

COURT CASES, CULTURAL EXPERTISE, AND “FEMALE GENITAL MUTILATION” IN EUROPE

Ruth M. Mestre i Mestre and Sara Johnsdotter

ABSTRACT

This chapter discusses adjudication, expertise, and cultural difference as it appears in criminal court cases concerning female genital cutting (FGM) in the EU, as reported in a 2015 comparative overview. It begins with the distinction between typical and atypical FGM cases; a distinction that connects court cases to the cultural realities of the practicing communities, suggesting that the lack of cultural knowledge can cause unnecessary suffering to families and/or individuals who wrongly undergo prosecution in alleged FGM cases. A contrario, the intervention of experts in FGM court cases could be a positive approach to assessing the legitimacy of public intervention in certain cases.

Keywords: FGM/C; error iuris; cultural defense; typical/atypical FGM cases; cultural expertise; adjudication

INTRODUCTION¹

Practices of female circumcision, also referred to as “female genital cutting” (FGC) or “female genital mutilation” (FGM),² are prevalent primarily in some 30 African countries. With migration, the issue is increasingly relevant also for European societies (Johnsdotter & Essén, 2016; Johnsdotter & Mestre i Mestre, 2017). The European Commission estimates that at least 500,000 women and girls in Europe have undergone some kind of FGM and according to the WHO 180,000 girls are at risk. The number of reports, research studies, and parliamentary actions in Europe are significant, and a 2015 comparative overview of FGM criminal court cases within the EU, based on data collected by country experts in 11 European countries, shows little occurrence of the practice in criminal courts.³ FGM is prosecutable in all countries in Europe, either through specific criminal law provisions or through general criminal legislation, but fewer than 50 FGM criminal court cases exist in Europe, and a majority of them took place in France in the 1980s and 1990s.

Exploring the reasons for such disparities between estimates of affected girls and women, however, and court cases on the other is way beyond the scope of this chapter. It could be argued that, as any form of violence against women (VAW), FGM is particularly difficult to prevent, detect, prosecute, and punish efficiently. It is, however, unreasonable to believe that all European states fail in protecting girls at that scale. An alternative explanation would be that the number of unrecorded cases is much lower than what official conjectures suggest, making post-colonial feminist arguments more convincing. It has been argued (Peroni, 2016) that Western European states and institutions have targeted VAW of migrant background in ways that are stigmatizing by (1) putting disproportionate attention on and framing specifically certain forms of violence, (2) defining as cultural certain forms of VAW in ways that are stigmatizing toward minorities (as if the majority's forms of violence were not cultural), and (3) creating gendered racialized categories to describe non-Western women affected by violence (vulnerable women or girls at risk). What is usually called "FGM" is one of such forms of violence that receive disproportionate attention. By identifying FGM as a cultural form of VAW, we disregard the ways in which culture shapes the subordination of women in Europe and the cultural forms of violence embedded in, for instance, the ideology of romantic love.⁴ Montoya and Rolandsen Agustín (2013) argue that the European institutional discourse recognizing different forms of VAW has tended toward its culturalization, focusing much on diagnosis but failing to address solutions. In the same vein, the abovementioned 2015 report on FGM criminal court cases suggests that reiterated law enforcement concerns are not coupled with training and prevention that are needed in the case of FGM in Europe.

Keeping these difficult questions as a backdrop, this chapter will discuss adjudication, expertise, and cultural difference as they appear in criminal court cases concerning FGM in the EU. The discussion is organized in four parts. First, a brief contextualization of the practice in Europe will help understanding of the distinction between typical and atypical FGM cases that we suggest adopting. Typical cases are those where some type of FGM has been performed, either on European soil or abroad; atypical cases are cases without solid ground or evidence in a court of law. This distinction is not common in public discourse on FGM,⁵ but needs to be made from a position that builds on deeper insights into the actual FGM criminal court cases. It connects court cases to the cultural realities of the practicing communities, and requires previous knowledge about the different practices and communities, their migratory history, and the status in Europe of those involved. Both typical and atypical cases can originate on European soil or abroad, which makes their analysis more complex, as we will try to show.

The second part of this chapter will analyze some atypical cases that have reached the courts, raising issues of whether the intervention of experts is needed, and if so, of what type (anthropological, medical, both?), when (in what procedural moment) and for what purpose. The intervention of experts here seems to be more an evidential-building step than an evaluative one. By

calling "atypical" the cases that should not have reached court, we argue that the lack of cultural knowledge or expertise can cause unnecessary suffering to families and individuals who wrongly undergo prosecution on an alleged FGM case. *A contrario*, the intervention of experts could be a positive approach to assessing the legitimacy of public intervention in certain FGM court cases.

The analysis of typical cases, cases in which FGM has been performed, and their complexities will lead us to the fact that, in some of them, the defense has tried for the acquittal of parents by claiming "error in prohibition." This chapter argues that the ways in which error of prohibition relate to cultural difference need to be further explored. The chapter will conclude on the relationship between error iuris and cultural difference, where the purpose of the intervention of a "cultural expert" appears to be related to the task of evaluating the action under judgment, and when that action implies some form of VAW.

