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Citizens of Europe

Culture e diritti

a cura di
Lauso Zagato, Marilena Vecco



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Sapere l'Europa, sapere d'Europa

Collana diretta da
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Culturally motivated crimes against women in a multicultural Europe

The case of criminalization of FGM in the 2011 CoE Istanbul Convention

Sara De Vido

(Università Ca' Foscari Venezia, Italia)

Abstract The so-called 'culturally motivated crime' is a phenomenon related to multiculturalism, that can be analysed with a special focus on a conduct committed against women: female genital mutilation. The choice of dealing with such sensitive topic derives from a provision of the recent CoE Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter CoE Istanbul Convention), in force as of August 2014, which obliges States parties to criminalize female genital mutilation, and from the practice of European States mainly related to asylum and refugee status. An attempt to explain why the protection of core rights, like the prohibition of inhuman treatment and the protection of the physical integrity of a person, prevails in Europe over other considerations related to the (human) right to cultural diversity will be presented. Nevertheless, it will be also argued that, due to the growing presence of immigrant communities, the mere repression is not enough, but it should be accompanied by measures aimed at developing the knowledge of human rights.

Summary 1. Multiculturalism and culturally motivated crimes. – 2. FGM as a violation of human rights: challenges of multiculturalism for European Countries. – 3. The provisions on FGM criminalization in the 2011CoE Istanbul Convention on preventing and combating violence against women. – 3.1. The ECtHR jurisprudence on FGM. – 4. State practice in Europe concerning FGM. – 4.1. Some examples of European States' legislation prohibiting FGM. – 4.2. National jurisprudence on FGM. – 5. FGM and the right to cultural diversity: beyond repression.

Keywords Multiculturalism. Female genital mutilation. Women. Istanbul convention.

1 Multiculturalism and culturally motivated crimes

Migration flows have caused over the centuries significant demographic and social changes in the Countries of destination. From a pure descriptive point of view, the term 'multiculturalism' identifies the «actual pluralism present in society», which derives from «the coexistence of longstanding minority groups, such as the distinct linguistic communities within Belgium, Canada, and Switzerland, or it might be due to the migration of peo-

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ple with different cultures, religions, languages, and origins, as is the case in many countries around the world» (Bloemraad 2011; Xanthaki 2010, p. 23). In this sense, Europe is multicultural. From another perspective, multiculturalism defines a set of policies endorsed by States in order to deal with an increasing number of immigrants (Kymlicka 2012). In Western Countries, these policies have shifted from the recognition and accommodation of diversity (from 1970s to mid 1990s) to a «return of assimilation» with a consequent «reassertion of ideas of nation building, common values and identity, and unitary citizenship» (Kymlicka 2012, p. 3). Despite criticism over the failure of multiculturalism,¹ and notwithstanding the data on migration flows,² cultural diversity is a key feature of contemporary societies.³ The question is however how to deal with cultural diversity when the behavior of a foreigner dictated by tradition is considered to be ‘a crime’ for the ‘host’ State. Cultural rights, which are at the heart of this book, include the right to enjoy and develop cultural life and identity (Stamatopoulou 2012). «Culture» may be regarded «as a way of life, the sum of material and spiritual activities and products of a community».⁴ However, as observed by Ayton-Shenker (1995), «the right to culture is limited at the point at which it infringes on another human right. No right can be used at the expense or destruction of another, in accordance with international law».

This article will focus on a sensitive phenomenon related to multiculturalism, the so-called ‘culturally motivated crime’, with specific regard

1 Kymlicka 2012, p. 15, outlines that «Chancellor Angela Merkel’s announcement that multiculturalism has «utterly failed» is puzzling, since the approach has not actually been tried in a significant way in Germany. Official policy at the national level has been hostile to institutionalized pluralism, and multicultural initiatives have emerged primarily in cities with large immigrant populations. Merkel’s critique of multiculturalism is therefore a red herring, but as ... it serves a political purpose». Nevertheless, Kymlicka 2012, p. 9, is convinced that multiculturalism has not failed and that ‘multiculturalism-as-citizenization’ is the answer: it is about «constructing new civic and political relations to overcome the deeply entrenched inequalities that have persisted after the abolition of formal discrimination».

2 See OECD (2013). *International Migration Outlook 2013* [online]. OECD Publications. http://www.keepeek.com/Digital-Asset-Management/oecd/social-issues-migration-health/international-migration-outlook-2013_migr_outlook-2013-en#page1 (2014-04-26). The report shows that in OECD Countries, permanent immigration increased by about 2 per cent in 2011 (OECD 2013, p. 16). Data shows however that Countries which used to be of destination are facing an opposite trend: immigrants are moving back to their Countries of origin.

3 CoE, *White Paper on Intercultural Dialogue*. «*Living Together As Equals in Dignity*», Strasbourg 2008, p. 19: «The cultural diversity of contemporary societies has to be acknowledged as an empirical fact».

