

Evaluating the impact of existing legislation in Europe with regard to Female Genital Mutilation.

Spanish National Report

January 2003-March 2004



Authors

Javier de Lucas (Director)
Centre of Studies on Citizenship, Migration and Minorities
(University of València)

María José Añón Roig
María Helena Bedoya
Isabel María Fernández
Fernando Flores Giménez
Angeles Galiana Saura
José García Añón (co-ordinator)
Adriana Kaplan
Antoni Llabrés i Fuster
María Isabel Martínez
Ruth Mestre i Mestre

Javier Mira Benavent
José Manuel Rodríguez Uribe
María Olivé Elias.
Mario Ruiz Sanz
Ángeles Solanes Corella
Carmen Tomas y Valiente
Francisco Torres Pérez
Ana Valero Heredia



With the support of the *Daphne programme*
(*Directorate General of Justice and Home Affairs, European Commission*)

This publication reflects the authors' views only.
The Commission is not liable for any use that may be made of the information contained herein.

Index

Introduction

- 1. Legislation with regard to Female Genital Mutilation in Spain**
- 2. Court cases related to Female Genital Mutilation in Spain**
- 3. Description of the practising community. Socio-demographic notes.**
- 4. Procedure followed in case of a legal intervention to prevent or to penalise the performance of Female Genital Mutilation**
- 5. Implementation of legislation on Female Genital Mutilation**
- 6. Obstructing and favouring factors for the implementation of legislation applicable to Female Genital Mutilation**

Conclusions

Bibliography

Annexes

Authors

Introduction

The *Spanish Report on the evaluation of existing legislation with regard to Female Genital Mutilation* (FGM) is the result of a research project supported by the European Commission Daphne Programme. The project *Evaluating the impact of existing legislation in Europe with regard to female genital mutilation*, has been coordinated by the *International Centre for Reproductive Health* of Ghent University (Belgium) from January 2003 to March 2004.

The project included as partners the *Foundation for Women's Health, Research and Development* (FORWARD, United Kingdom); *Lund University* (Sweden); *Commission pour l'Abolition des Mutilations Sexuelles*, (CAMS, France), the *Centre of Studies on Citizenship, Migration and Minorities* of the University of Valencia (GECIM, Spain), and the above mentioned *ICRH* (Ghent University, Belgium) .

The Spanish report is an interdisciplinary research done by the *Centre of Studies on Citizenship, Migration and Minorities* (University of València), directed by professor Javier De Lucas, and which counts with researchers and collaborators both, from the University of Valencia and other Universities such as University of Barcelona and University Rovira i Virgili of Tarragona; in the fields of Law (Penal Law, Constitutional Law, Theory and Philosophy of Law), Sociology and Anthropology. The Group of researchers includes as well lawyers and public prosecutors.

Practice of Female Genital Mutilation in Spain, like other European countries, address this rite that is introduced by immigrants from countries where the practice is prevalent (as we may see in *chapter 3*), as a violation of women's rights and consider that such violation cannot be justified by respect of cultural traditions or initiation ceremonies. The increasing of immigration in Spain, has been a fact in last years, and it would be an important issue in future, increasing too the number of girls at risk in our country.

In Spain, since October 2003, we have a new specific legislation, but before Female Genital Mutilation was liable too under the general offence of injuries in the Penal Code. In this Report, like in the other of the project, we have examined the possibilities and difficulties in the implementation of the Spanish national legislation, in order to recommend a legislative and political strategy through Europe.

The research methodology, common to all reports, was designed by the ICRH in its coordination task, but was as well discussed by all the partners along the six steering committee meetings we have had. The structure and content of report reflects the answers to following questions: 1. What is the legislation with regard to FGM in your country? Description of the legislation.; 2. What is the number of published court cases/suspected cases related to FGM in your country? What is the number of “hearsay” cases?; 3. Brief description of the practising community and the corresponding jurisdiction: number of Africans per country in the geographic area where the cases that you describe are located; 4. What is the procedure to be followed in case of a legal intervention to prevent or to penalise the performance of FGM?; 5. Is legislation applicable on FGM being implemented?; 6. What are the obstructing (favouring) factors for the implementation of legislation applicable to FGM?

First of all we have compiled information about legislation applied with regard to FGM: not only general or specific criminal law, (in the case of Spain both because we have a change of law since october 2003), but also child protection procedures. In *chapter 1*, you may find the result: a Constitutional analysis, changes in Criminal Law, and an introduction to Minor protection Laws.

The second issue was the knowledge of court cases, police and judicial investigation in order to study how justice works. In this part, we contact key-informants, review archival records and study other reports: usually sociological, anthropological and health reports. In *chapter 2* we have selected and summarized seven court cases in which we have found enough relevant information to other parts of the report.

At the same time, we need to identify the practicing communities to estimate the prevalence of women with FGM and the number of girls at risk of FGM. This was interesting not only to limit the research but to focus on a territory where there was a probability of cases in Court. We have chosen Catalonia: a community with court cases (in Barcelona and Girona) and prevalence of FGM; and Valencia, a territory without known cases and with no prevalence of FGM. This analysis is shown in *chapter 3*.

In order to detect factors that hamper the implementation of existing legislation we need to know how procedures work at different levels: health services, social assistance, police, prosecution office and courts. Examining procedure laws, referral procedures, guidelines or ruled practices was not enough. We had to know what happens, who knows a case, which institution examines it, which real men they have....

To complete this, we have performed a study, interviewing key-informants with an standard interview: police, prosecutors, judges, doctors, nurses, social assistants and immigrants. Interviews were fulfilled in Valencia, Tarragona, Barcelona and Girona. Results are in *Chapter 4* (procedure followed); *Chapter 5* (implementation of applicable legislation) and *Chapter 6* (obstructing and favouring factors for the implementation of legislation).

We had three main meetings to design the research and discuss texts and provisional results. Some of conclusions of provisional spanish report were discussed in two seminars: “Ciudadania europea y conflictos culturales”, [*European citizenship and cultural conflicts*] (Valencia, 29, 30 and 31 october 2003); and “Violencia de género: instrumentos jurídicos en la lucha contra la discriminación de las mujeres” [*Gender violence: legal instruments fighting against women discrimination*] (Valencia, 26, 27 and 28 november 2003)

The study was financed by the European Commission, *Daphne programme*, and ran from January 2003 to March 2004 (EC-CONTRACT nº 02/058/WYC). In addition, in the period we have done this study, the *Centre of Studies on Citizenship, Migration and Minorities* was financed with other projects related: “Indicadores y medidas para el desarrollo de políticas públicas de integración social de los inmigrantes y la garantía de sus derechos en la Comunidad Valenciana”, [*indicators and measures to develop public policies for social integration of immigrants and the protection of their fundamental rights in the Land of Valencia*], Project I+D “Generalitat Valenciana”; 2002-2003; “Los derechos fundamentales en las sociedades multiculturales” [*fundamental rights in multicultural societies*], project I+D, Subdirección General de Proyectos de Investigación, Dirección General de Investigación, Ministerio de Ciencia y Tecnología, november 2002-october 2005; “Los derechos de participación como elemento de integración de los inmigrantes” [*participation rights as a element of the integration of immigrants*], II Convocatoria de Ayudas a la Investigación en Economía, Demografía y Estudios de Población y Estudios Europeos de la Fundacion BBVA; 2004-2005.

We wish to thank all who have collaborated in this study, specially we remark the collaboration and contributions of Elena Gascón Sorribas (Sociology of Law Laboratory; University of Zaragoza); María Heras García (Public Prosecutor); Dolores Gisbert Millet (Doctor, Health Service, Valencia); Ignacio de Lucas (Public Prosecutor); Laura Matilla (Lawyer, city council of Cullera); Joan Mayoral Simón (Justice

Department, Regional Government of Catalonia); Xavier Montagud (Social Services, Regional Government of Valencia); and Dolores Sabater Collado (Court Secretary).

With the results of the five National Report analysis and the information about legislation in all European Union member States, the coordinators, Els Leye and Jessika Deblonde, have elaborated *A comparative analysis of the different legal approaches in the 15 EU Member States, and the respective judicial outcomes in Belgium, France, Spain, Sweden and the United Kingdom* (ICRH, 2004).

Javier De Lucas
Centre of Studies on Citizenship, Migration and Minorities
(University of València)

<http://www.uv.es/immigracio>

1. Legislation with regard to Female Genital Mutilation in Spain

Summary

1.1. A constitutional approach to the problem:

1.1.1. Constitutional framework covering the protection of the rights of the migrant minor.

1.1.2. The freedom of conscience of foreigners and constitutional points of reference.

1.1.3. The migrant minor as holder of fundamental rights: Particular attention is given to points of reference in relation to the minor's best interest and in relation to manifestations of freedom of conscience.

1.1.4. The rights and duties of public and private actors in relation to the protection of the minor's best interests.

1.2. Female Genital Mutilation and Criminal Law

1.2.1. Possibilities for the intervention of criminal law: political/criminal issues.

1.2.2. Countries in which Female Genital Mutilation takes place and the applicability of Spanish Criminal Law.

1.2.3. Female Genital Mutilation in Penal Law.

1.2.3.1. Regulations in force until September, the 30 th, 2003

1.2.3.2. The current legislation: The amendment of art. 149 of the 1995 Penal Code.

1.3. Measures taken in the Spanish legal system in relation to the rights of minors and their application in cases of Female Genital Mutilation.

1.1. A Constitutional Approach. Approach to the problem.

1.1.1. Constitutional framework covering the protection of rights of the migrant minor.

The creation in 1978 of the Spanish State in the form of a Social and Democratic State of Law has had an enormous influence in the elaboration of the law of the migrant minor. In the Spanish Constitution of 1978 (hereafter *SC*) the principle of “real” or “material” equality set in article 9.2 is the perfect instrument to protect the minor, and the minor migrant too, by public authorities: “It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life.”

Holding the condition of minor as well as that of foreigner puts the migrant minor in a particularly vulnerable position which requires and justifies duty of care on the part of the State which finds its roots in the values of justice and equality and hence solidarity; such values are enshrined in our Constitution as higher principles of the legal system (Article 1.1 *SC*)

In like manner, article 39 *SC* establishes the protection of the minor as one of the guiding principles of positive legislation, judicial practice and the activities of public authorities - in accordance with what is set forth in paragraph 3 of Article 53 *SC*¹. Furthermore, the mandatory compliance with the fundamental rights therein binds public authorities and private individuals alike. Different Constitutional norms express minor rights as limits to public authorities and private individuals. We find hence that article 20.4 *SC* refers to the protection of youth and childhood as an intrinsic element among others such as freedom of expression, information, artistic creation and

¹ Art. 39 *SC*: “1. The public authorities ensure social, economic and legal protection of the family. 2. The public authorities likewise ensure full protection of children, who are equal before the law, regardless of their parentage, and of mothers, whatever their marital status. The law shall provide for the possibility of the investigation of paternity. 3. Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they

expression and freedom of teaching. In a similar manner – and returning to this for deeper analysis at a later stage – the ideological and religious freedom of individuals and communities will not be subject to anymore limitation in their manifestations than “that which will be necessary to uphold public law and order under the protection of the law”; one of the integral components of the aforesaid concept of law and order is indeed the set of laws protecting minors².

Lastly, from article 10.2 of the Constitution we see that the international legal system acts as the highest reference source in relation to the interpretation of basic human rights. We find that Treaties and agreements concerning situations of risk for individuals holding rights –due to a specific social condition, cultural condition or due to their sex, set forth in their State legal system such practices, like Female Genital Mutilation, constitute an attack on the basic rights of migrant minors – such as the right to life, the right to physical and psychic integrity, freedom of conscience, the right to good health, the right to equality and non discrimination – rights which are recognised by virtue of their condition as human beings and which are independent of any questions of citizenship or of belonging to any nation.