FGM IN EUROPE

The recognition of VAW as a human rights violation in the international agenda has been a matter of struggle, celebration, and concern among feminists: struggle, for it was not until the 1990s that VAW entered international human rights law; celebration because it was done by connecting violence to inequality and subordination; and concern for, as Peroni (2016) puts it, the overemphasis on female victimhood may perpetuate stereotypes of women in need of protection. This is particularly true for non-western women. The international fight against FGM has followed the same familiar pattern of struggle, celebration, and concern. The Beijing Platform for Action of the IV World Conference on Women of the United Nations declared in 1995 that FGM is a form of VAW. The international consensus reached in 2008 as to the definition of FGM is expressed in the Interagency Statement,⁶ according to which FGM comprises all procedures involving the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons. It acknowledges four types of procedures: clitoridectomy, excision, infibulation, and unclassified.⁷ The type of cutting and procedure varies from one country to the next and also varies among ethnic groups.⁸

FGM is prohibited in all European countries,⁹ either through specific criminal provisions (as in Austria, Denmark, Italy, Spain, Sweden, Switzerland, and the UK) or through general provisions in the Penal Code that penalize bodily injury and mutilation (e.g., Finland, France, Germany, and the Netherlands). The *Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)* entered into force in 2014, and although it is not the first action undertaken by the Council of Europe regarding gender-based violence,¹⁰ it is the first legally binding document. Almost all member states of the Council of

Europe have signed it¹¹ and it can be considered the common understanding and standard to combat VAW.¹² It introduces some interesting features into European domestic legal systems as regards FGM, such as the "due diligence" standard regarding state responsibility for non-state acts of violence.¹³ The standard, as declared by DEVAW (1994),¹⁴ refers to the obligation of states to "pursue by all appropriate means and without delay a policy of eliminating violence against women," including "due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetuated by the state or by private persons."¹⁵ Thus, the *Istanbul Convention* provides the general obligations of the duty to prevent, protect and support; investigate, prosecute and judicially protect, as well as provide effective access to justice for victims of VAW.¹⁶

It specifically addresses FGM in Art. 38:

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 on 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)¹⁷

Aiding or abetting and attempting the commission of the offense in 38.a must also be considered an offense and these acts cannot be justified as cultural, religious, customary, or other (Art. 42). Regarding state jurisdiction, the *Istanbul Convention* establishes the obligation for states to ensure that its jurisdiction covers all the offenses committed *within the territory of the state*, to or by one of her nationals, or a person that has his or her habitual residence in the territory. It demands as well that the state ensures jurisdiction beyond its territory, when the offense is committed to or by one of their nationals or a person who has his or her habitual residence on their territory, and *whether the act is criminalized in the territory where they were committed or not* (Art. 44¹⁸). This means that the principle of extraterritoriality of all the states analyzed in the 2015 report covered acts committed abroad *by* a national or resident, *or to* a national or resident, either in Europe or in the country of origin. This is puzzling for jurists, as extraterritoriality is a principle seldom used, and one requiring double incrimination. It is also puzzling that European states are virtually competent to persecute any act of FGM performed by a resident, regardless of the place of commission and the victim of such a crime. The reason for this emphasis in extraterritoriality and in non-requiring double-incrimination lies in the fact that some girls of European background have undergone FGM while visiting family in the countries of origin of their

parents. There is also a fear that, knowing FGM is prohibited in Europe, families will submit the girls to the practice before migrating to Europe.

This complexity makes the classification and analysis of court cases very difficult: typical cases would be cases in which an act of FGM (Interagency statement Types I, II, and III, according to the *Istanbul Convention*) has been performed by or to a European national or resident, either on European soil or abroad. The kind of evidence needed and justification of the judge's decision are arguably different in both cases, as is the need or justification for asking for cultural *advice* at some point. Atypical cases are cases in which prosecution happens on an *unlikely* FGM act, either because the alleged author or victim does not belong to a practicing community; because the act cannot qualify as FGM; or because, taking into consideration the practicing community the victim belongs to, it is incorrect to point to the alleged actor as responsible for the narrative "to make sense."

The last factor to consider regarding prosecution of FGM in Europe is the different models of Public Prosecution of European states, along the common law/continental law divide and within the continental system itself (Martín Pastor, García Marqués, & Eloy Azevedo, 2014).¹⁹ The public authority given the power to investigate, the extent and principles guiding such power, its limits and how it relates to the victim's actions, vary from country to country, making the comparison of FGM prosecution across Europe an extremely difficult task. Our proposal is to call typical cases those where some type of FGM as prohibited by the *Istanbul Convention* has been performed, either on European soil or abroad. Atypical cases are cases that should not have initiated legal procedures. This distinction, which connects court cases to the cultural realities of the practicing communities, requires previous knowledge about the different practices and works well regardless of the public prosecuting system of any given state. Information about the public prosecuting system could, however, be of interest when discussing at what procedural moment and initiated by whom cultural expertise could be of help in detecting and avoiding atypical cases.

