Derecho Penal*. Iustel. Mayo 2016.

Moreover, if the victim was under age or is a disabled person, the penalty of special disqualification for the exercise of parental authority shall be applied, if the judge considers it suitable to the child's interests. In the majority of cases it is the parents or relatives who oblige the victim to submit to this kind of aberrant mutilation. Thus the special disqualification is absolutely necessary in order to combat these behaviours and protect women and girls from future attacks or harassment.

VI. Cultural crimes.

Migration and displacements or conflicts have led to certain harmful practices like forced marriages and FGM. These different cultural practices are also imported and these behaviors are transferred to European countries. The profession of such beliefs is alleged to justify the performance of acts or behaviors against to fundamental rights, thus generating conflicts of their own the so-called "multicultural societies", in which, "under the protection of a supposed collective right of minorities, of foreign origin, to preserve their cultural identity, these beliefs are often used, considered unrestricted or absolute, to justify exceptions in the interpretation and application of other fundamental rights." In those cases, the purpose of the subjects belonging to these minorities is none other than to obtain a differentiation from the common treatment, authorizing them to develop behaviors and practices that can be revealed, after all, harmful to human rights³⁰.

That is why it is also important to preserve not only Universal Human Rights but also our cultural values and legally safeguard them in multicultural societies in which equality between men and women and freedom to choose husband has to be real and effective and where life and health are protected by criminal legislation with the most severe penalties.

The notion of cultural difference to single out court participants of ethnic minority background and to explain crime among them surfaces in some court cases, albeit in subtle ways. In identifying the characteristics of the 'foreign culture' that get picked up by court operators, gender stereotypes play an important role. In the case of men, culture is used in order to exacerbate and condone their violent, hyper-masculine and sexual behavior. For women, their cultural background is brought up to explain their passivity, lack of agency and propensity to be manipulated by male relatives³¹.

It seems obvious that cultural expressions must therefore respect a minimum of fundamental human rights, which should be clear to all citizens, regardless of their origin or culture traditions. From my point of view, the convenience of including in the Spanish Penal Code the female genital mutilation and forced marriages as singular crimes is justified. Both, without a doubt, are behaviors that violate fundamental rights: physical and mental health and physical integrity (Article 15 SC), in the practice of genital mutilation; and the right to personal liberty (Article 17 SC), when someone is forced to enter into a marriage without their consent. Since such legal assets

³⁰ PORRAS RAMÍREZ, J. M^a (coord.), *"Derecho de la Libertad Religiosa"*, Madrid, 4^a edición, 2016, pp. 36-37.

³¹ ALIVERTI, A., "Culturalising Crime? Racialisation through Criminal Litigation".03 Nov 2016 University of Oxford. Faculty of Law. <https://www.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2016/11>.

are already protected in the Spanish Criminal Code through the crimes of injury and coercion, respectively, a relevant doctrinal sector³² has expressed its rejection of the specific typing to these behaviors, not only because it is considered unnecessary, since there is no legal loophole, but to understand that its incorporation is sponsored for an ideology that transmits "to society a universalist message of intolerance ethics and rejection against the barbaric practices of groups culturally delayed, under the pretext of protecting their most vulnerable members"³³. Hence, in the opinion of these authors, the identification of such facts as constitutive criminal activities of certain communities, will lead directly to the criminalization and stigmatization of those. That's why they conclude affirming that a Criminal Law that does not respect cultural diversity constitutes an unjust Criminal Law³⁴.

When migration movement settles in another place, laws of host countries are imposed to radically different culture codes and the weight of cultural assessments beyond the coexistence environment reverts as a penalty reaction in the area of the multicultural movement³⁵; behaviors supported in a particular culture but constitutive of crimes in the host society such as forced marriages and FGM.

In Europe the discussion revolves around cultural crimes or crimes culturally conditioned. Are these cultural traditions a justification or excuse for criminal behaviors? From my point of view, clearly no, but its criminal treatment might reduce the penalty.