1.1.2. The freedom of conscience of foreigners and constitutional points of reference

As we all know, article 13.1 SC points out that “foreign nationals will have in Spain the public liberties guaranteed by this Title in the terms established in the Treaties and the Law”. Nonetheless, the decisions of Constitutional Court (*Tribunal Constitucional*) has more precisely evolved in such a way – under limits placed by the Constitution - as to recognise the equality between Spaniards and foreigners in relation to the holding and enjoyment of basic rights inherent in the condition of being a person and hence to the dignity thereof.³ Furthermore, foreigners also

are still under age and in other circumstances in which the law so establishes. 4. Children shall enjoy the protection provided for in the international agreements safeguarding their rights”

² Decision of Spanish Constitutional Court (hereafter *STC*) 141/2000, FJ 5°. You may find the decisions cited in <http://www.boe.es/tc>

³ This attribution of equality becomes manifest with respect to the right to life, physical and moral integrity, intimacy and ideological freedom set forth in *STC* 107/1984; the right to judicial guardianship made effective in *STC* 99/1985; the right to personal liberty and security set forth in *STC* 115/1987; or the

benefit from the principle of equality which means that they cannot be discriminated against on grounds of conscience as set forth in article 14 of each of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, (Rome, 1950) and the *Spanish Constitution*. This is the spirit followed by our Constitutional Court up to the extreme of practically limiting the restrictions in the exercising of basic rights by foreigners in relation to their political activities. Following from this the Constitutional Court, in its decision 107/1984, november the 23th, reminds us that the only exclusion that is explicitly introduced in the Constitution in relation to foreigners deals with the political right to suffrage (Article 23 SC) *in relation with 13.2 SC*: “Only Spaniards shall have the rights recognized in section 23, except in cases which may be established by treaty or by law concerning the right to vote and the right to be elected in municipal elections, and subject to the principle of reciprocity.”

Following from this, there is no doubt whatsoever that article 16 SC recognises the freedom of conscience and ideology of foreigners “without limitation other than what is necessary for the upholding of law and order as protected by the Law”. The new Spanish regulatory scheme established by way of a Law, *Ley Orgánica 4/2000* January the 11th, *on the rights and liberties of foreigners and their social integration (LO 4/2000)*, amended in *LO 8/2000* december 22th and in *LO 14/2003*, 20th november sets forth the limits and scope of the freedom of conscience of foreigners in article 3.2 which embodies “the rules pertaining to the basic human rights of foreign nationals shall be interpreted in accordance with the Universal Declaration of Human Rights and with the international Treaties and Agreements. This applies to legislation in force in Spain, and *without any possibility of alleging the profession of a religious faith or ideological convictions of any kind in order to justify acts or such behaviour contrary to the aforesaid basic rights*”⁴.

The limited or non-absolute nature of freedom of conscience is established in Article 9 of the Convention of Rome (1950) which provides that the right to freedom of thought, conscience and religion “shall be subject only to such limitations as are

right to not being discriminated by virtue of birth, race, sex, religion, opinion or any other personal or social condition set forth in *STC 137/2000*, May 29.

⁴ This article is not modified in this two changes of law.

prescribed by law and are necessary in a democratic society (...) “for the protection of the rights and freedoms of others”. This falls in line with “respect for the Law and the rights of others” as “basic element of political order and social peace” set forth in Article 10.1 SC, constituting the basis of the dignity of the person.

It can be deduced hence, that the possible tension that may arise between expressing the freedom of convictions that define one’s cultural identity – the authentic manifestation of basic human rights of Article 16 SC – and the basic human rights of other people, foreigners forming part of these “others”, should benefit the latter as they are elements which constitute “public order protected by the Law”; all the more so when we are dealing with such rights intrinsic to a person’s dignity, i.e. the protection and preservation of physical and psychic integrity. This is why no conviction or belief can be used in justifying acts such as female genital mutilation, given that this practice contravenes the rules governing the basic human rights of foreigners. But, as we may see, the answer of Law to cultural conflicts in which are involved fundamental rights is not so easy and we may shade saying that there is no prevalence of a fundamental right over other.

1.1.3. The migrant minor as holder of fundamental rights. A closer examination of points of reference regarding the minor’s best interest in relation to manifestations of freedom of conscience.

While the Spanish Constitution makes no express mention of the minor as holder of basic human rights, it is plainly evident that any interpretation entertaining the exclusion of minors as holders of constitutional rights – with the exception of the right to suffrage in Article 23.1 of the Spanish Constitution or the right to work in Article 35 SC, where the rights are in a state of suspension until a specific age is reached – goes against the principles of equality and dignity of the person.

The principle of respect for the dignity of the person (Article 10.1 SC) and the demands of the principle of equality (Article 14 SC) necessarily extends the holding capacity of fundamental rights to the migrant minor’s own condition of person. Following from this it is clearly evident that in the light of the provisions of the Constitution itself, and drawing from legislation and jurisprudence established in this

area, that migrant minors hold rights as to freedom of belief and moral integrity⁵. The question of being under the age of adulthood is nonetheless relevant as far as the exercising of the said right and holding this right is concerned. In relation to the minor's capacity to act, the minor is not subject to more limitations than those set forth by the law or derived from the degree of maturity attained which would in turn determine the minor's capacity to comply with a religious belief or to define her/his individual conscience and consequently act in accordance with religious doctrine or with individual moral conviction bound by her/his choice. In this sense, it is necessary to establish a clear distinction between what represents the effective recognition of the minor's right to freedom of conscience and the interest she/he may have as to the exercising of the said right; it is a question that in certain situations cannot be fully understood in the same terms. By analysing the situation in both national and international laws in relation to the rights of minors, we realise that there exists an ongoing tension between, on the one hand, the recognition of the minor's autonomy, as active subject of rights, and whose will must necessarily be relevant in the definition of her/his interest, and on the other hand, the duty of care that is derived from parental protection and authority over the child⁶.

⁵ Reference is made to the right to ideological freedom of the minor: *LO 7/1980*, on Religious freedom (Arts. 1.1, 2.1 c) and 3.1) and *LO 1/1996*, January 15, on the *Protección Jurídica del Menor (Child Protection Law)* (art. 6.1). In relation to the minor holding rights to freedom of belief see the decisions of Spanish Constitutional Court: 215/1994; 260/1994; 60/1995; 134/1999 and the already cited 141/2000.

⁶ Article 162 of the Civil Code sets forth a series of exceptions to general rule of legal representation on the part of the parents for children who are minors and not yet emancipated: "Parents who hold legal custody have the legal representation of their minor children who are not yet emancipated. The exceptions are: 1. "Acts relative to personality and others that the child, in accordance with the law and with the minor's condition of maturity can do for her/himself". On the other hand that the spirit of the 1989 Convention of the Rights of the Child is characterised precisely by the autonomy of the minor. The child becomes an active subject of her/his rights, as holder and beneficiary and with the possibility of exercising those rights, always subject to the conditions of the minor's maturity. Lastly the *Ley Orgánica 1/1996, de Protección Jurídica del Menor (Child Protection Law)* establishes in its 2nd Article, that "The limitations on the capacity of minors to act shall be interpreted in a restrictive manner". Recent legal texts manifest the legislator's high tendency to view the minor's autonomy in the exercising of her/his fundamental rights. In this regard, the *Ley Orgánica 1/2002*, March 22, del *derecho de asociación (Parliamentary Law regulating the Right to form associations)*, establishes in Article 3 b) that they "Form associations, and participate in them, non-emancipated minors older than 14 with the consent in writing of the people who stand in for the minor's capacity without prejudice to the rules laid down for children/juvenile groups or school associations in Article 7.2 of *LO 1/1996*, January 15, *Protección Jurídica del Menor*" (*Child Protection Law*). In a similar fashion, Article 9.3 b) *Ley 41/2002*, November 14, basic in the regulation to the autonomy of the patient, and the rights and duties in relation to information and clinical documentation and Article 9.2 of *Ley 1/2003*, January 28, of the *Generalitat (Government of Valencia)* on Rights and Information for the patient in the Community of Valencia, gives protection to the decision of the minor in matters relating to health.

The duty of the parents to cooperate to foster the child's rights in order to contribute to an integral development of the child, has been interpreted by the *Constitutional Court* on repeated occasions:

“From the perspective of Article 16.1 SC minors are full holders of fundamental rights, in this case, their right to freedom of beliefs and to moral integrity, without having the rights and the ability to exercise these rights infringed upon and left aside, with respect to guardians and parents, (...) *the fundamental rights of the minor will be modulated in accordance with the child's degree of maturity and in accordance to the different situations as set forth in the legislation in relation to the minor's capacity to act (Articles 162.1, 322 and 323 CC or Art. 30 Ley 30/1992, November 26, entitled: Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común, Public Administration Procedure Law)*”⁷.

Evidently, the minor finds her/himself in the process of forming a personal ideological and religious identity as well as the formation of the conscience while the parents have assigned to them a role that is essentially one of support and guidance in their personal development (Article 39.3 Spanish Constitution). According to what is established in Article 6.3 *LO 1/1996*, “they have the right and duty to cooperate so that the minor will use that freedom in such a way as to contribute to the minor's integral development”; following from this, in Section 2 of Article 14 of the Convention of the Rights of the Child establishes that “the Party States will respect the rights and duties of the parents, or of their legal representatives, in the guidance of the child in the exercising of her/his rights in accordance with the development of her/his faculties”. It follows hence that the parents have vested in them a function of guidance and education but at no times does this function mean that there is a substitution or seizure of the minor's rights. In other words, nobody can exercise the right of freedom of conscience – in its content and with its positive and negative ramifications – on behalf of and for the minor; this could entail the imposition of beliefs, experiences, religious or conscience practices contrary to the convictions and feelings of the minor. In short, in the crux of child-parental relationships, neither the aforementioned role of education and guidance, nor the exercise of the parents' freedom of belief, can be oblivious to the fact that their children are the holders of their own basic human rights.

⁷*STC 141/2000, FJ° 5 and STC 154/2002, FJ 9°.* (The italics have been added).

In this sense, the duty of the parents to respect the rights of their child requires a gradation of the duties and faculties inherent in the concept of custody in relation to the child's capacity to exercise her/his own rights at a given point. The increasing degree of participation in matters which concern her/him are subject – in accordance with legislation in force – to the degree of intellectual and emotional maturity given that the consideration of the minor as holder of rights – by virtue of her/his dignity as a person – demands this consideration. We can conclude hence that the rights of the minor in the area of freedom of conscience can be understood as a placing of limits on the acts of the parents.

Looking now at the analysis of the practice of FGM, we find that the problem constitutes an attack on the constitutional principles which enshrine the basic rights of any human being. Such non-compatibility with the constitutional spirit is present regardless of whether this practice takes place as a result of the parents' freedom of conscience reflecting obedience to the cultural norms of the country of origin; it needs to be pointed out that in most cases the parents believe that the mutilation will have a beneficial effect in the girl's future. While the genital mutilation of female minors is normally instigated by parents and other members of the family who hope to comply with a traditional practice in their country of origin, there can be no doubt that neither the freedom of conscience of parents/family nor the girl's own freedom of conscience can prevail in regard to this practice as external manifestations of Article 16 SC.

Female genital mutilation constitutes a serious attack on constitutional rights of minors who are subject to this practice and in no circumstances whatsoever can it be justified in terms of the freedom of conscience of those who carry it out or in terms of compliance of traditional cultural norms. As a response to these kinds of Acts, multiple precepts of the Constitution can be invoked, such as Article 10.1, the heading of which refers to the dignity of the person; we find that the right to the minor's own freedom of conscience is protected by Article 16; the protection of the best interests of the minor is set forth in Article 39; the right to equality and non-discrimination is established in Article 14; practices damaging to the health of minors are set forth in Article 43. It is rather notorious that the minor's right to physical and moral integrity in this context becomes quite transcendental, being guaranteed in Article 15 of the Constitution which in turn prohibits inhumane and degrading treatment.