ATYPICAL FGM CASES MAKE UNFAIR COURT CASES

On Thursday June 26, 2015, *The Telegraph* reported:

"Disgusting" FGM campaign wins prestigious advertising awards at Cannes. A heavily criticised campaign raising awareness about FGM has won Cannes Lion industry awards. [...] The adverts depict flags of Western countries – such as the Union Jack – splattered with blood stains and with thick thread "sewing" them back together. A message printed on the flag reads: "Female genital mutilation doesn't only happen in faraway places. Over 50,000 girls in the UK are at risk."²⁰

The "it happens here" campaign was designed to raise awareness about the fact that FGM is still carried out in countries such as the UK, even though it is illegal. The campaign is very powerful and moving but misrepresents reality

by suggesting that the worst form of FGM (Type III) often happens and goes unnoticed across Europe. Raising awareness in such a strong way, the campaign calls for an urgent intervention from the state, investigating rumors and cases, and effectively prosecuting. This is particularly true in the UK where the case presented as the first criminal case regarding FGM in 2015 seemed in accordance with this *pressing social need* to tackle FGM. In our opinion, however, it is the most atypical criminal court case reported: An obstetrician was taken to court for how he had sutured an already circumcised woman during delivery in November 2012. He had used a stitch to stem blood, and this stitch, the Prosecutor argued, could be classified as criminal according to the UK ban on FGM. During the trial process, the judge rejected two attempts by the defense to dismiss the prosecution on the grounds that, under the FGM Act 2003, a doctor is exempt from prosecution if a surgical procedure is carried out on a woman in labor or after childbirth and was medically necessary. The man was acquitted of the charges in February 2015. It is atypical in that the act hardly qualifies as FGM, the doctor definitely did not belong to a practicing community nor did he do it for *cultural reasons*: the prosecutor simply did not acknowledge the difference between FGM/re-infibulation and medically indicated surgical procedures to correct trauma following labor.²¹

Another atypical case concerns the Netherlands, where a Moroccan man was taken to court in 2008 for suspected FGM. Morocco is a non-practicing country when it comes to circumcision of girls. The man's daughter claimed that he had cut her genitalia with a pair of scissors. He was eventually sentenced for child abuse but acquitted for FGM. Other examples splash the press here and there. In January 2017, the Spanish press reported that the Catalan government would have to pay a married couple of Gambian origin for moral and psychological damages for events that occurred in 2012. They were detained for two days and their two daughters put in a children's facility for nine days, because their pediatrician claimed that the girls' genitalia had been altered. She later admitted that she had no expertise in the matter.²² In a Swedish case, parents of Gambian origin were detained for several weeks in 2012 after a pediatrician had asserted that two girls, aged one and three, had been circumcised. Later a group involving a gynecologist, a urologist, and a forensic expert concluded that the girls' genitalia were normal, and the parents were released.²³

All these cases reflect the willingness to open investigations and legal proceedings regarding FGM in different European countries. In fact, it was reported in *The Guardian* (February 4, 2015) that "[a]ccusation against Dr D. Dharmasena came at time of growing pressure over failure to bring FGM prosecution in UK." Many have criticized the decision of the Crown Prosecution Service (CPS) to bring "the apparently doomed prosecution," challenging that it met the evidential test or the public interest test the CPS ought to apply when undertaking prosecution (Rogers, 2015).²⁴ The willingness to bring criminal cases to court, demonstrated by such "atypical" examples, contrasts to common assumptions that the scarcity of cases in

Europe is due to reluctance among authorities to deal with cases of FGM. Indeed, one explicit policy goal at the European level is to support EU member states in prosecuting FGM more effectively (European Commission, 2013).

All in all, these cases ended rather well, as prosecution stopped at an early stage or resulted in acquittal. The question remains, however, whether that suffering was necessary or if it could have been avoided with the help of experts, be they doctors or pediatricians with cultural expertise on the different practices and practicing communities, or on cultural experts who know, for example, that Morocco is a non-practicing country.

The cases mentioned show that it is often difficult to decide whether modification of the genitalia has occurred or not. In Sweden, several criminal investigations demonstrate that professionals assessing small girls' genitalia, when there are suspicions about circumcision, reach divergent conclusions. Where some physicians see clear signs of cutting, others say that the appearance of the (same) genitalia are normal and they thus see no signs of circumcision. Obviously, not all criminal court cases end in convictions, so the point is not that these cases resulted in acquittals, but rather that they should not have been taken to court at all.

A more disturbing case occurred in Sweden in 2006 when a Somali father was sentenced to two years in prison for allegedly performing FGM on his daughter. He was convicted regardless of the fact that there was no evidence, neither direct nor circumstantial, and he was not likely to be the perpetrator (Johnsdotter, 2008a, 2008b²⁵). The only evidence presented in court was his daughter's statement during police interrogations that he had been in the room when she was circumcised, holding her down. Although the treatment evidence receives in different jurisdictions may differ, it is a common standard that when someone's statement is the only evidence in court and there is no other valid circumstantial evidence, the statement should be convincing, without major contradictions,²⁶ and the person that gives it must be a reliable person. In this case, during the months of repeated police interrogations and court proceedings, the 16-year-old girl changed her statements about when the circumcision took place (January 2005, or possibly autumn 2004; "no idea at all," or possibly in August 2005); who was present in the room (the circumciser, the father, and the father's sister; or the circumciser, the father, and the father's new wife);²⁷ how her father held her; who else was circumcised with her and other details. Her contradictory statements were offered during a time of conflict between her parents over custody and child benefits that was the tipping top of a conflict between two clans with firm loyalties to their own kin. With such a weak evidential basis, other forces must have been at play for the court to assess the father's guilt – arguably, stereotypes about Somali men and women, and the power dynamics within the couple in a Muslim marriage, what happens at circumcisions in Somalia, the role men as fathers play in decision-making regarding circumcision of their daughters, and a multitude of other aspects about which the court had little real knowledge. For instance, had they known that among Somalis, it is inconceivable that a Somali man would have anything to do with