4 Hence the right of self-determination, including cultural development, the rights to freedom of thought, religion and association, the right to education, and also the right to maintain and develop culture (Donders 2010, p. 19).

to a conduct committed against women: female genital mutilation.⁵ To our purposes, a culturally motivated crime is an act committed «by a member of a minority culture, which is considered an offence by the legal system of the dominant [but we will prefer the term majority] culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behavior and approved or even endorsed and promoted in the given situation» (Van Broeck 2001, p. 5; Basile 2007, p. 1296). Examples are the Japanese *oyako-shinju*, or parent-child suicide, and the Laotian *zij poj niam*, or marriage by capture. The choice of dealing with such sensitive topic derives from a provision of the recent CoE Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter CoE Istanbul Convention), in force as of August 2014, which obliges States parties to criminalize female genital mutilation, and from the practice of European States mainly related to asylum and refugee status. We will try to explain why the protection of core rights, like the prohibition of inhuman treatment and the protection of the physical integrity of a person, prevails in Europe over other considerations related to the (human) right to cultural diversity. Nevertheless, we will also argue that, due to the growing presence of immigrant communities, the mere repression is not enough, but it should be accompanied by measures aimed at developing the knowledge of human rights. For the sake of completeness, we should precise that male circumcision, which will not be addressed in this article, is usually ‘socially accepted’ in Western Countries, although, as FMG do, it causes an injury to the genital organ of a child for cultural or religious reasons (Miazzi, Vanzan 2008, p. 67).⁶ According to some authors, the similarities of circumcision to FMG, as far as the permanent effects on a person and the absence of consent to the treatment are concerned, do not explain a legislation that admit the former, provided that it respects the right to health, but severely punish the latter (Miazzi, Vanzan 2008, p. 79; Levitt, Merry 2011, p. 86). This position is supported by acknowledging the fact that there are different types of FGM and not all of them cause severe injuries.⁷ Nonetheless, the

5 The term ‘cultural defence’ is most used in common law Countries.

6 In Germany the Parliament approved a new law on 12 December 2012 in order to grant parents the right to authorize circumcision by a trained practitioner. This law, approved by a great majority, followed the judgment of the Higher Regional Court in Cologne in May 2012, according to which the circumcision of a young boy on religious grounds amounted to bodily harm, and was therefore illegal (Mancini 2012).

7 What about other practices, which can be extremely debilitating like surgical bodily modification? «There are more serious consequences for resisting FGC than plastic surgery, in the form of exclusion, inability to marry and assume adult status, and even violence. Nevertheless, there are also pressures for cosmetic surgery with its assumptions about beauty, ideal body types, and appropriately sized breasts. Those whose bodies do not conform face exclusion and negative social responses. People who choose plastic surgery seek

World Health Organization (WHO) clearly considers that «female genital mutilation has no known health benefits» and, to the contrary, «male circumcision has significant health benefits that outweigh the very low risk of complications when performed by adequately-equipped and well-trained providers in hygienic settings».⁸

2 FGM as a violation of human rights: challenges of multiculturalism for European Countries

According to the WHO, the notion 'Female Genital Mutilation' (hereinafter FMG) refers to «all procedures involving partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons».⁹ It includes operations as severe as clitoridectomy, excision and infibulation (Type I, II and III respectively), but also other «harmful procedures to the female genitalia for non-medical purposes» (Type IV).¹⁰ These ancient practices are common in Africa, some Countries in Asia and the Middle East and in immigrant communities in North America and Europe.¹¹ Refusing this kind of operation may imply the exclusion of a woman from her community of origin once she is back home, or her community in the Country of destination. It may be even considered an attempt to the honour of the family and a matter of deep shame (from Packer 2002, pp. 17 and 23).

An international convention which prohibits FGM has never been adopted. However, the prohibition of this practice is provided in regional treaties, such as the CoE Istanbul Convention, which will be analyzed in the following paragraph, and the 2003 Protocol to the African Charter

a more positive response and greater acceptance and recognition. Physical appearance seems to affect access to jobs and mates. The consequences of not engaging in the practice are far less severe than for FGC, but in both cases there are significant social pressures that induce women to change body shape to satisfy the expectations of others» in Levitt, Merry 2011, p. 86.

8 WHO (2008). *Eliminating Female Genital Mutilation, An Interagency Statement*. http://www.un.org/womenwatch/daw/csw/csw52/statements_missions/Interagency_Statement_on_Eliminating_FGM.pdf, p. 1 and 11 (2014-04-26). On the misconceptions related to FGM, see Ahmadu 2007, p. 278 ss.

9 WHO 2008, p. 1.

10 WHO 2008, p. 5. Skaine 2005, p. 199 also analyzes the provisions included in different legal systems prohibiting FMG, acknowledging that «studies in Kenya and Sudan found that some of the people are choosing less severe forms of FGM and others are expressing a desire to either modify FGM or abolish it».

11 WHO 2008, p. 1.

on Human and Peoples' Rights on the Rights of Women in Africa. As for the latter, Art. 5 reads that «States Parties shall prohibit and condemn all forms of harmful practices which negatively affect the human rights of women and which are contrary to recognized international standards. States Parties shall take all necessary legislative and other measures to eliminate such practices, including: [...] prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them».

UN organs and committees have raised awareness of the risks of this practice for women's health. The then UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, affirmed that «even if a law authorizes the practice, any act of FGM would amount to torture and the existence of the law by itself would constitute consent or acquiescence by the State». From a human rights perspective, the medicalization, «whereby girls are cut by trained personnel rather than by traditional practitioners [...] does not in any way make the practice more acceptable».¹² In its general comment no. 21, the Economic Social and Cultural Rights Committee (hereinafter ESCRC), despite acknowledging the existence of an individual and collective right to take part in cultural life (Pineschi 2012, p. 36), posits that «female genital mutilation and allegations of the practice of witchcraft, are barriers to the full exercise by the affected persons of the right enshrined in Art. 15, paragraph 1 (a) [of the Covenant on Economic Social and Cultural Rights]».¹³

As for non-binding acts adopted at regional level, the CoE Parliamentary Assembly has passed a resolution calling on Member States to «publicly condemn the most harmful practices, such as female genital mutilation, and pass legislation banning these, thus providing public authorities with the mechanisms to prevent and effectively fight these practices, including through the application of extraterritorial «legislation or other measures to establish jurisdiction» for cases where nationals are submitted to female

¹² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, 15 January 2008, A/HRC/7/3, ch. 53. See also the General Recommendation n. 14 of the CEDAW Committee, 1 February 1990, in which the UN body considered that the practice is harmful to the health of women and children. In its dialogue with States, the Committee expressed its concern about FGM and asked the State party to adopt measures aimed at eradicating the practice. Recommendations have been addressed to Burkina Faso, Eritrea, Somalia, Indonesia, The Gambia, Guinea and Sierra Leone, but also to Switzerland and Denmark (Addo 2010, pp. 630-632).