The preponderance of the minor's right to physical and mental integrity as opposed to an act of freedom of conscience of those who may hold the custody and guardianship of the minor, or indeed as opposed to an act of freedom of conscience of the minor herself – on the grounds that she might have been given granted consent for its execution – has firstly as its base, the very dignity of the person, conceived as an essential element of the set of basic human rights. The protection afforded by the Constitution to one of the freedoms most strongly rooted in the autonomy of each person, such as her freedom of conscience, must clearly give way when the right to life or the right to physical integrity of the minor are at stake.

Even though we find that there is generally speaking, high consideration given to the determination of the minor herself in deciding upon acts where she holds rights, in no case should a conclusive value be given to the expressed will of the minor when “the definitive and irreparable character of her decision” places her own life or health at risk⁸.

The prioritised importance of the person's right to life and to health as opposed to other rights, benefits or values which are constitutionally protected have been seconded by the Constitutional Court throughout its period of jurisprudence. The preponderant value of “life”, as a supreme juridical benefit at the apex of the set of values enshrined in the ethical code established by the Constitution, has conditioned its constant prevalence and it has reinforced the State's duty to uphold and protect it over and above the will of an affected person even when such a will were based on ideological and religious motives. Hence we find the Constitutional Court in its *Auto*

⁸ The Constitutional Court in decision 154/2002, in its legal foundation 9 takes up these affirmations: “It is true that the legal system concedes relevance to certain acts or juridical situations to the minor. This is reflected in particular – with respect to the regulations pertaining to the relationships of persons affected by the subject we are delving into - as much in the Civil Law of Aragon (applicable when the legal neighbourhood is found in that territory which holds its own right or *fueros*) as in the Civil Code. Hence acts related to rights of person (precisely among which we find physical integrity), from which the faculty of legal representation that parents have as holders of legal custody, explicitly set forth in Article 162.1 of the Civil Code; such an exclusion on the other hand, does not extend to the duty to look after minor and her/his best interests. Mention must also be made of various acts leading to the creation of juridical effect or the formalisation of determined juridical acts such as, among others, the capacity to enter into a contract of marriage, to issue a will, to act as witness, to be heard in relation to the granting of custody or guardianship to one of the parents. In this vein, the same occurs in the area of penal law, for the specification of certain crimes. Notwithstanding this, the exceptional recognition of the minor's capacity to with respect to specific juridical acts, as those that have just been mentioned, is not in itself sufficient to, by way of harmonisation, recognise the juridical efficacy of an act which, by engaging a negative question in life, has in its essence a definitive character and in consequence is irreparable”.

(sentence) 369/1984 had affirmed the guaranteed right of religious freedom in Article 16.1 of the Spanish Constitution has as a limit “the health of persons” and in its later sentence 137/1990 it established that “the basic right to life (...) as a basic principle of the constitutional order, requires that the public authorities and, in particular, the legislative authorities, take on the duty to adopt measures that may be necessary to protect those benefits, life and physical integrity, in the face of attacks by third parties, *without having to follow the will of the holders of the said rights* and even when the holders of such rights have made no formal expression of their will⁹.

Furthermore, the said preponderance is made more salient when the life or health of a minor is threatened as has been recently demonstrated by the Constitutional Court in its recent sentence 154/2002, where it has reiterated the preponderant value of the minor’s right to life as a prioritised juridical benefit to be protected.

1.1.4. The rights and duties of private and public actors with regard to the protection of the Minor’s best interests.

The family unit constitutes the primary base where the minor receives her/his initial ethical and moral teaching. Without any doubt, the child is a passive subject in relation to major decisions taken by her/his parents in relation to her/his education and integral upbringing; these in turn shape her/his intellectual faculties and conscience. The duty expected of parents to educate and bring up their children, as set forth in Article 39.3, Spanish Constitution; the said goes hand in hand with the rights given to parents

⁹ What was established by the Constitutional Court *Auto* 369/1984 has at its origin the Constitutional Court *Sentence* April 14, 1983, in a case dealing with a medical intervention on a woman who was a Jehovah’s Witness; contrary to her express desire, where it was considered that the Judge had acted correctly by placing the value of the patient’s life over and above her religious freedom. The Constitutional Court in a the subsequent *Auto* interposed – in a rather unfortunate manner – the “health of persons” as limit to religious freedom. The Highest Interpreter of the Constitution, in this case, shunned the public character of the limit in relation to Article 3.1 of *LOLR*, an error which has been rectified in the *STC* 154/2002 affirming in its *legal foundation*¹³ that “in the case we are dealing with there is no affectation of health, given that the international texts which act as guidelines for the interpretation of our laws refer to public health, understood as referring to the risks for health in general”.

In a *Sentence* March 27 1990, the Constitutional Court once again reiterated the absolute value of human life when there is conflict with religious freedom. In an interesting exposition of the evolution of the legislation and jurisprudence in the area of blood transfusions can be seen in Juan Luis SEVILLA BUJANCE: “*Transfusiones de sangre, conciencia y derecho a la vida. Especial referencia a los menores*” (Blood Transfusions, Conscience and the Right to Life: A special Reference to Minors), *Revista General del Derecho*, núm. 676-677 (January-February number), 2001, pp. 71-85.

for the religious and moral education of their children according to their convictions and set forth in Article 27.3, Spanish Constitution; this law grants parents a degree of autonomy and limits the intervention of public authorities in this area¹⁰. It is nonetheless important to bear in mind that while the said law protects the right of the minor to be educated according to the values, religion and/or ideology of the parents, it is no less true that the projection of religious convictions onto the child under custody has to be necessarily limited when the minor's best interests are at stake; this is so in order to encourage a harmonious personality development for the child and to avoid abusive parental influences in such development. In this sense, the question of family autonomy cannot relegate fundamental principles to a secondary position; principles intrinsically linked to social order and incorporated in the highest set of laws enshrined in the Constitutional Court – laws pertaining to freedom, equality, dignity, the value of a person or indeed the list of fundamental laws; the State having an inherent duty of care to uphold the rights of individuals when they are threatened in the family context, and particularly so in the case of minors¹¹.

The Juridical relationships between parents and children are subject to the laws of custody and guardianship. The independence of parents in this is limited by the best interests of the minor and her strictest benefit. The minor's rights have juridical superiority in that there is an overriding priority of protection of her rights should there be a conflict with other benefits or rights constitutionally recognised – see Article 2 of *LO* (Parliamentary Law) 1/1996, January 15 *Protección Jurídica del Menor* (LOPJM, Child Protection Law)¹². Following this rationale, the Constitutional Court has

¹⁰ As formulated by the Magistrate Tomás y Valiente in his *divergent opinion* (*Voto Particular*) in *STC* 5/1981 “(...) this right held by the parents projects itself directly and preferentially onto the area of education rather than on teaching per se; the former is understood as the transmission of scientific knowledge while the latter refers to the communication of moral, philosophical and religious convictions in accordance with a determined ideology”, though he quite rightly points out that “nobody is unaware of the difficulty of distinguishing between what constitutes teaching and what constitutes education”.

¹¹ It is in this sense that Verónica PUENTE ALCUBILLA manifests herself in *Minoría de edad, religión y derecho* (Religion and Law in Relation to the Condition of Minor), Ministerio de Trabajo y Asuntos Sociales, Madrid (Ministry of Employment and Social Security) 2001, p. 246.

¹² The importance of guardianship and custody stems fundamentally from its purpose, consisting of the care, education and integral upbringing of the minor child or child with a handicap, whose interest is superior to that of others in her/his circle, and more precisely, with her/his parents (Articles 90, 92, 96, 154, 156, 158, 159 and 161 of the Civil Code). Furthermore, the Convention of UN on the Rights of the Child, November 20, 1989 (ratified by Spain on November 30, 1990) in Article 3.1 sets forth that “in all measures concerning children taken by public or private institutions of social welfare, the courts, administrative authorities or legislative bodies, will have at the utmost consideration the superior interest of the child”. The Spanish legislation in relation to questions of minors defines the interest of the minor as the guiding and inspiring principle behind all the acts of the public authorities related with the child at an administrative as well as at a judicial level (*Exposición de Motivos*, Article 2 and 11.2 de la *LO* 1/1996,

reiterated that the international norms pertaining to the protection of childhood and the Parliamentary Law known as *LO 1/1996* make up “the legal statute of minors not available within the national territory”, a statute that “without any doubt constitutes a key element of public order warranting uncompromising observance by the public authorities and which constitutes a legitimate limit to the freedom of manifestation of one’s own beliefs (...)”¹³.

January 15 *Protección Jurídica del Menor* (Child Protection Law) and Articles 172.4, 173.3 and 4 and 173 *bis* of the Civil Code). Furthermore, the Constitutional Court has reiterated in its jurisprudence the superior interest of the minor as a juridical category with a prioritised degree of protection. For all these questions see *SSTC 141/2000*, FJ 5°; *124/2002*, FJ 4° and 6°; *154/2002*, FJ 10° and *221/2002*, FJ 2°.

¹³ Legal Foundation 5 from *STC 141/2000*. In this sense, Francisco RIVERO HERNÁNDEZ manifests his total agreement with the findings of the *Constitutional Court* in the sentence *141/2000*, upon understanding that the interests of minors is the clearest limit, because of the special protection they are afforded in cases of conflict with others, to certain rights held by adults, not only as general limit to the rights and interests of other parties in the case of conflict, but within the core family relations and in the exercising of custody, which takes on a special tinge in its conceptual nature of *oficium iuris* (its specific weight is based on the protection of the child, the main protagonist, and not the faculties of the father or the mother) as in the interpretation of the norms governed by it. See the opinion of the author in: “*Límites de la libertad religiosa y las relaciones personales de un padre con sus hijos. (Comentario a la STC 141/2000, May 29)*”, *Derecho Privado y Constitución*, No. 14, 2000, pp. 245-299.

1.2. Female Genital Mutilation and Criminal Law

1.2.1. The possibility of Criminal Law intervention: Political-Criminal Issues

Prior to analysing Spanish criminal law relating to female genital mutilation, a reflection, albeit brief, must be made with respect to the possibility of combating this phenomenon through the application of the punitive branch of Spanish law. The controversy stems from the specific characteristics of the practice in question (above all, the fact that it is a rooted tradition in certain cultural groups and in view of its impact on the minor's most direct family nucleus), and strictly speaking, springs from two legal issues which, in spite of being very related, may be considered as separate, i.e. the legitimacy and the effectiveness of Criminal law intervention.

As discussed in the previous section on the application of Constitutional law, from the perspective of legitimacy, the problem mainly lies in the fact that such actions are considered to be of a cultural and/or religious nature by the immigrant groups which practice them. Consequently, doubts arise as to whether criminal intervention would infringe upon the freedom of religion and thought (Art. 16 SC) of the parents of the mutilated children and adolescents, as well as to whether (as would be fitting to mention at this point) exercising the state's punitive power in this area would be rendered as discrimination against a cultural group, in violation of article 14 of the Spanish Constitution. So as to avoid unnecessary repetition of the matters addressed earlier, let it suffice to add that consideration as to the application of criminal law in cases of female genital mutilation must respect the basic guiding principle of punitive intervention, commonly referred to as "the principle of minimum intervention". In accordance with this principle, taking recourse to criminal law, the branch of law dictating punishments which most infringe upon the rights of the offender, shall only be considered legitimate to protect victims from the most serious attacks on their most fundamental legal rights. In this respect, there can be no doubt whatsoever that genital mutilation is to be considered an

extremely serious attack against several highly important legal rights worthy of criminal protection. Consequently, it would not be plausible to conclude that such acts are of a legitimate nature due to the fact that this behaviour stems from the religion or beliefs of the perpetrator, for the reasons already discussed in the section on constitutional law. In more technical penal terms, Article 20.7 of the Spanish Penal Code (hereafter, *PC*), which counteracts among other items, the legitimate exercise of a right, would not be an adequate ground of defence for the protection of the performance of such acts. As with any defence, if exculpatory evidence is to be considered relevant, the legal interests and rights of the parties involved must be weighed. Accordingly, the violation of a legal right would only be justifiable to preserve higher-level rights once all of the interests of the parties involved have been evaluated. As such, under no circumstances would the interest of the mutilated woman prevail over the rights of the parents to decide upon the upbringing of their daughters based on freedom of religion and thought.