his daughters' genitalia and that if a man would insist on being present at a circumcision of a girl, the present women organizing the event would force him to leave, the court might have assessed the likelihood of the described situation differently. This case is different from the others in that an act of FGM had actually occurred, but evidence was far from convincing in what regards the responsibility of the father of the girl. It is arguable, then, that in the void of knowledge about the culture-specific context, typifications and stereotyping may guide the interpretations of testimonies, producing unfair results.²⁸

We have offered examples of two sorts of atypical cases: those in which no FGM was performed at all and cases where the inculcating evidence was not consistent with a sound cultural narrative. In the first set of cases, cultural expertise would be of use in informing a wide range of professionals, procedures, and decisions: from FGM protocols to the medical profession, or the public prosecuting authority. The second set of cases, in which FGM did happen, demonstrates that it is important that courts in Europe have access to knowledge about culture-specific contexts when they handle suspected cases of FGM in criminal courts, whether they are supposed to have happened in Europe or abroad.

However, for acts performed abroad that fall within the jurisdiction of a European state, this need for knowledge is more evident: Courts are assessing crime scenes that are located faraway from Europe, and events described in the European courts may follow a cultural logic that is unfamiliar to the Western court actors. Assistance in the form of knowledgeable expertise is crucial for the courts to be able to establish what "probably" or "likely" might have happened in these culturally unfamiliar contexts. Although the intervention of experts here seems to be more of an evidential-building step than an evaluative one, it is nevertheless fundamental to guaranteeing fairness. By calling "atypical" the cases that should not have reached the court, our distinction upholds the idea that the lack of cultural knowledge or expertise can cause unnecessary suffering to families and or individuals that wrongly undergo prosecution on an alleged FGM case.

TYPICAL FGM CASES

Typical cases are cases where an FGM act was performed, *either to or by* a European national or resident, either on European soil or abroad. Several reported criminal court cases would match this idea of the "typical" case on European soil.²⁹ In Switzerland, in 2008, two Somali parents were sentenced for an act committed in 1996, after they had arrived as refugees a couple of years earlier. They had their two-year-old daughter circumcised by a Somali physician who was temporarily in Switzerland and who performed circumcision under local anesthesia on the kitchen table. Twelve years later, the parents received a two-year suspended prison sentence for having encouraged FGM.

In Italy, in 2006, a woman of Nigerian origin had been under surveillance for some time when the police tapped a call with a two-week-old girl's father concerning the operation. The woman was caught red-handed when she was just about to perform the act, surrounded by scissors, gauze, surgical spirit, Lycodine, and syringes. Other cases hit the press reporting similar stories in France: In 2012, there was a court case regarding incidents that allegedly had taken place some years earlier. A circumciser performed an operation on girls whose parents originated from Guinea, and the Minors Protection Squad is said to have found material evidence in the form of "a bloody kitchen roll holding pieces of genital flesh" (France country report, cited in Johnsdotter & Mestre i Mestre, 2015, p. 18). These cases do not seem to have posed serious problems from a criminal law perspective in building enough evidence to convict the parties. A more problematic case occurred in 2013 when a Spanish court reached the conclusion that an illegal circumcision at some point had taken place in Spain although the place, date, or responsible actor could not be established as a matter of proven fact. The genitalia of a girl, whose parents originated from The Gambia, seemed intact in a first genital checkup, and in the next examination, they were detected as modified. It was assumed that something had happened on Spanish soil, since the family had not traveled during the period between the checks.

The bulk of the recent criminal court cases in Europe concerns acts of circumcision performed in African countries, which seem far more difficult to assess and judge. The first Danish court case took place in 2008 and dealt with parents born in Eritrea who had arranged for circumcision of their daughters, aged four and six, in Sudan in 2003. In a recent district court case in Denmark (April, 2017), two Somali parents were sentenced to prison for alleged FGM of two girls, aged 8 and 15 years, on a trip to Kenya in the summer of 2016. Italy has had two cases in which circumcision was committed abroad: one court case in 1999 regarding circumcision of a young girl (whose mother was Italian) in Egypt and one pending regarding a circumcision performed in Nigeria. The two criminal court cases in Sweden, both in 2006, involved parents from Somalia, and the acts are said to have been performed in Somalia. One of the criminal court cases in Switzerland in 2012 built on a case where the girl had been circumcised in Somalia 11 years earlier. Two court cases on FGM reported from Spain, in 2013 and 2104, were about circumcisions performed in Africa, in Senegal and The Gambia. Hence, it is reasonable to say that the "typical" FGM case is one in which a girl with background in a European country is circumcised in an African country.