¹³ ESCRC (2009). General comment No. 21 Right of Everyone to take part in cultural life (Art. 15, ch. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), 21 December 2009, ch. 64.

genital mutilation abroad».¹⁴ However, the resolution has raised much criticism in the Jewish and Muslim communities because the Parliamentary Assembly expressed its worries about «a category of violation of the physical integrity of children [... which includes] amongst others, female genital mutilation, the circumcision of young boys for religious reasons, early childhood medical interventions in the case of intersex children and the submission to or coercion of children into piercings, tattoos or plastic surgery» and called upon States to «clearly define the medical, sanitary and other conditions to be ensured for practices which are today widely carried out in certain religious communities, such as the non-medically justified circumcision of young boys».¹⁵

Shifting our focus to the European Union, the European Commission announced in a strategy paper of November 2013 its commitment to fight FGM, in particular «to help prevent the practice, improve support for victims; support health practitioners, as well as national enforcement of anti-FGM laws; and improve protection under EU asylum rules for women at risk».¹⁶ The Commission and the European External Action Service have also committed to promoting worldwide elimination of FGM through bilateral and multilateral dialogue. In February 2014, the European Parliament welcomed the European Commission action, defined FGM as a «brutal practice» and reiterated its call on the Commission to «submit, without delay, a proposal for an EU legislative act to establish prevention measures against all forms of violence against women (including FGM) and, as indicated in the Stockholm Programme, a comprehensive EU strategy on the issue, including further structured joint action plans to end FGM in the EU».¹⁷ Considering the EU Parliament and Commission's stances on the topic, the Council of the European Union Justice and Home Affairs acknowledged, in its meeting conclusions of 5 June 2014, that «female genital mutilation is a violation of women's full enjoyment of human rights, is a violation of children's rights and is a form of child abuse, which requires effective and multi-disciplinary action developed in close cooperation with the communities where such practices are carried out and taking into account the rights and best interests of the child», and called upon States and the European Commission «to strengthen their support to partner countries in combating

¹⁴ CoE Parliamentary Assembly (2013). *Children's Rights to Physical Integrity*, res. 1952 (2013), 1 October 2013, ch. 7.5.1.

¹⁵ CoE Parliamentary Assembly 2013, chs. 2 and 7.5.2.

¹⁶ Communication from the Commission to the European Parliament and the Council, *Towards the elimination of female genital mutilation*, 25 November 2013, COM (2013) 833 final.

¹⁷ European Parliament (2014). *Resolution on the Commission communication entitled 'Towards the elimination of female genital mutilation'* (2014/2511(RSP), 6 February 2014.

all forms of violence against women, including the elimination of female genital mutilation».¹⁸

In the case of FGM, the physical integrity of a person, generally of a girl, is endangered. We should remember that the right to physical integrity is usually recognized in national legislation, such as in Art. 5 of the Italian civil code, according to which «all acts through which a person disposes of his/her body are prohibited whether they cause a permanent reduction of his/her physical integrity or whether they are contrary to the rule of law, to the public policy or to public morals».¹⁹ Hence, FGM inevitably clashes with standards and values felt to be fundamental by European and more generally Western societies. As put by Kool (2010, p. 51), «in Europe FGM is considered a punishable and harmful tradition which must be combat effectively». It is true that also in Europe and North America women have faced discrimination and violence, and the data on domestic violence should never be forgotten, but FGM is seen to be a worse injury because it affects sexual organs and hence the essence of being woman.

Despite FGM being considered a violation of women's human rights, one cannot but take into account the challenges posed by multiculturalism, especially in Europe, where immigrant communities continue these practices, sometimes even despite the existence of laws prohibiting them. Questions naturally arise: Is the prohibition of all FGM, without distinctions, the solution? Can Countries allow some forms of FGM provided that they respect the right to health of women? Is criminalization of all these practices the answer? The position of the CoE is clearly against any operations that affect the physical and psychological integrity of a woman, as it emerges from the Istanbul Convention.

3 The provisions on FGM criminalization in the 2011CoE Istanbul Convention on preventing and combating violence against women

The Council of Europe Convention on Preventing and Combating Violence against women and domestic violence was adopted in 2011 in Istanbul, as the outcome of a long process aimed at protecting women's

¹⁸ Council of the European Union Justice and Home Affairs meeting conclusions on *Preventing and combating all forms of violence against women and girls, including female genital mutilation*, 5 June 2014, preamble and ch. 27.

¹⁹ Art. 5 Italian civil code: «Gli atti di disposizione del proprio corpo sono vietati quando cagionino una diminuzione permanente della integrità fisica, o quando siano altrimenti contrari alla legge, all'ordine pubblico o al buon costume». The translation is of the author.

rights. It entered into force in August 2014.²⁰ According to the Convention, violence against women is «a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life».²¹ The definition of domestic violence is a separate concept, which includes «all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim».²² Two main provisions are of interest to our purposes. The first one expressly deals with female genital mutilation. It reads as follow: «Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalized: a. excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris; b. coercing or procuring a woman to undergo any of the acts listed in point a; c. inciting, coercing or procuring a girl to undergo any of the acts listed in point a». The conduct must be intentional, which means that perpetrator is both aware that a certain action will bring about a certain result and is willing to cause such result (Cassese 2013, p. 43). The second provision, Art. 42, requires that States parties ensure that «in criminal proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called 'honour' shall not be regarded as justification for such acts. This covers, in particular, claims that the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour». The wording of the two Artt. does not leave much doubt.