Nonetheless, in certain cases a sentence might be dismissed or mitigated by way of what is known in criminal law as “mistake of law” (as provided in Art.14.3 of the *PC*), i.e. where the party responsible for the crime is not aware of the illegality of his actions. Such awareness is as an integral part of the statutory definition of culpability in the case of this or any other crime. However, it is important to bear in mind that the exclusion of criminal liability (where the mistake is insurmountable) or mitigation of liability (where the mistake is surmountable) is in no way equivalent to handing down a sentence whereby the action is determined to be legal (which would only occur in the case that a ground of defence were applied). Effectively, cases are examined individually to determine if the party responsible for the crime was aware (or may have been aware) that the action he committed is prohibited under law. In other words, in no case is female genital mutilation tolerated due to the cultural or religious practices traditionally rooted in certain communities. On the contrary, in the case of that this clearly prohibited action is committed, the accused individual is determined to be guilty where the necessary elements for such a verdict concur.

As discussed in the previous section, the legitimacy of recourse to *ius puniendi* as a form of protecting fundamental legal rights such as a woman’s physical and psychic integrity, does not replace the advantages or even the need to resort to other measures of a social or educational nature, which may prove to be as or even more effective than

criminal law in the prevention of such practices. In this respect, even based on the premise which is currently most accepted, that Criminal law is justifiable not as a means of reward or punishment but rather as an instrument to be used for the protection of legal rights through so called "general prevention" (intimidation of a group through threat of the imposition of penalties as a result of certain actions or behaviours), there should be recognition that in order to prevent the behaviour in question, other measures must be taken. These measures should include efforts of a social nature, aimed at making the immigrant groups aware of the terribly harmful nature of genital mutilation. Other more questionable preventive measures would include the avoidance of situations in which there is most risk of the practice of mutilation (holidays in the immigrants' country of origin) where the cost of impeding minors from accompanying their parents on these trips must be weighed¹⁴, in view of the significant interference in their everyday family life. The legitimacy of such a measure would therefore need to be the subject of more extensive reflection.

Returning to the original question, once the perfect legitimacy of the punishment of female genital mutilation is established, the issue of whether criminal law intervention is advantageous arises. However, this issue relates more to the effectiveness and possible negative consequences of applying criminal law than to legitimising principles. In this respect, it has been alleged, for example, that the parents' fear of being criminally prosecuted could drive them to forego paediatric and gynaecological check-ups at which genital mutilation of children or adolescents could be discovered. This end result would cause even greater danger to those individuals that the law is meant to protect. It has also been argued that imposing prison sentences on the parents responsible for such actions would give rise to a break-up of the family nucleus in which case the minors would be left completely unprotected.

There is no doubt that such risks are real, however it must be recognized that the avoidance of these undesirable consequences is not sufficient argument to justify the abandonment of laws under which the harmful behaviour in question would be prosecutable. The risks entailed should be confronted by the public authorities through a

¹⁴ There is a specific section, *infra*, on the legal status of minors in the Spanish legal system and the possible preventive measures aimed at their protection.

series of specific measures (reinforcement of health and social services responsible for assuring that parents provide their daughters with necessary health care, special aid for minors in cases where any of their parents has been convicted, etc.) Simply failing to consider genital mutilation to be a punishable crime or failing to prosecute the responsible parties upon discovering that such a crime has been committed is not the answer.¹⁵

1.2.2. Countries in which Female Genital Mutilation takes place and the applicability of Spanish Criminal Law.

As is well known, female genital mutilation is usually not practiced in Spain but rather in the country of origin of the immigrant communities. Consequently, the Spanish Courts are faced with numerous obstacles to punishing such actions.

Indeed, aside from the cases of mutilation which have taken place within Spain, (where Spanish law would evidently be applicable under the principle of territoriality, *Section 1.2.3.* of this part of the Report addresses the particulars of the regulations in force and of different reform proposals), the canons of construction which govern the space in which Spanish criminal law is considered to be in force, make no provision whatsoever for the prosecution of genital mutilation practiced outside of Spain.

Pursuant to the second paragraph of Art.23 of the Spanish Law of the Judiciary Power (*Ley Orgánica del Poder Judicial, LOPJ*), Spanish courts shall only have jurisdiction over mutilations committed outside of Spain provided that the perpetrators are Spanish citizens or foreigners who have obtained Spanish nationality following the perpetration of the crime (personality principle), and in both cases, where the act is punishable in the country where it was carried out (dual criminality requirement). Furthermore, either the aggravated party or public prosecutor is required to have filed a

¹⁵ In this respect, in "El Derecho penal ante la mutilación genital femenina" (Criminal Law Applied to Female Genital Mutilation) (I), *La Ley*, 26-9-2001, p. 5, ROPERO CARRASCO also affirms that the risk "of foregoing the prosecution of these actions or of the imposition of a guilty verdict in order to try to prevent such repercussions" can only be avoided through supportive measures of this nature.

complaint or action before the Spanish courts and the alleged offender may not have been acquitted, pardoned, or sentenced in the country where the act took place.¹⁶

Even where that the acts are illegal in the place that they were carried out (which may not always be the case¹⁷), the application of Spanish law under the aforementioned personality principle is not at all simple because the parents of the children (who actually return to Spain and may eventually fall under Spanish jurisdiction) are not normally Spanish nationals.^{18, 19}

Furthermore, it is best to avoid interpreting that there is some room for the punishment of these crimes under Spanish law on the basis of universality or universal jurisdiction. In reality, in spite of the fact that Art. 23.4 of the *LOPJ* provides that

¹⁶ Art. 23.2 of the Organic Law of the Judiciary: provides that «Spanish courts may exercise jurisdiction over acts recognized as crimes under Spanish criminal law although they were committed abroad, where the perpetrators are Spanish citizens or foreigners who have obtained Spanish nationality following the perpetration of the crime and the following requirements are satisfied: a) The act must be punishable in the country in which it was carried out, except when this requirement is not necessary by virtue of an international treaty or legislative act of an international organization to which Spain is a party; b) the aggravated party or Public Prosecutor must have filed a complaint or action before the Spanish courts ; c) the alleged offender must not have been acquitted, pardoned, or sentenced abroad, or must not have served his sentence. If only part of the sentence was served abroad, the corresponding sentence in Spain shall be reduced accordingly».

¹⁷ It is noteworthy that dual criminality may not be required where so provided under an international treaty or legislative act of an international organization to which Spain is a party».

¹⁸ In the General Council of the Judiciary Power's report on the Draft *Law on specific measures relating to the safety of citizens, domestic violence and the social integration of foreigners (Ley Orgánica 11/2003 de 29 de septiembre, de medidas concretas en material de seguridad ciudadana, violencia doméstica, e integración social de los extranjeros)* approved at the meeting held on 20 February 2003, the need to amend said Article 23.2 to allow the Spanish Court to have knowledge of genital mutilation cases was noted "where this crime is committed abroad by legal residents of Spain so as to evade Spanish laws"(p.55) In other words, the personality principle would be extended (it currently only applies to Spanish citizens and foreigners who have obtained Spanish nationality following the perpetration of the action) to legal residents of Spain, at least in the case of female genital mutilation. The General Council of the Judiciary's report makes no mention of its application to other crimes. The Law was approved in September, the 29th, BOE, September the 30th, number 234, without the amend.

¹⁹ In the case of Spanish citizens (or where Spanish nationality was subsequently obtained), although it is most likely that any such persons did not directly perform the circumcision abroad (parents ordinarily only put their children in the hands of other people who actually perform the criminal actions), there would be a possibility of penalizing them for *acts of participation* (i.e. paying the quack doctors who perform the mutilation) carried out in the place the crime was committed (where the other requirements laid out in Article 23.2 of the Organic Law of the Judiciary are met, especially dual criminality requirements). It is to our understanding that where Art. 23.2 refer to "those who are criminally responsible" and "the action committed" the scope of the law is not limited to *acts of the perpetrator*. Bear in mind that if this were not the case, where a Spanish citizen currently in France were to persuade a Frenchman to kill his fellow Spanish citizen, and the Frenchman actually committed the crime and then took refuge in Spain, the Spanish citizen would not be held criminally responsible.

Spanish Courts may gain knowledge of certain acts committed abroad (genocide, terrorism, hijacking, etc.), female genital mutilation is neither expressly mentioned nor would it be possible to include it, as some authors have tried, in the final open clause of this law. [23.4 g): «or any others that under international treaties or conventions are required to be prosecuted in Spain »]: While Spain may have endorsed several international documents aimed at the protection of the physical integrity or health of women and children (which may which may involve the obligation to adopt different measures designed to punish mutilation) such international agreements may not empower Spanish Courts to obtain knowledge of acts committed abroad.²⁰. Consequently, there have been several legislative proposals aimed at obtaining explicit acknowledgement that such trials fall under the jurisdiction of the Spanish courts ²¹.

²⁰ The statements by ROPERO CARRASCO in, "El Derecho penal ante la mutilación genital femenina" (Criminal law applied to Female Genital Mutilation (y II), *La Ley (The Law)*, 27-9-2001, pp. 4-5 do not seem to be correct.

²¹ See amendment no. 190 of the *grupo parlamentario socialista* (Socialist Parliamentary Group) to Draft Organic Law 121/000136 on specific measures relating to the safety of citizens, domestic violence and the social integration of foreigners (*Boletín Oficial de las Cortes Generales. (Official Gazette of the General Courts) Congreso de los Diputados (Congress of Parliamentary Members)*, VII Legislature, Serie A: Draft Laws, 13 May, 2003, no. 136-8): in which the introduction of a new section 4. f. bis in Art. 23 of the Organic Law of the Judiciary is proposed. This new section would give Spanish courts jurisdiction over «female genital mutilation in all of its forms where the perpetrator is physically located in Spain».

Some years ago the grupo mixto (Mixed Group) (ERC) made a similar proposal, although it was subsequently withdrawn. See *Boletín Oficial de las Cortes Generales (Official Gazette of the General Courts) Congreso de los Diputados (Congress of Parliamentary Members)*, VII Legislature, Serie B: Draft Laws, 25 May, 2001, no. 147-1: calling for the modification of section e) of Art. 23.4 to be reworded «Crimes relating to prostitution, the corruption of minors or incompetent person and ritual genital mutilations».

Likewise, the Congress of Parliamentary Members approved a transactional resolution proposal combining up to five proposals presented by different groups in relation to female genital mutilation in general and specifically including resolution proposal: 162/000290 by the Grupo Parlamentario Socialista (Socialist Parliamentary Group) which urges the Government to carry out all actions which contribute to eradicating the practice of female genital mutilation (section 4 specifically beseeches the Government to “to propose the necessary legal change to give the Spanish Courts jurisdiction to try those criminally responsible, either due to their actions or due to negligence, for female genital mutilation, where these persons are physically located in Spain, regardless of where the mutilation was performed”), 162/000291 by the grupo parlamentario mixto (Mixed Parliamentary Group) which call for the implementation of a plan aimed at preventing female genital mutilation, 162/000292 of the Parliamentary Group of Catalonia (Convergència i Unió) urging the Government to adopt measures to eliminate female genital mutilation (all three resolution proposals are included in *Boletín Oficial de las Cortes Generales. Generales (Official Gazette of the General Courts) Congreso de los Diputados (Congress of Parliamentary Members)*, VII Legislature, Serie D, 21 May 2001, n. 179), 162/000304 of the grupo parlamentario federal de Izquierda Unida (Federal Parliamentary Group of the Left United on the adoption of measures to combat the practice of circumcision or female genital mutilation, and 162/000308 of the grupo parlamentario popular (Popular Parliamentary Group) on measures to eradicate female genital mutilation (both of the latter proposed resolutions are included in the *Boletín Oficial de las Cortes Generales. (Official Gazette of the General Courts) Congreso de los Diputados (Congress of Parliamentary Members)*, VII Legislature, Serie D, 1 June 2001, no. 188).