In one of the Swiss cases, a woman of Somali origin had custody of a younger relative. She took the girl back to Somalia for a longer stay in 2001, where she let the girl be reunited with her biological mother, who decided to have the girl circumcised. What the Swiss court had to decide was whether the Swiss-Somali woman should have foreseen the risk of circumcision and thus had a duty to *protect* the girl against it. The court decided in 2008 that she had had such a duty and that she had failed it. In a Spanish case, a woman born in The Gambia took her two daughters back for a two-month stay during the

summer of 2003. During a couple of days their grandmother (the woman's own mother) supervised the girls. She decided to have them circumcised and had it performed – a decision that ended up in a major conflict, since the girls' mother was opposed to the practice. The Spanish-Gambian woman was acquitted by the Spanish court, since her only intentions had been to take her girls back to the country of origin, not to have them circumcised. The court held that it would be disproportionate to hold that leaving her children with her mother constituted negligence in the duty of care. This way of approaching the problem shows that courts struggle with the difficulty of not really knowing what happened and yet having to find some responsibility in those in charge of the children.³⁰

Two other Spanish cases are of particular interest for our discussion. In 2011, a woman from Senegal was accused of having performed FGM on her daughter in the country of origin, before arriving to Catalonia. The National Audience appreciated error of prohibition because, living in a rural area of Senegal, she could not be expected to have known the laws in Spain. However, the court claims to have extraterritorial jurisdiction regardless of the fact that neither the mother nor the child resided in the state at the time of the facts, but the father did.³¹ In 2012, a Gambian couple living in Teruel was accused of having performed FGM on their baby girl: arriving in Spain when she was four months old, her genitalia looked normal in her first pediatric exam, but were altered six months later. Both parents were accused of having performed FGM on the girl in Spain, although they claimed it was performed in The Gambia, prior to their migration. The pediatrician's words were considered incriminatory evidence and both parents were convicted: six years for the father and two years for the mother. The court stated that a long-term resident cannot claim to be unaware of the criminal provisions against FGM, but a person living in The Gambia can. Further, the court stated that, although it is impossible to admit culture as a mitigating factor, they must consider in this case a surmountable error of prohibition.³²

A similar reasoning followed the Verona case in Italy. The Venice Court of Appeal stated that the *ignorantia legis* excuse requires the union of two elements: a subjective element (the person's situation and perception, knowledge, and so on) and the objective element (the context that could make that error insurmountable).³³ The case involved a Type IV FGM in Verona one month after the enactment of the law prohibiting FGM. No informative campaign had been undertaken by public authorities to explain the new provisions, and the mother had recently arrived in Italy. The court held that it was not reasonable to expect the mother to have known that Type IV was prohibited under Italian law.

ERROR IURIS AND CULTURAL DIFFERENCE

The previous cases and reasoning by the courts resonate with the cultural defense discussed in American and European courts and law journals since

the 1980s and, thus, the relations between error of prohibition, cultural expertise, and cultural defense need to be further explored.

Frick (2014, p. 556) defines the cultural defense as an attempt to recognize values and norms in terms of legally privileged justifications toward exculpation (exclusion of guilt) or mitigation of the defendants' guilt and punishment. As Van Broeck (2001) has pointed out, this concept needs to be coupled with the definition of culturally motivated crimes (a terminology currently accepted in Italy and Spain³⁴), that is, "an act by a member of a minority culture, which is considered an offense by the legal system of the dominant culture. That same act is nevertheless, within the cultural group of the offender, condoned, accepted as normal behaviour and approved and even endorsed and promoted in the given situation" (Van Broeck, 2001, p. 5). Needless to say, FGM fits perfectly with this definition.

For our discussion, it is important to distinguish two different components of the cultural defense: the volitional and the cognitive, with quite different implications. The volitional cultural defense denies the defendant's ability to resist the compulsion of his or her culture (his culture made him do it, he couldn't help himself), while the cognitive defense argues that the individual simply did not know his or her actions were unlawful, encompassing cases of ignorance of law and mistake of fact (Gordon, 2001). While cultural defense as such does not exist as a formal principle within Europe (Frick, 2014), the examples show that different courts have dealt with cultural difference by referring precisely to the already existing defense theories of the error in prohibition. In fact, the cases discussed from Italy and Spain are cases in which a *cognitive cultural defense* (Frick, 2014; Gordon, 2001) was deployed. The argument behind such a defense is that it would be unfair to judge people under laws they do not know or understand, or for acts that lack all the elements of the crime.³⁵ These are cases for which the legal system accepts an exception of the maxim "ignorance of the law is no excuse," or people's beliefs or knowledge cannot be placed above the law (Saws, 1986). Cultural cognitive defenses claim that the maxim is not absolute and can be outweighed in situations where cultural evidence is used to show that either the defendant did not realize there was a prohibition or her actions were different from what is prohibited (Gordon, 2001, p. 1813). In her analysis of different Spanish cases, Maqueda Abreu (2014, p. 207) points out that although courts are reticent to accept cultural defense as such, or culture amounting per se to error of prohibition, they do actually accept error of prohibition in their decisions as a mitigating factor. What is implied by *cultural defense as such* as opposed to error of prohibition, which makes courts reticent, is probably the widespread criticism the cultural defense has raised over the years, especially when the culturally motivated crime is one against women.