According to the explanatory report to the Convention, the drafters established female genital mutilation as a criminal offence «because this practice causes irreparable and lifelong damage and is usually performed without the consent of the victim».²³ The report then explains the meaning of the acts of excising, infibulating, which are taken from WHO studies, and «performing any other mutilation», which refers, quite generally, to

20 As of November 2015, total number of signatures: 18 States; total number of ratifications: 16 States, namely Albania, Andorra, Austria, Bosnia Herzegovina, Denmark, France, Italy, Malta, Monaco, Montenegro, Portugal, Serbia, Slovenia, Spain, Sweden, Finland, Poland and Turkey.

21 Art. 3, a).

22 Art. 3, b).

23 CoE explanatory report (2011), ch. 198, <http://www.conventions.coe.int/Treaty/EN/Reports/Html/210.htm>.

«all other physical alterations of the female genitals». Lit. b and lit. c. of Art. 38 are aimed at respectively adult and child victims. As a matter of fact, in the case of children, the element of «incitement» has been added, in order to criminalize the conduct of parents, grandparents or other relatives that ‘incite’ a girl to undergo FGM.²⁴ As for intention regarding the crimes in Art. 38, litt. b and c, the level is at a higher threshold than recklessness.²⁵ As outlined in the report, «an individual is not to be taken to have intentionally committed the offence merely because the offence resulting from the coercion, procurement or incitement was foreseeable. The individual’s actions must also be able to cause the acts in lit. a to be committed».²⁶ Focusing on ‘justifications’ to the conducts prohibited in the Convention, the report affirms that «Parties are required to ensure that criminal law and criminal procedural law do not permit as justifications claims of the accused justifying his or her acts as committed in order to prevent or punish a victim’s suspected, perceived or actual transgression of cultural, religious, social or traditional norms or customs of appropriate behaviour».²⁷ It is interesting to note that, concerning jurisdiction, the Convention provides in Art. 44, ch. 2, that «States shall endeavour to take the necessary legislative or other measures to establish jurisdiction over any offence established in accordance with this convention, where the offence is committed against one of their nationals or a person who has her or his habitual residence in their territory». By virtue of this article, States could establish jurisdiction in cases FGM is committed abroad against a woman who has her habitual residence in their territory. Hence, this provision may prevent families to go back to their home countries for the only purpose to force their girls undergo FGM.²⁸

3.1 The ECtHR jurisprudence on FGM

The European Court of Human Rights (hereinafter ECtHR) has dealt with FGM in cases related to women seeking asylum in order to escape this practice in their Country of origin. In the case *Collins and Akaziebie v. Sweden*, Emily Collins and Ashley Akaziebie, mother and child, who were

24 CoE explanatory report, 2011, chs. 200-201.

25 According to Cassese 2013, p. 45, «recklessness is a state of mind where a person foresees that his or her action is likely to produce its prohibited consequences, and nevertheless willingly takes the risk of so acting».

26 CoE explanatory report, 2011, ch. 202.

27 CoE explanatory report, 2011, ch. 216.

28 This aspect was outlined, as far as EU Countries are concerned, by the European Commission in its 2013 Communication, p. 5.

Nigerian nationals from Delta State, complained that, if expelled from Sweden (where they had sought asylum) to Nigeria, they would have faced a 'real risk' of being subjected to FGM.²⁹ In its decision on admissibility, rendered on 8 March 2007, the Court affirmed that «it is not in dispute that subjecting a woman to female genital mutilation amounts to ill-treatment contrary to Article 3 of the Convention. Nor is it in dispute that women in Nigeria have traditionally been subjected to FGM and to some extent still are». It is a strong affirmation which confirms the trend at the international level to consider FGM as a violation of human rights.³⁰ However, the judges analysed whether there was a «real and concrete risk» of being subjected to this practice. The answer was negative and thus the application considered inadmissible. To achieve this conclusion, the Court first noted that several States in Nigeria have prohibited FGM and secondly focused on the personal situation of the asylum seeker. Although the judges acknowledged that «it is frequently necessary to give [to the asylum-seekers] the benefit of the doubt in assessing the credibility of their statements and the supporting documents», when there are strong reasons to question the veracity of an asylum-seekers' submission, «individual must provide a satisfactory explanation for the alleged discrepancies». In particular, the woman, who was pregnant at the time she left Nigeria, did not decide to move to another State within Nigeria in order to escape from FGM but preferred to flee with a smuggler. Hence, «it is difficult to see why, as indicated by the Government, the first applicant, having shown such a considerable amount of strength and independence, cannot protect the second applicant from being subjected to FGM, if not in Delta State, then at least in one of the other states in Nigeria where FGM is prohibited by law and/or less widespread than in Delta State». This jurisprudence was further confirmed in other decisions on admissibility, such as *Enitan Pamela Izevbekhai and others v. Ireland*, of 17 May 2011,³¹ and *Mary Magdalene Omeredo v. Austria*, decided on 20 September 2011.³² All cases were related to the practice of FGM in Nigeria. In *Izevbekhai*, for example, the Court reiterated its position according to which the applicant could have decided to move to another State of Nigeria where FGM are rare. Furthermore, according to the Court in all the aforementioned cases,

29 ECtHR, *Emily Collins and Akaziebie v. Sweden*, appl. no. 23944/05, decision on admissibility, 8 March 2007.

30 Zagato 2008, p. 64, refers to Art. 2, ch. 1, of the 2003 Unesco Convention for the Safeguarding of Intangible Cultural Heritage which protects intangible cultural heritage so far as it is compatible with existing international human rights instruments.