Finally, there is a need to refer, albeit briefly to the possibility of sanctioning actions carried out in Spain, which are more or less related to the mutilation to be practiced in a country outside of Spain. However, preparatory acts (specifically sanctioned in relation to bodily harm pursuant to Art. 151 of the Spanish Penal Code) may only be taken into consideration where the perpetrators or co-perpetrators of the mutilation abroad are also responsible for the actions carried out in Spain (generally the parents). In other words, there is no case of conspiracy as defined in Art. 17.1 of the Spanish Penal Code («A conspiracy exists when two or more persons come to an agreement concerning the commission of a crime and decide to commit it»), even if the parents decide to take their daughter abroad in order to have female circumcision performed on her, where they have not resolved to be the actual perpetrators of the crime (if they have only resolved to put the child into the hands of a «quack doctor» the preparation of the crime is not punishable in that it is not considered to be a conspiracy)²². With respect to incitement as defined in Article 17.2 of the Spanish Penal Code («Incitement exists when the person who has resolved to commit a crime invites another or other persons to commit it.»), and although this is an issue which has been doctrinally argued, the parent would have to have invited the other person to perform the circumcision with the parent as a co-perpetrator²³. Be advised that in the above case,

With respect to the issue in question, in the aforementioned transactional resolution proposal 162/000322 on measures to eradicate female genital mutilation -transactional text-, *Boletín Oficial de las Cortes Generales. Official Gazette of the General Courts) Congreso de los Diputados (Congress of Parliamentary Members)*, VII Legislature, Serie D, 26 June 2001, no. 205), the Government was urged to require that «the Technical Commission reviewing the Penal Code's penalty system perform an analysis of Spanish legislation and study the possible legislative changes needed in order to properly punish these practices, regardless of where the actions are committed, in cases where the persons responsible for the crime are physically located in Spain ».

²² It is wrong to affirm that «where the parents of the minor have agreed to perform genital mutilation on the child in Spain (whether the action is carried out in Spain or abroad) such an agreement would be considered to be conspiracy to commit a crime of bodily harm» (as stated in *Protocolo de prevención de la mutilación genital femenina en la demarcación de Girona (Protocol for the Prevention of Female Genital Mutilation in Girona)* July 2002, p. 35).

²³ It is only possible to affirm that «where one of the parents decided and proposed that another person perform such an action, this action would be considered to be an incitement to commit a crime of bodily harm» (as also stated in *Protocolo de prevención de la mutilación genital femenina en la demarcación de Girona (Protocol for the Prevention of Female Genital Mutilation in Girona)*, July 2002, p. 35) if it is assumed that the person proposing such a crime does not plan to commit the crime himself (which would be difficult to substantiate in accordance with a literal reading of Art. 17.2 above). It would only be appropriate to apply Art. 17.2 in the cases commented upon (and this is an absolutely minority position in Spanish penal doctrines) where the crime is not committed after there has been a proposition and persuasion. See. MIR PUIG, *Derecho penal.(Criminal Law) Parte general (General Part)*, 6ª ed., Barcelona, 2002, L 13/40-42.

the parents can not be considered to be premeditating co-perpetrators acting in conspiracy or inciting the commission of a crime in the terms understood by the absolute majority (in other words, they have only prepared the crime: Evidently if the circumcision had already been performed there would be no reference to preparation in that the subsequent attempt to commit the crime or completion of the crime by way of the perpetrator would take precedence over the previous acts). Lastly, it is worthwhile to mention that in our opinion, in order to article any kind of liability for acting in conspiracy or inciting the practice of genital mutilation, it is necessary for the action to be punishable in the country where the crime was planned.²⁴.

1.2.3.Female Genital Mutilation in the Spanish Penal Law

1.2.3.1. Regulations in force until september, the 30th, 2003.

There is no doubt as to the classification of female genital mutilation as a crime of bodily harm under the Penal Code in force in Spain, as approved by Organic Law 10/1995. Nevertheless, bearing in mind the different types of bodily harm accounted for in this legal text (structured in terms of the significance of the bodily harm and certain other variables), it is necessary to determine the specific qualification to be attributed to the action in question, bearing in mind that there are several forms of female genital mutilation and numerous reported consequences of such mutilation with respect to the physical and psychic health of the victim.

²⁴ Likewise, a preparatory act in relation to an abortion to be carried out in the United Kingdom would not be punishable if the abortion, being the main action, is considered to be legal in the country where it is to be carried out.

On the other hand, there is more possibility of prosecuting true acts of participation carried out in Spain prior to initiating a crime actually carried out abroad (cases in which there is an attempt to commit a crime or the crime is actually carried out abroad). Consider a case where a parent persuades an individual to perform the circumcision of his own daughter who is already abroad, from a distance, i.e. by telephone or letter, or a case where someone's cooperation to commit the crime is limited to transporting the daughter from Spain by plane. Be alerted, nevertheless, to the difference between this case and that addressed in note 19: Spanish law would apply under the principle of territoriality to non-executed acts carried out in Spain, where there is participation in an attempted crime or crime committed abroad. However, there is a question as to whether Spanish law would apply to Spanish citizens who have carried out acts of participation abroad by virtue of the personality principle.

In terms of the literal reading of the types of bodily harm, which is to serve as the basis for all subsequent interpretation, **Art. 147** provides that «whoever by whichever means causes bodily harm to another person affecting his bodily integrity or physical or mental health, shall be punished as a perpetrator of bodily harm and sentenced to imprisonment for a term of between six months to three years, where in the interest of the victim's health, such bodily harm objectively requires medical first aid and medical or surgical treatment. Simple medical observation or follow-up on the course of the injury shall not be deemed medical treatment». Furthermore, where bodily harm is of the basic type provided, it may be further classified as one of the specific injuries provided for in **Art. 148**, in which case the judge shall be authorised to increase the sentence (imprisonment from two to five years) under three circumstances: where there is a use of means by which the victims' life or health is endangered, where an act of cruelty is committed or where the victim is less than 12 years old or incompetent. **Art. 149** provides for the most serious of all crimes of bodily harm, in view of the special significance and permanence of the bodily harm. A sentence of imprisonment for a term of between 6 and 12 years which shall apply to whoever «by whichever means or procedure, causes bodily harm to a person resulting in the loss or incapacity of a main organ or limb, or in any sense, impotency, sterility, serious deformity or serious somatic or psychic illness». Under **Art. 150** which refers back to the previous article, imprisonment from between three and six months is set out for any person who «causes bodily harm resulting in the loss or inability to use any other than a main organ or member, or deformity.» As can be inferred from merely reading these provisions, the typical descriptions are riddled with regulatory or qualifying terms («main» organ or member, «serious» illness or deformity, etc.), meaning that there are certain risks with respect to legal certainty and person responsible for applying the above laws is inexcusable forced to first interpret them.

It is obvious that the actions in question shall always constitute a crime involving, at least, malicious bodily harm of a basic type (in which case it would be possible to discuss whether to apply the first and second causes of injury set out in Art. 148). The essential question to be considered is whether any of the other more serious types of bodily harm apply. Earlier, reference was made to the different forms of female genital mutilation, in addition to the different degree to which the consequences of these actions

may affect women's health. As such, it is advisable to use prudence, in that at times, it may not be as easy as it first appears to classify the type of injury resulting from these actions in accordance with the descriptions of bodily harm provided in article 149.

Our first task was to determine which section of the Spanish Penal Code is typified by this action in addition to the jurisprudence on these actions. Without a doubt, the first case mentioned under this article (the loss or inability to use a main organ or member) best describes genital mutilation. In this respect, there are certain noteworthy considerations. Firstly, the article refers both to limbs (for example, extremities) as well as to internal organs. Furthermore, loss is grouped together with the inability to use a limb or organ (either due to the amputation of a limb or the removal of an organ), or the loss of function of a limb or organ (resulting in immobility of the former and the ceased functioning of the latter). With respect to loss of function, the Supreme Court has applied the article referring to this type of injury in cases where there was only a partial loss of function (i.e. Supreme Court Sentence of 17 September 1990, A 7344). However, there should be a total or at least substantial loss, since only in this case can there be a valid comparison of this action with cases of amputation or loss, which are punishable by the same sentence. In any case, the issue of most relevance for the purposes of this report is that pursuant to Art. 149 these are required to be «main» organs or limbs. If this were not the case, it would be necessary to apply Art. 150, in which case a lighter sentence would be imposed. As such, the determination of which of the two articles is to apply must be based on a regulatory or qualifying concept, meaning that there is a degree of legal uncertainty involved, as mentioned above. Supreme court case law does not offer an all comprising definition of the term "main", but rather has dealt with the problem in a fundamentally casuistry manner. For example, it has classified all extremities as main limbs, including However, the gall bladder and fingers were not considered to be main organs or limbs. (In the case of fingers, Art. 149 stipulates that the loss of several fingers is equivalent to the loss of the hand).

As will be discussed later in this report, the Spanish Penal Code has been amended, precisely to include express mention of cases of genital mutilation and bring an end to possible interpretation doubts. However, it is necessary to determine to what degree it could be applied in cases of female genital mutilation. For the time being, it is sufficient to conclude that it may not be easy to apply the Spanish Penal Code to all

forms of mutilation. While the code may be applicable in cases where the clitoris is removed, since in our opinion, the clitoris must be considered to be a main organ. In the case of intermediate practices, such as the total or partial removal of the labia menora, there are more doubts with respect to its application. Nonetheless, considering that the practice of genital mutilation tends to have a serious impact on the health of the woman both at the time the practice is performed (in that the practice may even lead to death due to septicaemia or the loss of blood) and in the medium and long-term (in which case the effects are of both a physical nature, i.e. cysts on the victim's skin, continual vaginal infections, spasms in the urinary tract, painful sexual relations, extremely difficult pregnancies, etc., and of a psychological nature). On frequent occasions, this form of bodily harm will lead to a «serious illness», in which case Article 149 would apply but must be reserved for cases of malicious intent. Therefore, an analysis of the possible concurrence of circumstantial mens rea must be analysed (since it is uncommon to speak of direct *mens rea*- dolo-) with respect to these harmful consequences (just as in cases of unexpected death). Otherwise, it would be necessary to resort to the application of the corresponding imprudent articles.

Fear of a possible legal interpretation of Article 149, which does not take female genital mutilation into account, was precisely what led the Socialist Parliamentary Group to draw up a bill to amend this law. This amendment consisted in the introduction of a new legal interpretation clause stipulating, «[e]the above paragraph shall always be understood to include female genital mutilation in any of its forms.»²⁵. In defence of this draft amendment at the Senate Plenary Session (by Mr. Belloch Julbe) the senate was alerted to the possibility that «some judge ... might lucubrate over whether or not the clitoris is a main organ », after which the speaker added his conviction that «this Chamber cannot permit ... a discussion of whether one of the specific forms ... is or is not to be considered mutilation», and further stated that «the Senate has the obligation to confront this issue, in the interests of the principle of legal certainty and to avoid any interpretation which might humiliate this country»²⁶.

²⁵ Draft law 622/000012 calling for the amendment of Article 149 of Organic Law 10/1995, of 23 November, to include an interpretative clause on the restriction of female genital mutilation (*Boletín Oficial de las Cortes Generales (Official Gazette of the General Courts) Senado (Senate)*, VII Legislature, Serie III-A: Senate Draft Laws, 27 June 2001, no. 14).

²⁶ *Diario de Sesiones del Senado (Summary of Senate Meetings)*, VII Legislature, Year 2001, no. 52 (Plenary meeting held on 21 June 2001), p. 2.984.