According to Phillips (2003), the main critiques against cultural defense revolve around four issues: (1) It threatens to undermine legal universalism by elevating cultural membership above other considerations. The reasons why cultural difference would justify an acceptable form of ignorance of the law

need to be explained; (2) it will put in danger the rights of women, who tend to be the victims of such crimes. Cultural defenses, irrespective of whether the defendant is a man or a woman, reinforce patriarchal cultural practices that should not receive any institutional support. Cultural defense has been criticized for its potential to condone VAW; (3) it lends itself to stereotypical representations of non-Western people, as victims of their culture; and (4) it can lead to an opportunistic use of culture as defense. It is impossible to discuss these arguments but in some brief comments. We believe most of this criticism is better suited for the volitional strand than for the cognitive one. The first, third, and fourth arguments are straightforward reasons for the use of cultural expertise in different phases of the legal handling: when explaining the cultural factors that made a person unaware of the fact that she was committing a crime; helping the courts in avoiding the use and misuse of particularly static notions of culture as well as avoiding the use and abuse of stereotypes toward minority groups. Courts will then evaluate cultural expertise as the procedural rules of the state prescribe and probably as they do with any other expertise in court.

The argument that says cultural defense threatens legal universalism is true if it is understood in the volitional strand ("their culture made them do it"), but it does not work so well for the cognitive strand ("they did not know it was unlawful"). As Gordon (2001) puts it, cultural difference as a form of ignorance means that "cultural forces prevented a defendant from realizing a fact, but he otherwise acted of his own free choice" (2001, p. 1815). Error of prohibition is a classic defense theory that is used in many situations and not just for dealing with cultural difference, so the question would rather be the opposite: how could cultural difference not be an acceptable form of ignorance of the law? It is true, however, that the problem arises in particularly troubling crimes (and not when "immigrants of East African countries are charged for chewing *khat*"; Frick, 2014, p. 566), as it is difficult to argue the "lack of knowledge regarding the existence of human rights such as the right to life or security of person" (Frick, 2014, p. 568). This argument, again, works well for certain "culturally motivated crimes," such as "honor killings" (which Frick analyses), but it may not work so well for FGM, where the action itself is not indented as a crime or *punishment* by its actors (as opposed to killing) and no such obvious human rights are at stake.³⁶ Thus, we share the concerns of using and abusing "culture" as a justification for different forms of VAW, by far the most discussed danger of the cultural defense.³⁷ Yet, we believe that the presence of stereotyped images of minority cultures and minority women in court (see, e.g., Macklin, 2006) is what most hinders the modification of patterns of VAW among immigrant groups (rather than taking culture into account). Introducing cultural expertise in criminal court cases does not equal cultural defense; rather, it helps in contextualizing the criminal acts without reinforcing stereotypes. We need to further explore how cultural expertise and error of prohibition can work in favor of women's rights.

CONCLUSION

In this chapter, we have tried to demonstrate that a distinction between atypical and typical FGM court cases is useful and that engaging cultural expertise is crucial in the legal handling of both categories. As regards atypical cases, they make unfair court cases which potentially cause evitable harm to families and individuals; harm that is avoidable if professionals are attentive to cultural issues at an early stage of the legal procedure. Also, the legal handling of typical cases calls for cultural expertise: courts need assistance when they are to decide what likely happened, or what can be established beyond reasonable doubt, in situations involving unfamiliar cultural dimensions. This is especially pertinent when the crime scene is located abroad.

In both instances, the use of cultural expertise can minimize the stigmatizing effect that the criminalization of FGM may have both on specific immigrant groups and women of migrant background. Precisely because criminalizing a practice associated with a particular group without "playing into racist conceptions [...] is a daunting and delicate task" (Macklin, 2006, p. 216), we need to further explore how the use of cultural expertise in the legal handling of suspected FGM cases can reduce the harms of unfair results.

NOTES

1. This chapter is part of a broader ongoing common work that has been published in Johnsdotter and Mestre i Mestre (2015) and Johnsdotter and Mestre i Mestre (2017).

2. A note on terminology: We will use the acronym FGM (female genital mutilation) for the legal context. When we deal with the actors' perspective, we will talk about circumcision of girls (Johnsdotter, 2017). Also, some researchers use FGC (female genital cutting). There is a growing occurrence of the terminological compromise FGM/C, which aims to reconcile conflicting views among a wide range of researchers using their own preferred term.

3. Johnsdotter and Mestre i Mestre (2015). The countries included in the study were Austria, Denmark, Finland, France, Germany, Italy, the Netherlands, Spain, Sweden, Switzerland, and the UK. It was of specific interest to include Switzerland in the analysis because legal proceedings regarding FGM had taken place in the territory, but this information is seldom included in EU reports. Both EIGE and the European Parliament have issued a significant number of documents. See, for instance EIGE (2015) on how to estimate the number of girls at risk, or European Commission (2016), a communication requiring states to end with FGM.