31 ECtHR, *Enitan Pamela Izevbekhai and Others v. Ireland*, appl. no. 43408/08, decision on admissibility, 17 May 2011.

32 ECtHR, *Mary Magdalene Omeredo v. Austria*, appl. no. 8969/10, decision on admissibility, 20 September 2011.

«the fact that applicants' circumstances in Nigeria would be less favourable than in [the Country in which the applicant seeks asylum] cannot be regarded as decisive from the point of view of Article 3».³³

In sum, the ECtHR has acknowledged that FGM may amount to torture and inhuman or degrading treatment, but it has eventually concluded that there was not a violation in the cases at issue, since the applicants could have moved to another part of Nigeria to be safe. On the one hand, it is clear that a 'real and concrete' risk must be assessed in order to prevent fraudulent behaviours by asylum-seekers and to avoid easy «stigmatization» of poorer Countries. On the other hand, however, the proposal of the Court that the asylum-seeker could have moved to another State within Nigeria before seeking asylum abroad should take into consideration certain guarantees, established by the ECtHR itself in other judgments. As a matter of fact, in a different case, the Court posited that «the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment».³⁴ It is worth anticipating that the jurisprudence of the ECtHR has been less in favour of women seeking asylum to escape FGM than the one of some national courts.

4 State practice in Europe concerning FGM

The CoE Istanbul Convention obliges States parties to criminalize conducts which amount to FGM. In order to comply with this obligation, States must include the crime of FGM in their criminal system and provide for

³³ ECtHR, *Collins*, 2007.

³⁴ ECtHR, *Salah Sheekh v. The Netherlands*, appl. no. 1948/04, 11 January 2007, ch. 141. According to the Court, «Art. 3 does not, as such, preclude Contracting States from placing reliance on the existence of an internal flight alternative in their assessment of an individual's claim that a return to his or her country of origin would expose him or her to a real risk of being subjected to treatment proscribed by that provision [...] However, the Court has previously held that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention [...]. It sees no reason to hold differently where the expulsion is, as in the present case, to take place not to an intermediary country but to a particular region of the country of origin. The Court considers that as a precondition for relying on an internal flight alternative certain guarantees have to be in place: the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under Article 3 may arise, the more so if in the absence of such guarantees there is a possibility of the expellee ending up in a part of the country of origin where he or she may be subjected to ill-treatment».

'effective, proportionate and dissuasive sanctions' according to Art. 45 of the Convention. Some of the aggravating circumstances included in the Convention, Art. 46, must be taken into consideration by national legislators, such as the fact that the offence is committed by a member of the family (lit. a), or that the offence was committed against a person made vulnerable by particular circumstances (lit. c), or that the offence resulted in severe physical or psychological harm for the victim (lit. h). It should be acknowledged that some European States have already adopted legislation that prohibits practices of FGM and that national judges have dealt with, although few, cases concerning the practice of FGM or requests for asylum and refugee status. We will focus on these two aspects in the following subparagraphs.

4.1 Some examples of European States' legislation prohibiting FGM

According to a recent study commissioned by the European Union, ten Member States up to twenty-eight, included Italy, have already adopted specific criminal law provisions on FGM.³⁵ The United Kingdom adopted the Female Circumcision Act as early as 1985, which was subsequently amended in 2003 by changing the word 'circumcision' with 'mutilation'. The UK Female Genital Mutilation Act of 2003 also covers act committed in Countries where the practice is not considered illegal. Extraterritoriality, which is not excluded by the CoE Istanbul Convention, is also provided in the Dutch law of 2006. In Italy, Law no. 7 of 9 January 2006 introduced the offence in Art. 583 bis of the criminal code (Basile 2011). According to this article, the perpetrator of FGM can be sentenced to a period of deprivation of liberty ranging from four to twelve years. For the purposes of the first paragraph of the article, FGM comprises all the types listed by the WHO, namely clitoridectomy, excision and infibulation and all other practices that cause similar harm, whether committed without health reasons. The provision, in the second paragraph, is also aimed at punishing other practices which bring about bodily or psychological harm, if committed *with the intention* of impairing a woman's sexual function. In this case, the deprivation of liberty ranges from three to seven years. The sanction is reduced by two thirds if the injury is mild. However, when the victim is a child, the sanction is increased by one third. As for jurisdiction, the provision is also applicable when the conduct is committed abroad by an Italian national or a foreigner having his/her residence in

35 EIGE (2013). *Female genital mutilation in the European Union and Croatia report*. <http://eige.europa.eu/sites/default/files/documents/eige-report-fgm-in-the-eu-and-croatia.pdf> (2015-10-30), p. 43. The ten Member States are Austria, Belgium, Cyprus, Denmark, Ireland, Italy, Spain, Croatia, Sweden and United Kingdom.

Italy, or when the victim is an Italian national or a foreigner having her residence in Italy.³⁶

It should be pointed out, however, that criminalization, which has both purpose of prevention and of repression, is usually not enough. African Countries have adopted similar laws, without contributing to the reduction of the phenomenon especially in the poorest areas.³⁷ Even in European Countries, «there is no substantial evidence that specific criminal law provisions are more effective in prosecuting and punishing acts of FGM. A limited number of criminal cases on FGM have been brought to courts».³⁸ Interestingly, France, where FGM is prosecuted under general criminal law, has registered the highest number of criminal court cases.³⁹

4.2 National jurisprudence on FGM

National judges have faced the sensitive issue of FGM both indirectly, in cases related to asylum and refugee status, and directly, criminally prosecuting alleged perpetrators of this practice. We will describe selective cases, which seem useful in order to draw some conclusions in light of the CoE Istanbul Convention.