It may just be that the fears of the speaker of the Socialist Group were justified, considering, as was discussed above, that the application of Art. 149 to certain forms of genital mutilation is somewhat complicated. This complication must be implicitly recognized, even though not applying the abovementioned article may be branded as absurd or “humiliating” to the country from the date on which the introduction of the interpretative legal clause was considered to be necessary. Nonetheless, the argumentation recently wielded by the current Minister of Justice, Mr. Michavila, in his defence of the Draft Law presented by Government can only be labelled intolerable. This law is currently in the parliamentary phase and calls for the introduction of a second section in Article 149 expressly referring to female genital mutilation. In his defence of this section of the amendment, the Minister insisted that as a result of the initiative taken by his Government, an «absolutely inhuman practice which is not reflected in the Spanish Penal Code, Senators, as confirmed by the General Counsel of the Judiciary and by the reiterated case law of the Second Chamber of the Supreme Court, will finally be recognized to be a criminal act. As of the current date, this aberrant and inhumane act remains unpunished in our Penal Code.»²⁷.

Indeed, it is equally aberrant that the Minister of Justice makes affirmations that are so utterly inaccurate from a legal point of view, and moreover that he supports his statements with non-existent pronouncements of both the General Council of the Judiciary and the Supreme Court. According to information made available to us, not a single sentence has been handed down on this issue, and, we dare to flatly affirm, that even if a case had been tried, the actions in question would never have been considered atypical. There is no need to insist on what is already obvious, since while it is true that the application of Art. 149 to some forms of genital mutilation may be arguable; there is no doubt as to the consideration of such behaviour as a type of bodily. Therefore the affirmations of the Minister are not only completely inaccurate from a legal point of view, they are a misrepresentation of the facts, aimed at confusing the public opinion.

²⁷ *Diario de Sesiones del Congreso de los Diputados (Summary of Congress of Parliament Members, Plenary and permanent member meetings, Year 2003, VII Legislature no. 245 (plenary meeting no. 236, held on Thursday, 10 April 2003), p. 12.546.*

Otherwise, it is important to bear in mind that under Art. 132.1 of the Spanish Penal Code, in cases of bodily harm crimes, among others, «where the victim is a minor, the terms of the statute of limitations will be calculated as of the day this victim has reached adult age. If the victim were to die before reaching this age, the term would be calculated from the day of the victim's death.»²⁸. Finally it is unnecessary to reiterate that it is evident this crime is prosecutable by law.

1.2.3.2. The current legislation: Amendment of art. 149 of the Spanish Penal Code of 1995

Article 149 of Penal Code has been amended and in force since October the 1st, 2003 adding a second paragraph:

«Any person performing whatever form of genital mutilation, shall be punished with a sentence of imprisonment of between six and twelve years. Where the victim is a minor or is incompetent, the judge may see to dictate a sentence of particular disqualification for the exercise of custody, guardianship, tutorship by will, protection or care of minors between four to ten years, in the interest of the minor or incompetent individual.»²⁹

The proposition had little differences, as may be seen in the sixth paragraph of Article 1 of the Draft Organic Law 121/000136, the section two of Art. 149, was as follows: «Any person removing the clitoris or performing any other form of genital mutilation on any woman, regardless of her age, shall be punished with a sentence of imprisonment of between six and twelve years. Where the victim is a minor or is incompetent, the judge may see to dictate a sentence of particular disqualification for the exercise of custody,

²⁸ In accordance with Art. 131.1 of the Penal Code, the period of prosecution for injuries included in Art. 149 lapses after 15 years (consequently the actions are prosecutable until the victim, who is a minor at the time the crime is committed, is thirty three years old).

²⁹ The change is introduced by a *Law on specific measures relating to the security of citizens, domestic violence and the social integration of foreigners* (LEY ORGÁNICA 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros; BOE 29-9-2003, n. 234): «El que causara a otro una mutilación genital en cualquiera de sus manifestaciones será castigado con la pena de prisión de seis a 12 años. Si la víctima fuera menor o incapaz, será aplicable la pena de inhabilitación especial para el ejercicio de la patria potestad, tutela, curatela, guarda o acogimiento por tiempo de cuatro a 10 años, si el juez lo estima adecuado al interés del menor o incapaz.»

guardianship, tutorship by will, protection or care of minors in the interest of the minor or incompetent individual»^{30, 31}.

Lastly, it is worthwhile to mention some of the different amendments to the new text of Article 149 proposed by different parliamentary groups. Amendments numbers 16 (to the Preamble) and number 22 (to the proposed text of Article 149.2) presented by the Basque Parliamentary Group (EAJ-PNV), both aimed at setting out the actions which are worthy of being included in Article 149 (and consequently, whose sentences are comparable to the mutilation of main organs and limbs). Based on the fact that are several forms of mutilation, the above amendments specify that all of different actions generically referred to as “female genital mutilation” can not be grouped together and uniformly punished. Accordingly, only total or partial removal of the clitoris, and or any part of the external genital organs», «the only action which is considered to be bodily harmful, in that it causes the incapacity of women’s’ main organs or limbs»³². Amendments 74 and 93 (to the Preamble and the proposed text of Art. 149.2, respectively) of the Federal Parliamentary Group of the Left United provide for the same changes as the above amendments.³³ Finally, amendment number 39, of the Mixed Group is noteworthy, although, as opposed to the above amendments, it calls for the direct omission of the express classification of this action, based on the understanding that «it fulfils a merely symbolic function without any practical

³⁰ *Boletín Oficial de las Cortes Generales (Official Gazette of the General Courts). Congreso de los Diputados (Congress of Parliamentary Members, VII Legislature, Serie A: Draft Law, 21 March 2003, no. 136-1, p. 5.*

³¹ It is noteworthy that after being reviewed in Congress, the meaning of the heading of the second section is once again that given in the Draft Law (Draft Law text, p. 14, is only slightly different. «Any person performing genital mutilation» on any person» to «performing any form of genital mutilation on another person ...»). This is the text which was approved in the Plenary Meeting of the Congress on 26 June 2003 (*Boletín Oficial de las Cortes Generales (Official gazette of the General Courts). Congreso de los Diputados (Congress of Parliamentary Members), VII Legislature, Serie A: Draft Laws, 21 March 2003, no. 136-13, p. 127*) and has been submitted to the Senate for its approval. The text of the Proposed Draft, on the other hand, seems to include the indications of the Public Prosecutor's Draft law report.

³² *Boletín Oficial de las Cortes Generales (Official Gazette of the General Courts). Congreso de los Diputados (Congress of Parliamentary Members), VII Legislature, Serie A: Draft Laws, 13 May 2003, no. 136-8.*

³³ *Ibidem* previous note. As a discussion starting point, all of these amendments allude to the fact that "female genital mutilation is the name given in our country to certain practices or rites developed in three different stages of time, the second of which includes the partial or total removal of the clitoris and/or external genital organs". Consequently, this term is an extensive concept within which it would be necessary to distinguish the specific phase of removal.

effectiveness, given that the crime is already punishable and that the sentence is the same.

1.3. Measures taken by the Spanish Legal System regarding the protection of minors and their application to cases of Female Genital Mutilation.

The scope of the Spanish legal system with respect to the rights of minors and their protection has experienced important transformations in recent decades. From this perspective, family law, which is traditionally understood as a field of private law, has had many of its sustaining principles modified. The evolution of international and European laws relating to children's rights, the impact of the Spanish Constitution on the subsequent state legislative impact, and above all, that which is generated from the social status clause, and the responsibility assumed by the different institutions and public administrations have occasioned an entire system of protections for minors which forms part of the fundamental rights and makes up public law. It was in this context that the Parliamentary Law for the Legal Protection of Minors (*LOPJM*), Child Protection Law, was passed³⁴ as a legal statute regarding minors. This law gels with its two important sections: on one hand it sets forth a taxonomy of fundamental rights of the minor, and on the other, it describes the institutions and duties for protection for minors.

Both Spanish national legislation and autonomous legislation are responses to a very broad concept of protecting minors; if there is any criterion which fundamentally characterises minors it is the protection which they deserve – that they are basically provided for on an ongoing basis through two institutions: parental authority and guardianship – and on an immediate basis with an entire range of righteous measures with a multitude of social agents.

In this sense, it can be asserted that the legal statutes for minors give the possibility of being applied preventatively to practices of female genital mutilation given that the possibility of carrying out these practices presents a situation of risk and harm to the children. From the principles of social status rights, we can extract the idea that the public powers not only have to act on these situations of effective abandonment, but also in the prevention of situations of abandonment, and finally, on making sure that

³⁴ As a result of the ratification of the Spanish Constitution of 1978, the law-makers have been passing corrective legislation on an ongoing basis for developing laws in the field which are in accordance with the Constitution. Such is the case with the *LOPJM* which was enacted on the 15th of January of 1996 and controls the legal statutes for minors.

the minor has a proper family and social situation once the situation of abandonment has been overcome³⁵.

Taking into account the perspective that the Spanish legal system adopts regarding the institutions for protection of minors two models or approaches can be distinguished, as different authors have argued to be important³⁶:

a) An *institutional model* formed by a group of institutions which takes into account the possible situations which minors may encounter and in accordance with the replacement and complementary principles, establishes three levels of protection: protection given by the parents, protection given by the guardian and protection given by the legal defender. All three are institutions of legal custody.

b) A *functional model* which takes into account the situation of abandonment of the minor. This is when the above-mentioned institutions have not worked suitably producing the assumption of guardianship or legal custody by the public entities for the protection of minors.

The most evident characteristic in this situation is that the minor is found in a legally binding situation. Parental power and guardianship mean that the protection of the minor corresponds to the holders of protective functions, to whom the administration has also conferred their assets and legal representation of the minor. On the other hand, the minor should be obedient and respectful to the holders of her legal custody. Nevertheless, there is just one fundamental interpretative key to all of these faculties: to protect the higher interests of the minor at all times³⁷.

³⁵ Legislation relating to minors in the autonomous regions: Law of Andalusia on the Children's Rights and Care, 1998; Law of Aragon on Childhood and Adolescence, 2001; Law of Asturias on the Protection of Minors, 1995; Law of the Canary Islands on the Comprehensive Care of Minors, 1997; Law of Cantabria on the Protection of Childhood and Adolescence, 1998; Law of Minors of Castile-La Mancha, 1999; Law of Extremadura on the Protection and Care for Minors, 1994; Law of Madrid on the Guarantees of Childhood and Adolescence Rights, 1995; Law of Galicia on the Legal, Economic and Social Protection of the Family, Childhood and Adolescence, 1997; Law of Childhood of Murcia, 1995; Law of the Minor of La Rioja, 1998; and in the Land of Valencia (Law 7/1994, 5 december, Generalitat Valenciana, about Childhood and the Rule (Decree 93/2001)

³⁶ Isabel LAZARO GONZALEZ (coord.), *Los menores en el Derecho español* [Minors in Spanish Law], Madrid, Tecnos, 2002, pp. 40-41.

³⁷ Article 2 of the LOPJM.

The principle of higher interests of the minor in Spanish law has been developed concomitant to international texts³⁸, European laws³⁹, national regulations and autonomous policies, regarding the protection and promotion of minors. This fact, which has been repeatedly manifested⁴⁰, is one of the basic milestones in the evolution of the fundamental rights of minors. This is a principle which is justified by the special situation of abandonment in which minors are found, being unable to make decisions about their life with sufficient maturity and responsibility; another aspect of this is the importance of the conditions in which the child lives for subsequent stable development in life.

The minimum basic content of this principle is made up of the following premises⁴¹:

a) The consideration of the minor as a person. This perspective allows to be kept in mind the special needs that children have throughout their childhood and adolescence in gauging their different interests. The situation of a young child who requires special protection from third parties because of their vulnerability and minimal capacity to take action, and the importance for others to focus on their development, is different from the situation of an adolescent.

b) The condition of the child of being the subject of fundamental rights, specific rights, rights oriented towards free development of their personality and their dignity. The recognition of children as holders of fundamental rights and therefore of subjective rights did not take place in Spain until the Constitution of 1978 was adopted. Since then,

³⁸ Universal Declaration of Human Rights, Articles 16.3, 25.2, 26.2 and 3, *Declaration of Children's Rights*, Articles 9.3, 18, 20, 20.1, 21 and 27.1.