"Cultural crimes" acquire a considerable complexity to present some very unique characteristics. First, authors and victims are foreigners. Second, female genital mutilation and forced marriages are manifestations of the so-called genre based violence. And, thirdly, they are the result of acts committed in relation to with minors and women, by members of their family within the family. This implies a greater vulnerability of the taxpayer and, as in other crimes committed in the family context, it represents a substantial increase in the difficulty of carrying persecution, by remaining hidden in the privacy of the family environment, or given the greater pressure suffered by the victim not to denounce. In effect, the passive and active subjects are foreigners or descendants of foreigners, who maintain their traditions and practice the same practices they carry from generation to generation. In addition, the fact of being immigrants places them in a position of greater vulnerability to the State. And being foreigners, it often represents

³² MAQUEDA ABREU, M. "El nuevo delito de matrimonio forzado: Art. 172 bis CP". *Estudio crítico sobre el anteproyecto de reforma penal de 2012 Ponencias presentadas al Congreso de Profesores de Derecho Penal "Estudio Crítico sobre el Anteproyecto de Reforma Penal de 2012"*, ÁLVAREZ GARCÍA (DIR.) Y DÓPICO GÓMEZ-ALLER, J (COORD.). Valencia, 2013, p. 563; DE LA CUESTA AGUADO, P. M. "El delito de matrimonio forzado". *Comentario a la reforma penal de 2015*. Aranzadi. 2015.

³³ IGAREDA GONZÁLEZ, N. "Matrimonios forzados: ¿otra oportunidad para el derecho penal simbólico?" *InDret* 1/2015. www.indret.com.

³⁴ ESPINOSA MARÍN DE CEBALLOS, E., "Derecho penal y diversidad religioso-cultural: los delitos de mutilación genital femenina y matrimonio forzado", in *Anuario de Derecho Eclesiástico del Estado*, vol. XXXIII (2017), pp. 299-316.

³⁵ HERRERA MORENO, M., «Multiculturalismo y tutela penal: a propósito de la problemática sobre la mutilación genital femenina», in *Lex Nova*, n.º 5, 2002 p. 69.

problems of adaptation and cultural integration, particularly linguistic, and other difficulties in accessing resources³⁶.

Motivation capacity is the basis of criminal liability. But this does not happen in cases in which the subject has no knowledge of the prohibition. In these cases who does not know a standard cannot motivate himself by it; thus criminal law waives the imposition of a penalty. For Zaffaroni³⁷, "the one who knows the prohibitive norm, but cannot internalize it for cultural reasons, as a rule, cannot be reproached for that lack of internalization (comprehension)" and, therefore, we are faced with an invincible prohibition error, an authorship by conscience that would exceptionally exclude guilt".

The author believes that he has acted lawfully, although that belief can come determined by error of the prohibitive norm. In this case, occurs the exemption or exclusion of criminal liability, it is invincible error. If on the contrary the mistake is avoidable, one or two degrees lower punishment is imposed³⁸.

Can be justified the attack on certain valuable goods of host societies on the basis of a cultural custom of the migrant? Is applicable in those cases the mistake of prohibition?

In several judgement³⁹ Spanish courts did not consider the mistake of prohibition because 'ignorance or lack of knowledge that FGM is a crime wielded by the accused parent not may without prejudice to the viability of the criminal action exercised:

“Although FGM is considered an ancestral practice of more than three thousand years in their country which does not seek to undermine the physical integrity of women but facilitates the integration of the child in their community," even though, while these cultural practices have been extended to our borders as a result of migration flows, "can not motivate the construction of a theory of the mistake of prohibition founded in cultural facts to which the subject belongs,". "The respect for traditions and cultures has an impassable limit: human rights, as the common denominator enforceable in all cultures, traditions and religions. Ablation of the clitoris is not culture, is mutilation and female discrimination”.