4.2.1 Cases related to asylum and refugee status

English courts tried to answer to one key question. In the clear words of Lord Justice Auld, «for young girls in Sierra Leone [or in other Countries where FGM is practiced], seeking asylum in another country because they fear it, is it persecution for a Refugee Convention reason, namely because

³⁶ A new paragraph was introduced in 2012 (Art. 4, Law no. 172, 1 October 2012), which is applicable whether the perpetrator is a parent or the legal guardian of a child ('tutore'). In those cases, the parent is subject to the loss of parental authority and the legal guardian cannot act in the exercise of his/her functions any longer.

³⁷ In Nigeria, as outlined by the ECtHR in the judgment *Collins*, cit., several States have prohibited FGM by law, including Cross Rivers, Ogun, Rivers, Bayelsa, Osun, Edo Abia and Delta. In Delta State, e.g., the «Prohibition of Female Circumcision and Genital Mutilation Law» was passed on 21 February 2002 and published in the Delta State of Nigeria Gazette on 14 March 2002. FGM are criminalized in Ghana, Burkina Faso, Tanzania (only if practiced on children), Sudan (prohibition of infibulation).

³⁸ EIGE 2013, p 44.

³⁹ Ibid. See also UN Division for the Advancement of Women, United Nations Economic Commission for Africa (2009). *Expert Group Meeting on good practices in legislation to address harmful practices against women*, EGM/GPLHP/2009/EP.09, 11 May 2009, p. 7.

they belong to a 'particular social group'?).⁴⁰ As it is well known, the 1951 Refugee Convention defines a 'refugee' in Art. 1A, ch. 2, as a person «owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country». The case *Fornah* is particularly interesting for our purposes. *Fornah* was a young woman, aged 15, who escaped from Sierra Leone. She asked for refugee status because she feared of undergoing FGM if returned to her Country of origin. The Secretary of State for the Home Department granted her leave to remain until her 18th birthday, and it could have extended the period for further three years on humanitarian grounds. The woman asked to be recognized as a refugee. The Court of Appeal held that FGM of «young, single and uncircumcised Sierra Leonean women» does not constitute persecution 'for reasons of' their membership of a 'particular social group' for several reasons, among which the fact that «however harshly we may stigmatize the practice as persecution for the purpose of Article 3, it is not, in the circumstances in which it is practiced in Sierra Leone, discriminatory in such a way as to set those who undergo it apart from society».⁴¹ The applicant's appeal against this decision was allowed by the House of Lords in 2006. Lord Bingham posited that «women in Sierra Leone are a group of persons sharing a common characteristic which, without a fundamental change in social mores is unchangeable, namely a position of social inferiority as compared with men [...] it is a characteristic which would exist even if FGM were not practiced, although FGM is an extreme and very cruel expression of male dominance» and he went further acknowledging that «there is a perception of these women by society as a distinct group. And it is not a group defined by persecution: it would be a recognizable group even if FGM were entirely voluntary, not performed by force or as a result of social pressure».⁴² More recently, the High Court of Ireland expressed in the clearest way that «the view taken in this State and throughout the EU of FGM is that it is an abomination. Forced FGM is viewed as amounting to persecution within the meaning of s. 2 of the Refugee Act 1996».⁴³ The case concerned a minor, represented by her parents who were opposed to FGM, who sought asylum in order to

40 Supreme Court of Judicature, *Zainab Esther Fornah v. Secretary of State for the Home Department*, [2005] EWCA Civ 680, 9 June 2005, ch. 1.

41 *Fornah*, 2005, ch. 44.

42 House of Lords, *K (FC) (Appellant) Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2006] UKHL 46, 18 October 2006, ch. 31.

43 High Court of Ireland, *A.H.E.H [A Minor] & Ors v. The Refugee Appeals Tribunal & Ors*, [2013] IEHC 163, 21 March 2013, ch. 17.

escape FGM once returned to Sudan. The Tribunal had rejected the claim, arguing that both parents would have been able to prevent members of their family from carrying out the practice on the child. The High Court, quashing the decision of the tribunal, argued that the judge «simply overstated the strength of their ability to protect their daughter in face of the sheer volume of cultural support for FGM in Sudan or underestimated the extent of the risk of the applicants' extended family or community taking the matter of the first applicant's circumcision into their own hands. In the judgment of the Court, the Tribunal Member did not properly assess the strength and force of such cultural influence and unreasonably attributed strength of character and personality to the parents to withstand those cultural attitudes».⁴⁴

As for Italy, the Corte d'appello of Catania (Court of Appeal) rendered a landmark judgment in 2012, granting refugee status to a woman who escaped from Nigeria while people of her community tried to force her undergo FGM.⁴⁵ The Court affirmed that the situation of the applicant deserved an analysis under refugee law, as the woman expressed a reasonable fear of being subjected to gender-based violence 'as being woman'. Furthermore, she faced the risk of being subjected in her Country of origin to an inhuman and degrading treatment, 'like it is infibulation'. The Court based its reasoning on the deposition of the woman, which was supported by 'reliable sources' such as a report prepared by Amnesty international and UN documents. The decision of the Tribunal was thus overruled and the applicant obtained refugee status.