4. An EU-wide survey launched by the European Union Agency for Fundamental Rights (FRA) on violence against women (2014) estimates that 3.7 million women in the EU have experienced sexual violence in the course of the 12 months before the survey interviews. This corresponds to 2% of women aged 18–74 years in the EU.

5. We have discussed this in Johnsdotter and Mestre i Mestre (2017).

6. Apologies for this oversimplification of such a complicated and long process. In 1997, several international organizations produced an *Interagency Statement* that was revised in 2008, due to the world indices of prevalence, earmarking 2010 as the proposed deadline for the eradication of the practice (*Eliminating FGM. An*

Interagency Statement; WHO, OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, 2008).

7. 'Type IV, unclassified: All other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization (WHO, OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, 2008). Types I, II, and III are practised in 28 countries in Africa, and a few countries within Asia and the Middle East. The practice has also been reported in certain ethnic groups in Central and South America. Eighty-five percent of FGM belong to Types I and II. The remaining FGM, mainly Type III, is located geographically in the

Horn of Africa, where the indices of prevalence are very high (e.g., Djibouti 93%; Somalia 98%). A further distinction is also made between practices that are carried out collectively that constitute socialized rites of passage (usually Types I, II, and in some cases Type IV) and those practised on individual women (Type III and in some cases Type IV). For a description of the complexity of the practices, see, for example, Walley (2005), Gunning (2005), Obiora (1997), James and Robertson (2005), Herlund and Shell-Duncan (2007).

8. From the perspective of prevention and abolishment, the meaning of the practice for the group and the way the procedure is carried out imply the use of differentiated strategies and instruments.

9. For detailed information on all EU countries and Croatia regarding FGM (domestic legal frameworks, data, national policies, prevalence estimates, child protection routines, and so on), see EIGE (2013a) and EIGE (2013b). For analysis about European laws regarding FGM/C and their implementation see, Leye et al. (2007), Leye and Sabbe (2010), Kool (2010).

10. See, for example, the recommendation adopted by the Committee of Ministers of the Council of Europe in 2002 regarding the protection of women against violence. For a systematic assessment of The Council of Europe discourse and actions regarding VAW, see Choudry (2016).

11. Except for Armenia, Azerbaijan, and Russia. It has been ratified by Albania, Andorra, Austria, Belgium, Bosnia and Herzegovina, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Italy, Malta, Monaco, Montenegro, Netherlands, Poland, Portugal, Romania, Sweden, Serbia, Slovenia, Spain, and Turkey.

12. For an interesting critique of the Convention, see Peroni (2016).

13. The concept of "due diligence" has become a customary human right standard in international law since its emergence in the Inter-American Court of Human Rights. See the Velasquez Rodriguez Case, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988). For an excellent account of the emergence and development of the standard, see Hasselbacher (2010).

14. Declaration on the Elimination of all forms of Violence Against Women, U.N. Doc. A/RES/48/104 (February 23, 1994).

15. In 2006, UN officially endorsed the due diligence standard as a tool to fight violence against women, and recent rulings of the European Court of Human Rights have developed the meaning and scope of the due diligence standard with regard to the state's positive obligations to prevent, protect, prosecute, and redress violence against women, considering the failure to meet due diligence in the fight against violence as a form of gender-based discrimination. Case of *Bevacqua and S. v. Bulgaria* (Application n. 71127/01, ECHR 2008) and *Opuz v. Turkey* (Application n. 33401/02, ECHR 2009).

16. Articles 5 and 12 of the *Istanbul Convention* establish the content of the obligations derived from the Due diligence standard and the general obligations States undertake with the signature. For an analysis on how the Convention impacts FGM, see The Council of Europe & Amnesty international (2014).

17. Please note that the *Istanbul Convention* covers only Types I to III of the WHO classification.

18. The principle of extraterritoriality was promoted by the European Parliament in 2001 and 2009, but was definitely embraced after the *Istanbul Convention*. The Convention has already had an impact in Spain and Germany regarding this principle. See Johnsdotter and Mestre i Mestre (2015). Art. 44 of the Convention is, by far, the article that has received more reservations. For instance, it imposes a duty on states to allow prosecution of certain crimes, including FGM, until well after the victim has reached majority of age, and some states, such as France, have made a reservation to this provision.

19. The literature regarding Public Prosecution in Europe is wide and extended. In the last ten years, an important amount of comparative analysis has been developed and The Consultative Council of European Prosecutors works in collecting information about the functioning of prosecution services in Europe and implementing Recommendation (2000) 19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system. According to the CCPE, it has taken longer for harmonization in the field of law enforcement to emerge as a concern because the issue is a delicate one for the institutions in each state, with implications for the way that public authorities are organized. For a very interesting comparison of eight countries, see Martin Pastor et al. (2014).

20. *The Telegraph*. Retrieved from <http://www.telegraph.co.uk/women/womens-life/11699603/FGM-Ogilvy-campaign-wins-Cannes-Lion-awards.html>. Accessed on May 23, 2017.