³⁹ The European Convention on the Recognition and Enforcement of Decisions Concerning Custody of Children and on Restoration of Custody of Children (Luxembourg, 20 May 1980); The European Convention on the Exercise of Children's Rights (25 January 1996), signed but as of this date not ratified by Spain.

⁴⁰ Isabel LÁZARO GONZÁLEZ (coord.), *Los menores en el Derecho español* [Minors in Spanish Law], pp. 97 and following.

⁴¹ I. LÁZARO GONZÁLEZ (coord.), *Los menores en el Derecho español* [Minors in Spanish Law], p. 110. F. RIVERO HERNÁNDEZ, *El interés del menor* [The Interests of the Minor], Madrid, Dykinson, 2000, pp. 52 and following.

being a minor does not give a certain status, but rather is understood as a temporary period in the existence of a person.⁴²

c) The consideration that children are people who need attention, promotion, provision and protection. The protection and promotion of children must be directed as a priority for achieving autonomy, acquiring conscience of themselves (self-respect), of their social surroundings, of their rights and obligations which empower them to exercising their freedom responsibly. Regarding this point, decision 53/1985 of the Spanish Constitutional Court may be consulted.

d) Finally, the idea that minors should participate or be heard in the decisions that affect them⁴³.

From the *functional point of view*, this principle has an influence that permeates throughout the rest of family law. Consequently, it must be applied to all situations or conflicts in which minors are involved. Regarding this, it is interesting to inquire about the elements charged with applying the principle of higher interest of the minor: the holders of parental authority, custody and care, the judge, administrative authorities and the ministry attorney. In this specific setting, it is considered fundamental for a close relationship to exist between family protection and kinship and the action taken by the public administration. In Spain and notably in its autonomous regions there is greater and greater intervention by the different administrations in protecting children.

Firstly, the protection of children is the responsibility of the parents, custodians and care providers, which includes the most relevant aspects affecting the protection, custody, education and representation of the minor. Article 39.2 of the Spanish Constitution of 1978. Thus, the doctrine maintains that in making decisions and carrying out of the interests of minors, the parents must act with the utmost respect for their personality, keeping in mind their personal characteristics. Therefore, the initial capacity for deciding whether a given measure is legitimate interference within the

⁴² Before, B. ALÁEZ CORRAL considered that the civil-legal configuration of minor as a status of the individual characterised by a lack of ability to work or a limitation thereof stemming from weakness or personal imperfections, is correlated to the absence of constitutional consideration. *Minoría de edad y derechos fundamentales* [Minors and Fundamental Rights], Madrid, Tecnos, 2003.

⁴³ I. LÁZARO GONZÁLEZ (coord.), *Los menores en el Derecho español* [Minors in Spanish Law], p. 110. F. RIVERO HERNÁNDEZ, *El interés del menor* [The Interests of the Minor], Madrid, Dykinson, 2000, pp. 52 and following.

scope of the fundamental rights of the minor, even when they may be submitted to a certain amount of judicial control, given that there may be a conflict between the authorities for protection, education and representation with the basic human rights of children, starting with the right to life and physical and moral integrity, as may happen in the environment in which we are dealing with here⁴⁴. Article 158.3 of the Spanish Civil Code stipulates: "The judge, by virtue of his office, at the request of the child, at the request of any parent or ministry attorney shall pronounce...3rd In general, any other orders which he deems appropriate to the object of protecting the minor from danger and preventing injury to him."

The parents have the most important responsibility toward the children and afterwards, the Spanish legal system has a function of guarantee attributed to the public authorities in general. Article 39.2 of the Spanish Constitution of 1978 specifies that "The public authorities ensure, likewise, the comprehensive protection of children..." and article 12.2 of the *LOPJM* specifies: "The public authorities shall keep watch to ensure that the parents, custodians or care providers carry out their responsibilities suitably". Therefore, from this the public institutions continue with a complementary and supplementary function to parental action with the object of providing the minors with well-being considered essential for the appropriate development of their personalities.

However, when the parents have a broad set of powers attributed to them which relate to children, they still do not have authority in the absolute sense, given that their rights as parents should always be measured by the principle of the higher interest of minors, to which must be added the specific limits of the specific action being dealt with.

Secondly, in the Spanish legal system the authority to ensure that the higher interest of the minor prevails and to decide who should have custody for ensuring the interests of the child as the weakest or most defenceless party is given to the judge or court; it is always kept in mind that custody must be considered under the principle of minimal intervention. Therefore, the judges and courts are guarantors that the principle of the higher interest of the minor is applied correctly by the institutions in charge of ensuring the well-being of minors as well as the holders of parental authority, custody

⁴⁴ B. ALÁEZ CORRAL, *Minoría de edad y derechos fundamentales* [Minors and Fundamental Rights], pp. 226-227

and provision of care. This is among the most important criteria in relation to the measures adopted in the case under consideration, given that in accordance with Spanish legislation, parental authority of the parents is subject to control by the judges. Judicial custody can be expressed as two aspects or tempos:

- a) With a preconceived or preventative character whose justification is to avoid damage or harm to the minor, both immediate and future. The Spanish Civil Code refers to this in Articles 156, 158 and 216.2
- b) With relation to the behaviour of the parents (Articles 92, 93, 158 and 217).

Preventative measures in the cases in which knowledge of the wishes of one or more of the parents are known for carrying out genital mutilation of a female child. Among these measures, the following are worthy of mention:

- *Information and educational measures of sociocultural order, which explain the possible social and legal ways of understanding genital mutilation.
- *Prohibiting or impeding parents from taking minors outside of Spain. This measure should be set down only for the time in which the child is at risk.
- *Establish periodic visits by a forensic physician or paediatrician.
- *Attribute the exercise of parental authority to a parent who is against the decision to carry out a mutilation.
- *Request follow up reports from the evaluation teams, care for the victim and other social services.
- *Any other measure or protection in Article 158.3 of the Civil Code which is considered reasonable and appropriate for avoiding risk and guaranteeing the higher interest of the child.

Thirdly, the intervention of the public Prosecutor in protecting the rights of children in Spain. The Prosecutor is entrusted with two essential functions relating to the rights of minors: to facilitate their access to justice and to ensure the protection of the minor, and with these factors to have active legal recourse. The 3rd Addendum of the *LOPJM* has bearing on the role of the Prosecutor in guaranteeing access to justice by stating, "Both the Judge and the Prosecutor shall act by virtue of their office in the interests of the minor or incapable person, adopting and proposing measures, processes and evidence which they deem to be relevant".

Lázaro⁴⁵ considers that in this way a *public civil action* is instituted in Spain in the matter of protecting minors and the suitable procedures do not pose problems given that the Civil Code, as we have seen, provides for the Judge being able to adopt measures which he considers suitable for protecting the minor from grave danger or for avoiding harm. These measures may be adopted within the framework of any civil or criminal process or in a process of voluntary jurisdiction. Nevertheless, it is important to note that in civil matters the Prosecutor has significant limitations in his research faculties, as well as a greatly weakened and indeterminate obligation by the public and private entities for providing information to those who request it.⁴⁶

Fourthly: The institution of the children's rights advocate (Ombudsman).

In Spain, the figure of *Ombudsman* [Defensor del Pueblo] is institutionalised with powers throughout all of Spain. On the other hand, ten autonomous regions also have this institution, three of which – Catalonia, Galicia and Andalusia – have a specific figure for the defence of children's rights which is the Ombudsman's Aide [Adjunto al Defensor]. Finally, from the institutional point of view, it should be mentioned that the Region of Madrid has a *Children's Ombudsman* [Defensor del Menor] named by its Autonomous Parliament while the institution of Ombudsman with general powers does not exist in this region.

The existence of a specific and independent institution for protecting the rights of children is being proposed in numerous international texts even when there is a broad debate both for and against the specialisation or "sectorialisation" of the Ombudsman. Therefore, the most important criticism regarding the functions of the institution of Ombudsman in any of its forms is regarding its procedural passivity; Ombudsmen are not authorised to act in the name of the minors in court. This is a power which is considered to be essential for ensuring the defence of children's rights.

This is made clearer when the importance of the use of *ex officio* action by these institutions is noted. An *ex officio* action promoted by the *Síndic de Greuges de*

⁴⁵ I. LÁZARO GONZÁLEZ, *Los menores en el Derecho español* [Minors in Spanish Law], p. 134

⁴⁶ C. VARELA GARCÍA, "Commentaries on Parliamentary Law 1/1996, of the 15th of January for the Legal Protection of the Minor: Programme Principles and Conflictive Laws", cited by I. Lázaro González (coord.), p. 135

Catalunya and developed in collaboration with the Department of Justice of the Catalonian Government produced a form of basic protocol of action in cases of sexual abuse and child abuse; this brought about coordinated action between the involved institutions. The protocol further provides for action in the case of genital mutilation of young girls. The Ombudsman of Andalusia prepared a special report in 1999 regarding the system of protection for minors. This report provided a systematic review of the measures and resources for the protection of minors with the object of improving the action by public institutions in this field⁴⁷.

Carrying out genital mutilation practices on young girls may be considered to be an "at-risk" situation which means that preventative measures should be taken by the public authorities. The measures of prevention have a basic objective of avoiding situations of vulnerability of the minor from occurring. The primary requirement is recognising an at-risk situation and its severity. An at-risk situation is considered to be a situation which is harmful in any way to the minor without becoming severe enough to declare it a situation of non-protection (*LOPJM*). Therefore, what is protected against in these cases is the possibility of harming the child's physical or psychological integrity, her health, or her moral integrity in virtue of or stemming from a relationship of domination and subordination which is the underlying cause of these practices.

The measures which are adopted in this context attempt to avoid risk without separating the child from her family and are limited, "to eliminate, within the institution of the family, any risk factors," this is stated in the Declaration of Motives of the *LOPJM*.

Legislation by the autonomous regions provides for measures of intervention for correcting at-risk situations; this must take place at the core of the family but without removing the minor under any circumstances. The measures are generally of an assistive nature carried out by the social services. The preparation and launching of individual social intervention projects and family help. The authorised public institutions evaluate and decide whether there is an at-risk situation through an administrative procedure whose declaration has an effect from the moment is ordered. This is a situation which can be seen, for example in the *Protocol d'actuacions per a prevenir la mutilació genital femenina de la Generalitat de Catalunya* and the *Protocol*

⁴⁷ I. LÁZARO GONZÁLEZ (coord) pp. 137-138

for the Prevention of Female Genital Mutilation in the demarcation of Girona of July 2002, modified in november 2003 (see annex).

2. Court cases related to Female Genital Mutilation in Spain

In the research we have include all documented court cases we have acceded. In Valencia we have not found any case in court. Key-informants in the Valencia Community do not know about any report to the competent court, the investigating judge, to the police or to child protection authorities concerning a suspicion of performed female genital mutilation, neither concerning a risk of future mutilation.

In Catalonia cases with regard to female genital mutilation are reported to the competent authorities. We have reported and extracted here seven cases. There are more, but with these we may see what are procedures taken in Courts. Cases are originating from the health sector, social services and citizens. In the context of this case study, it is not possible to establish how many cases remain unreported.

In case of a reported risk for FGM, child protection procedures are initiated. In general, a hearing with the family is organised, parents are counselled, and eventual holidays in Africa are notified to the police or the social authorities. If there is an immediate need for care or protection a judge orders compulsory measures, such as the prohibition to leave the country, the removal of the passport of the girl, the realisation of a medical examination by a doctor after return from holiday.