In France, the *Conseil d'Etat* quashed a decision of the *Cour nationale du droit d'asile*, recognizing that 'les enfants et les adolescentes non mutilées' are a 'particular social group' for the purposes of the 1951 Refugee Convention.⁴⁶ Nevertheless, in order to obtain refugee status, the applicant must demonstrate that she belongs to such group and provide elements on the familiar, geographic, social environment «relatifs aux

⁴⁴ *A.H.E.H [A Minor] & Ors v. The Refugee Appeals Tribunal & Ors*, ch. 21. The position of US courts has been similar. A landmark case is *Kasinga*, decided in 1996. A Togolese woman sought and obtained asylum in the US claiming that she would have faced FGM and forced marriage if returned back home. The proposed definition of group was «uncircumcised Tchamba women who resist cutting». See Piot (2007, p. 164), criticizing the fact that lawyers portrayed the appellant as «coming from an unchanging patriarchal society of mutilators». Another controversial case was *Abankwah*, a Ghanese woman to whom asylum was granted in 1997. The social group was defined as «women of Nkumssa tribe who did not remain virgins until marriage». A comment in Kratz 2007.

⁴⁵ Corte d'appello di Catania, Sez. della Famiglia della Persona e dei Minori, *A.F. v. Ministro dell'Interno*, dep. 17 December 2012, available at <http://www.personaedanno.it> (2015-30-10).

⁴⁶ Conseil d'État, 21 December 2012, n. 332491, publié au recueil Lebon, www.legifrance.gouv.fr (2015-30-10).

risques qu'elle encourt personnellement». Furthermore, in line with the ECtHR jurisprudence, the *Conseil d'Etat* emphasized that the refugee status can be refused if the applicant can be protected in another part of her Country of origin, provided that she can safely move there and build «une vie familiale normale».⁴⁷

Two main considerations can be drawn from the cases presented in this paragraph. First, the Italian and UK Courts considered, as the ECtHR does, FGM as a violation of Art. 3 of the European Convention on Human Rights. Secondly, domestic courts analyzed the specific situation of the applicant taking into account her social environment of origin, which is described using reports and documents available at the international level. It seems that the Italian and French courts added to the reasoning another aspect, which is the reliability of the applicant's testimony. As a matter of fact, the Italian Court outlines that the deposition of the woman is 'in line with' the evidence presented in other reports and documents at the international level. As for the French *Conseil d'Etat*, it imposes more stringent requirements, as the applicant bears the burden to prove that she belongs to a particular social group because of the existence of certain elements. A case-by-case analysis is hence fundamental in order to avoid any abuse.

4.2.2 Cases on FGM Practiced in the Host Country

Even though generally prohibited by law, FGM is frequently practiced within immigrant communities in European Countries. Few cases have been brought to national courts. Interestingly, there has not been a successful UK prosecution since criminalization 28 years ago, notwithstanding the fact that FGM is estimated to have affected 66,000 women in Britain. To the contrary, France, without specifically criminalizing the conduct, has registered dozens of cases over the years, starting from 1983, when the *Cour de Cassation* considered FGM a mutilation, hence a personal injury.⁴⁸ In Italy, the first case brought to court after the entry into force of the 2006 law criminalizing FGM concerned G.O., a Nigerian midwife living in Verona, who practiced a FGM on a child aged two months.⁴⁹ The practice consisted in a harmful procedure to the female genitalia of the infant, which could be considered of Type IV according to the definitions of the

47 *Conseil d'État*, 21 December 2012, n. 332491, ch. 3.

48 *Cour de Cassation*, chambre criminelle, 20 August 1983. See *Rassegna giurisprudenziale delle MGF in Europa*, 2012, prepared by *L'altro diritto*, *Centro di documentazione su carcere, devianza e marginalità*, <http://www.altrodiritto.unifi.it/ricerche/migranti/ghizzi/cap2.htm#n44> (2015-10-30).

49 Three cases were brought to court in Italy before the adoption of the new law in 2006 (Colombo 2009, p. 60 ss.).

WHO. G.O. and the mother of the victim (X) were charged with the offence provided in Art. 583 *bis* of the Italian criminal code. G.O. was also charged with the offence of attempting to commit the crime, as she was arrested while entering the house of another infant (Y)'s father. The *Tribunale* in Verona found, in the judgment rendered on 14 April 2010,⁵⁰ that G.O. and the two parents were guilty of the offence enshrined in Art. 583 *bis*. However, the sentence was particularly mild (one year and 8 month of deprivation of liberty for G.O., 8 months for X's mother and 4 months for Y's father), as the tribunal argued that the injury was mild in accordance with the second paragraph of Art. 583 *bis*. The judge then acknowledged that the cutting was a culturally motivated crime «the legislator tries to deter», which has the purpose of exercising a control over the sexual function and woman's body, «practice that cannot be accepted because they constitute a severe attempt to primary rights recognized by our Constitution and supranational sources, such as the physical and psycho-sexual integrity of a woman or a girl, as well as the woman's dignity».⁵¹ Accordingly, even though some experts argued that similar practices did not have the intention to impair sexual function, the judge posited that those practices had the purpose to exercise a 'control' over the woman. This purpose was even admitted by the parents of the two infants and the midwife during depositions (Brunelli 2012, p. 52). Article 583 *bis* requires the specific intent to impair sexual function, *not* to *actually* affect this function. Interestingly, the judge affirmed that rules having a cultural basis cannot justify the violation of a criminal norm, whose purpose is to discourage similar practices. However, the judge took into account cultural reasons and traditions in the sentence. In other words, a culturally motivated crime did not prevent the court to judge the perpetrators guilty, but significantly reduced the punishment.⁵² The parents of the two infants appealed against the decision of the *Tribunale* in Verona. The *Corte d'appello* (Court of Appeal) in Venice acquitted the two parents in December 2012, affirming that there was no specific intent to control infants' sexuality and affect their sexual function.⁵³

Commentators have expressed different positions on the decision. On the one hand, it is possible to argue that, following the Court of Appeal's reasoning, Art. 583 *bis* of the Italian criminal code is destined to be completely ignored, especially as far as less severe practices are concerned. As a matter of fact, the judges focused on physical injuries, but what for psy-

50 Tribunale di Verona 14 April 2010, n. 279, esten. Ferrara.

51 Translation is by the author.

52 Pecorella 2011, p. 853 ss., acknowledges the importance of cultural diversity, but, at the same time, the need to guarantee the well-being of the members of the group. See also the comments by Randazzo (2013, pp. 15-16).