On the other hand Asúa Batarrita, as well as Zaffaroni are the opinion that "in terms of criminal prosecution, the clarity of the prohibition of FGM as illegal, and not

³⁶ ESPINOSA MARÍN DE CEBALLOS, E., “Derecho penal y diversidad religioso-cultural: los delitos de mutilación genital femenina y matrimonio forzado”, in *Anuario de Derecho Eclesiástico del Estado*, vol. XXXIII (2017), p. 302; BRUMAT, L. “La vulnerabilidad de los inmigrantes como sujetos de derechos humanos: un análisis de la SB 1070 del Estado de Arizona” in *Revista Ágora Internacional* n.º 13, sept. 2011.

³⁷ ZAFFARONI-ALAGIA-SLOKAR.: *Derecho penal. Parte general*, Buenos Aires, 2003, p. 736.

³⁸ Art. 14 Spanish Penal Code.

³⁹ See Sentencia 42/2013, 13th May, 9ª Sec. Audiencia Provincial de Barcelona; Sentencia del Tribunal Supremo 835/2012, 31st october.

acceptable conduct, is not incompatible with the nuance of blame" according to personal circumstances⁴⁰.

VII. Education for empowerment and intellectual development

From my point of view the key to girls' progress is education and learning. Persuading parents to keep their daughters in school and ensuring that they receive a basic education, as is their right, is important for a number of personal and family reasons, as well as wider social and economic reasons including postponement of marriage⁴¹.

Promote equality

Transformation can begin, in part, in the aftermath of a crisis, but that largely depends on the response. All humanitarian issues involve some kind of gender perspective, because men and women, girls and boys experience the world in markedly different ways. All types of humanitarian action therefore need to recognize and respond to these differences, and actively correct any disparities.

Wherever feasible, humanitarian assistance can challenge existing forms of discrimination, such as through providing comprehensive services for survivors of gender-based violence. It can enlist men and boys in building acceptance of new social norms, such as around women's inherent rights and the peaceful resolution of differences⁴².

VIII. Conclusions

Psychologists, anthropologists, and political scientists have studied how migrants can integrate—maintaining the heritage culture of the country where they were born, while simultaneously adapting to a host culture.

Fighting against this violence against women and children through criminal penalty theories and defending their rights at the national and international level is a way of employing the criminal justice system in the defense of human rights but it would be also desirable to support policies and programmes that promote education—from villages and schools to whole countries as well as also collaborate with partners around the world to eliminate child marriage and female genital mutilation, practices that violate girls' rights and perpetuate inequalities.

⁴⁰ ASÚA BATARRITA, A.: "Criminología y multiculturalismo. Medidas internacionales y propuestas de tratamiento jurídico para la erradicación de la mutilación genital femenina", *Eguzkilore. Cuaderno del Instituto Vasco de Criminología*, n. 18, december 2004, p. 94.

⁴¹ Vid. UNICEF, INNOCENTI Digest, nº7 2001, *Early marriage. Child spouses*, p.13.

⁴² Cfr. UNFPA, *Shelter From The Storm. A transformative agenda for women and girls in a crisis-prone world*. State of world population 2015

Principle of minimum intervention must be a reality and, therefore, Criminal law can only be applied in the face of the failure of other previous means, such as the one that has to propitiate an adequate and real integration of the immigrant, that respects their culture, traditions and beliefs, but that, at the time, does not consent the violation of human rights, as happens in cases analyzed. It is, then, that before resorting to Criminal Law, it must be attended to other measures, based on information, guidance, advice, training, and the provision of sufficient resources to prevent such behaviors and, where appropriate, repair them in accordance with the provisions of the different existing protocols in the field.

Many of these prevention programs to prevent illegal traditions such as FGM or forced marriages have indeed expanded in number and scope during the last decade; almost two dozen have documented some type of an evaluation. The largest number of evaluated programs is in South Asia, especially in Bangladesh and India. Programs in a broader range of African and Middle Eastern countries, including Ethiopia and Egypt, are also adding to the evidence based in strengthening crime prevention strategies against the smuggling of migrants and trafficking.

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