21. For a recent case of a doctor investigated for authorizing genital surgery of an adult woman, see <http://www.standard.co.uk/news/health/doctor-cleared-over-fgm-sayswomen-should-be-free-to-have-intimate-surgery-a3477941.html>. Accessed on May 23, 2017.

22. *El País*. Retrieved from http://ccaa.elpais.com/ccaa/2017/01/28/catalunya/1485616989_147479.html. Accessed on May 23, 2017.

23. From Johnsdotter's research archive of criminal investigations concerning suspected FGM.

24. J. Rogers further states that "The CPS" broad reference to the Code test has unsurprisingly failed to convince many that the prosecution was properly undertaken; at the very least, more explanation should be needed if the CPS wishes to regain public confidence over this episode. In the 2017 case (supra note 21), the press reports: "On the criminal investigation against him, he said it had 'dragged on' despite having no chance of success. "I gave an opinion in the same way that a barrister or a solicitor is asked to give an opinion. You can't possibly be held up for aiding and abetting for giving an opinion. But it's a highly political area. The pressure is on because they [the CPS] have never managed to get any convictions over the past 20 or 30 years."

25. Johnsdotter reports the first Swedish criminal court case based on the police investigation, transcripts of all police interrogations, audio-visual tape recordings of the three police interrogations with the young girl, and audio tape recordings of all court proceedings in district court and court of appeal.

26. Of course, this has been a major issue in private crimes and especially in VAW and rape cases. We broadly agree with the feminist critique that many forms of violence women face cannot be told in a coherent narrative and beyond all reasonable doubt, because the telling of a story of abuse inevitably reveals ambiguities. As Smart (1989, p. 34) put it, for rape trials, "the experience she wishes to convey is quite incomprehensible [...] the language she will use to explain her experience will be seen as flawed [...]" We nevertheless think that some coherence has to be drawn or has to be possible to make between what the victim says happened and what the context of the crime tells us: It has to be reasonable to believe that the facts narrated are plausible. See Ruiz (2009).

27. The man's sister travelled from Somalia to Sweden when she came to know that her brother was detained for suspected FGM. She presented herself in a police station in her brother's city of residence in order to testify that his version was true. She was immediately detained and remained in custody for many months, until her niece had changed her story and said instead that it was her father's new wife who had been present when the circumcision was performed. In the interrogation by the police, the girl stated that she had previously made these claims about her aunt's presence because she "hated her" and

"wanted to see her dead." The reason for this bitterness was that her aunt, according to the girl, had told other Somali people that the girl "was a whore" (transcripts from police interrogations, March 27, 2006, and August 7, 2006).

28. The importance of cultural expertise in the legal handling of suspected FGM cases is compellingly argued by Macklin (2006), who relates a case involving a Sudanese family in Canada: "neither the police, nor child welfare authorities, nor the lawyers involved approached the case with any real attentiveness to the complex cultural, social, and gender dimensions of the issue" (2006, p. 221). The charges were withdrawn when it was concluded that it was unlikely that an illegal circumcision had been performed. She emphasizes that professionals dealing with such cases – within the criminal justice system and child protection services – need to seek assistance when they are to deal with intercultural issues in order to avoid, as far as possible, evitable harm. See also Timmer (2015).

29. There seems to be evidence that FGM has occurred in France, Switzerland, Italy, and possibly in Spain (Johnsdotter & Mestre i Mestre, 2015).

30. In these cases, we possibly see the first signs of European systems dealing with caregivers who do not want to have their daughters circumcised but fail to sufficiently protect them from circumcision during stays in African countries. In criminal procedures, this implies a move from criminal intent to *neglect of care* when it comes to circumcision of girls living in Europe (Johnsdotter & Mestre i Mestre, 2015).

31. National Audience AN 13/2011.

32. Supreme Court Decision STS 835/2012.

33. Corte d'Appello di Venezia, 23 Nov. 2013, (dep. Feb 21, 2013), n. 1485.

34. See Maqueda Abreu (2014), Basile (2013).

35. Frick (2014) distinguishes three common arguments in favor of the cultural defense: the argument from necessity (a lesser evil than parallel judgments and societies); the argument from pluralism (imposing the norms of the majority would destroy cultural diversity that is valuable per se); and the argument from fairness, which again has three veins. The relativistic strand states that a system lacking cultural defense is unfair in imposing culturally biased rules to culturally different people; the deterministic strand affirms that it is unfair to pressure someone to act against his or

her culture and its ethical imperatives; and the epistemic/cognitive aspect suggests that ignorance of the law should be a defense for people raised in a foreign culture.

36. It is a particularly Western idea to condone genital modifications in infant boys while banning any such modification in the genitalia of the girl. In practically, all societies where circumcision of girls is practiced, so is circumcision of boys, and the procedures are often seen as mirroring each other (PPAN, 2012).

37. Although the discussion did not start with Okin's essay, her publication *Is multiculturalism bad for women?* (1999) invigorated the discussion. See Ahamadu (2000), Dustin and Phillips (2008), Frick (2014), Green and Lim (1998), Igareda (2015), Volpp (2000), Mestre i Mestre (2011), Mohanty (2003), Phillips (2003), and Peroni (2016) among many others.

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