53 Corte d'Appello di Venezia 23 novembre 2012 (dep. 21 febbraio 2013), n. 1485.

chological effects? (Randazzo 2013, pp. 15-16). Was not the purpose of the legislator to condemn all practices that constitute an attempt to women's dignity? On the other hand, as the Court of Appeal well explained, it is true that the analysis of the specific intent should be aimed at demonstrating the existence of more than a mere 'symbolic practice'. According to the judges, the intention should be accompanied by an injury to the genitalia which is concretely able to impair sexual function (Basile 2013, p. 11).

5 FGM and the right to cultural diversity: beyond repression

One question remains to be answered. As far as FGM is concerned, will the position of European Countries change as a consequence of the entry into force of the CoE Istanbul Convention? By virtue of this treaty, the prohibition of FGM has a formal recognition at regional level. Article 38 is clear: not only the most severe forms of FGM are prohibited, but also «any other mutilation to the whole or any part» of genitalia. The conducts must be committed intentionally, the purpose being the commission of the act itself and not the intention to affect women's sexuality. Accordingly, it is possible to argue that the Italian legislator could consider the possibility of amending the 2006 law in order to reduce differences in terms of level of intention and sanctions among mutilation and cutting. As a matter of fact, even a mere cutting with no permanent harm to sexual function may imply psychological consequences for the girl. In other words, is it really possible to fix a level of pain, especially psychological pain, in order to criminalize some conducts and not others? We personally believe it is not possible, also bearing in mind the jurisprudence of the ECtHR, which considers FGM as a violation of Art. 3 of the European Convention on Human Rights. FGM is a way through which a community exercises a form of control over women and perpetuate discrimination. Nonetheless, the sentence should vary according to the level of the injury caused by the perpetrators. A mild sentence is not excluded by the Convention, indeed. Article 45 allows sanctions which take into account the 'seriousness' of the offence. This is why we are convinced that the position of the *Tribunale* in Verona deserves attention, although it considers the so-called 'cultural defense' in the determination of the sentence. As we said, the Istanbul Convention prevents any forms of justifications based on culture or on traditions. In other words, it should not be the 'cultural defense' to mitigate the sentence, but rather the level of injury caused to a woman or a girl.

We are not clearly arguing that the 'Western' point of view in the definition of which individual human rights deserve protection should prevail. Hence, as we described in the aforementioned paragraphs, these harmful practices are also criminalized in Africa and Asia. Here we are talking

about physical and psychological harm to girls and women that has no other explanation than traditions or religion (Coomaraswamy 2013, p. 132).⁵⁴

This is the reason why legislation and jurisprudence are the most effective tool to avoid one of the risk of multiculturalism, which is the imposition of values on other cultures. The purpose is hence to avoid what an author defined as follows: «multiculturalism is normally understood as the recognition of cultural diversity within the rule of law, but [...] the issue is not really recognition, rather values» (Moore 2007, p. 315). The respect for human rights, and in particular the prohibition of discrimination, can be taught to immigrants and their children. It is not a matter of values but of respect for human dignity. Cultural rights are human rights, as clearly acknowledged by the ESCRC,⁵⁵ presenting both an individual and a 'collective' dimension. The exercise of these rights does not justify the violations of other rights (Pineschi 2008, p. 169). We could argue that it is not a matter of hierarchy among human rights, of a right «more important than another», but a quest for balancing rights that, in some cases, in some societies, in some periods, seem to clash. «Both rights and culture are changing all the time and are not oppositional» (Levitt, Merry 2011, p. 99). Cultural rights hence require «reconciliation with the protection and respect for other human rights» (Zagato, 2012, p. 49). In other words, a cultural practice may restrict human rights in the name of cultural diversity, provided that it does not go «so far as to violate the core of these rights» (Xanthaki 2010, p. 46; Donders 2010, p. 31). And, viceversa, human rights can prevent the exercise by a community of a practice that it is part of its culture. The question is then how to balance these rights. We are convinced that prevention and awareness are the answer, as suggested by the European Commission in her 2013 communication.⁵⁶ Prevention can be also achieved by granting asylum or refugee status to women who are escaping FGM. They could witness the risks linked to similar practices. In this respect, the jurisprudence can impose the necessary requirements, included proportionality, in order to prevent any abuse. Moreover, in the analysis of future cases related to expulsion, the ECtHR

54 According to Wolcher 2012, p. 59, it is an antinomy between the Western cultural commitment to the importance of individual rights and «certain non-Western cultural conceptions that value the well-being of the group more highly than that of the individual».

55 ESCRC 2009, ch. 1. According to Zagato 2012, p. 35, the 2003 UNESCO Convention on the Safeguarding of Intangible Cultural Heritage «plays an essential role in upgrading and redesigning thoroughly the extent of the cultural right under Art. 15, ch. 1, of the Covenant on Economic, Social and Cultural Rights: It is surely part of the human rights system (yet understood in an individualistic sense)».

56 EU Commission 2013, pp. 7, 11.

could – with all its judicial authority – take more into consideration a case-by-case analysis in order to better ascertain whether or not a violation of Art. 3 of the European Convention occurs if a woman is expelled to her Country of origin. It seems that domestic judges have already paved the way.

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