According to the information collected, reports with regard to a suspicion of performed FGM are followed up by a preliminary police investigation. In the process of evidence gathering, the realisation of a medical/genital examination of the victim is paramount. Until now, no evidence has been found to open the oral phase of the criminal procedure. Despite increasing the number of risk population in Aragon, until now, no evidence has been found to take any case to the Criminal Court⁴⁸. There are other suspicious cases and news about that in newspapers, but we have not included here.

In the cases collected, personal data have been omitted and we have pointed out the year, complainant, country of origin, legal situation of case, if mutilation was practiced and the source of information. The summary is as follows:

⁴⁸ This information was contrasted with a research made by the Sociology of Law Laboratory (University of Zaragoza) directed by professor M. Calvo García for Spanish Judiciary Government: "Immigrants and justice" ("La incidencia de la inmigración en el ámbito de la Administración de Justicia", 2000-2001)

Case A. Year 1993. Preliminary inquiries (previous judicial proceeding) number 66/93. Court of first instance and preliminary investigations number 1, Mataró (Barcelona)

There is a phone report to the tribunal coming from the Urgencies Service of Gynecology of an Hospital related with some injuries in their genital organs of a girl. The judge opens previous judicial proceeding, and he takes declaration to the parents.

In the declaration they explain that the mutilation has been practiced to the 8 year-old daughter by a person of feminine sex of certain religious authority that carries out these rites and that arrive from out of Spain. The circumcision was also practiced to the son. The parents manifest to ignore that these practices are punished in Spain. They understand that these practices are a tradition of cultural and religious type rooted in their country.

After the examination of the forensic recent amputation is appreciated (10 days) of the clitoris and major lips.

The Prosecutor argues the “error in law” (Art. 6 bis a), par. 3 Penal Code) like cause of exclusion of the criminal liability, since they believe acting correctly: ignoring the forbidding norm or understanding they act under a justification cause.

The judge declares nonsuit for not being the constituent facts of crime and also to appreciate the “error in law”. In crimes against the physical integrity the intention is demanded from injuring (*animus laendi*). In the case, intentional element doesn't exist, since the parents promoted and facilitated the intervention of the rite not only with the absolute convincing that the mutilation was not an attack to its daughter's physical integrity but they didn't consider the organ affected as such.

Complainant: Gynaecological Emergency Service of an Hospital

Country of origin: Gambia (tribe Maraka or Saranhule). *Religion:* muslims

Situation: Nonsuit. Dismissal without prejudice, due to facts are not offences and “error of law” as a cause of exclusion of criminal liability. Mutilation has been practiced.

Source: original documents

Valuation: Error in law only could be applied as an exclusion cause the first time arrives a case to the tribunals, but it seems difficult to justify it later on.

Case B. Year 2000: Commencement of procedure (Diligencias indeterminadas) 449/00, Court of First Instance and Preliminary Investigations number 3, Santa Coloma de Farners (Girona)

A paediatrician informed the court of the intention of a Senegalese national to travel with his daughter to his country of origin in order to have mutilation performed on the child. The doctor learned the facts through the comments made by the mother, who was against the practice.

The Department of Public Prosecution required the adoption of preventive measures. After the parents declared that the intervention would not be practiced, the order of stay of proceedings was made, since it was understood that there was no penal infringement. It was appealed by the Public Prosecutor and dismissed by the Provincial Court.

Complainant: Paediatrician

Country of origin: Senegal

Situation: Filed. No preventive measures were adopted. The mutilation was not practiced.

Source: Original documentation. Annual Report of the Department of Public Prosecution of the Provincial Court of Girona, 2001, pp. 74-75

Valuation: “disappointing from the point of view of juridical argumentation, since the aspects we later on stated and collected on the Gerona Protocol were not taken into account. In any case, the real result was better than the judicial proceeding could seem. The practice was truly prevented, and the paediatrician could verify, after the return from the trip to the country of origin, that it had not been practiced.” (J. M., *Sección de Atención al Menor* (Child Protection Office), *Dirección Territorial de Justicia de Girona*) Justice and Law Office in Girona, Generalitat de Catalunya.

Case C. - Year 2000: Preliminary inquiries.(Diligencias previas) Court of First Instance and Preliminary Investigations number 3 and number 7 of Girona.

Commencement of enquiries by the Public Prosecutor and the Judicial Authority after information published by the mass media related to activities of genital mutilation practiced in Banyoles (Girona) by a woman at the price of 15.000 pesetas (90 €).

Dismissal without prejudice was resolved.

Complainant: mass media

Country of origin: not specified

Situation: Dismissal without prejudice

Source: Annual Report of the Department of Public Prosecution of the Provincial Court of Girona, 2001, p.75

Case D. Year 2001: Voluntary jurisdiction record (*expediente de jurisdicción voluntaria*) numer 314/01. Court of First Instance and Preliminary Investigations, numer 6 of Girona.

Complaint lodged before the Mossos d'Esquadra (Autonomic Police) of Girona due to comments made at work in the presence of colleagues by a Mauritanian about his desire of travelling at the end of July 2001 to his country of origin in order to have genital mutilation performed on his daughter.

The Department of Public Prosecution required the adoption of urgent preventive measures and to open a voluntary jurisdiction record, because facts in that moment were not considered as offences: prohibition of leaving the country of the child and removal of passport; declaration of the parents of the child, medical examination of the child by forensic doctor in order to determine her state of health and physical integrity and periodical presence of the child; that the parents of the child are informed and warned of the transcendence and importance of the facts.

The Judge believed that the facts could not be considered an offence. He adopted the following measures: prohibition of leaving the country, with possibility of passport removal, inform and warning to the parents of the civil and penal consequences, and examination of the child by a forensic doctor.

The parents appeared in court, the child was examined and was found without any injury, and the court issued a warning to the parents about the civil and penal consequences were stated, and the leaving of the child from national territory was allowed, previous communication, and a new appearance in court and forensic examination was appointed five months later.

Complainant: job colleagues

Country of origin: Mauritania

Situation: Adoption of preventive measures. Mutilation was not practiced.

Source: Original Documents. Annual Report of the Department of Public Prosecution of the Provincial Court of Gerona, 2001, pp. 69-72

Case E. Year 2001: Committal proceedings (Diligencias previas) 75/01. Court of First Instance and Investigation number 2 of Santa Coloma de Farners (Girona).

Some neighbours inform the Social Services about the intention of the parents of a child of travelling to their country of origin, Senegal, in order to have genital mutilation practiced on the child. The Social Services communicate it to the prosecuting authorities.

The Department of Public Prosecution solicited the commencement of the committal proceedings and the adoption of urgent preventive measures: prohibition of leaving National Territory of the child, and, if advisable, removal of passport, taking of statements and warning of the penal transcendence of the facts to the parents.

The parents state that, although they had planned to have the mutilation practiced on their daughter, they would no longer do it.

The Court handed down a ruling in which it was formally agreed to request the parents to abstain from promoting any action that impaired the integrity of their children, warning them of the penal consequences (contempt of court, child abuse and injuries); and they were requested to inform of their return to Spain for a later medical examination.

After their return from Africa, a medical examination was practiced in which no sign of mutilation was found.

Afterwards, dismissal without prejudice was agreed, since evidence of an offence was not found.

Complainant: Social Services, neighbours.

Country of origin: Senegal

Situation: Adoption of preventive measures and dismissal without prejudice. Mutilation was not practiced.

Source: Original documents. Annual Report of the Department of Public Prosecution of the Provincial Court of Girona, 2001, pp. 72-73

Case F. - Year 2001: Preliminary inquiries (Diligencias Previas) 569/01. Court of First Instance and Investigation number 2 of Blanes (Girona)

Commencement of committal proceedings in May 2001, after a report from the Paediatric Emergency Service of the Gerona Hospital after examining a child from Gambia who presented signs of ablation of labia minora.

The parents declared that the parental grandmother performed the mutilation without their consent in Gambia during the holidays of 2000.

The Department of Public Prosecution solicited the dismissal without prejudice, since there was not any evidence that it had been practiced in Spain, nor that the parents had taken with malice aforethought the child to Gambia to have mutilation practiced on her. The court agreed to dismiss the case.

Complainant: Pediatric Emergency Service of an Hospital

Country of origin: Gambia

Situation: Dismissal without prejudice, due to extra-territoriality and lack of evidence. Practice of Ablation.

Source: Annual Report of the Department of Public Prosecution of the Provincial Court of Girona, 2001, pp. 73-74.

Case G. Year 2002 Cervera (Lérida)

A social assistant reported to the police and judicial authorities the intention of the father of three girls, expressed in public, of practicing the mutilation from the clitoris to his daughters between 6 and 9 years. The prosecutor opened an investigation.

Months later the doctors verified in an ordinary inspection that mutilation had been practiced. The mutilation was carried out in Gambia. The prosecutor opened previous judicial proceeding and accused the parents of facilitation for a mutilation crime. The parents stated that the practice was carried out by the grandparents and the girls' uncles when they were in another town. They assured that they acted convinced that they didn't make anything bad, since the practice is there usual.

Complainant: social assistant

Country of origin: Gambia

Situation: Nonsuit because the facts were committed outside of the country by some relatives that acted convinced that they didn't make anything bad, since the practice is there usual. The mutilation was practiced to the three sisters.

Source: A newspaper: *La Vanguardia*, 25-4-2003 (<http://www.ai-cat.org/educadors/2/nin-inf-javier.ricou-ablacion.html>)

3.– Description of the practising community. Socio-demographic notes.

Summary

3.1. Delimitation of the risk group.

3.2. A minority group unevenly distributed in Spain. Territorial and situational typology.

3.3. A territory without prevalence of FGM: The Valencian Community.

3.4. A territory with cases of FGM: Catalonia.

3.5. Some conclusions and suggestions.

3.1. Delimitation of the risk group

The practice of female genital mutilation in Europe takes place as a result of immigration from specific countries in which female genital mutilation has been generally practiced. Spanish legislation considers female genital mutilation as an attack on the physical integrity of a person. This situation requires an analysis from the viewpoint of the social sciences and the human rights, both in terms of the cultural changes these women experience, and of the material and socio-cultural determinants in which their sexual and reproductive activities are developed.⁴⁹

The aim of this chapter is to identify the residential distribution of the immigrant population resident in the Spanish State, susceptible of being object of female genital mutilation (FGM). For research purposes, and from the socio-demographic point of view, the interest lies in delimitating the risk groups and their residential location. This can indicate as well, those Autonomous Communities (Regions) in which there could be cases of FGM. Data obtained from the 2001 Census (with reference date November 2001) have been used for this chapter⁵⁰.

The anthropological perspective of FGM is not studied as an initiation rite of women practiced in some African countries. However, it seems essential to point out a number of aspects (see, among others, Kaplan 1998 and 2002). FGM is practiced in some African countries, mainly from Sub-Saharan Africa, and can adopt three different forms (clitoridectomy, excision, and, the most radical and complete one, infibulation). Regardless of the widely believed cliché, the practice of FGM cannot be identified with Islam. Some Muslim countries and states reject this initiation rite, whereas others practice it. Thus, for instance, FGM is not practiced in the Magreb area, area of origin of most Muslim immigrants residing in Spain. On the other hand, both in Ethiopia and

⁴⁹ See KAPLAN, A., BEDOYA, M. H., FRANCH, M. Y MERINO, M., “Avances interdisciplinarios en el conocimiento de los procesos de cambio e integración social: la situación de las mutilaciones genitales femeninas en España”, en GARCÍA CASTAÑO, F. J. Y MURIEL LÓPEZ, C. (eds.), *La inmigración en España: contextos y alternativas. Volumen II. Actas del III Congreso sobre la inmigración en España (Ponencias)*. Laboratorio de Estudios Interculturales, Granada, 2002, p. 291.

⁵⁰ At the time when these notes were written, the “Anuario de Migraciones 2002” (Migration Statistics 2002), based on data obtained from the Ministry of the Interior, that is, number of residents with residence permit and/or work permit. As usual, the number of immigrants registered is quite inferior to that of the 2001 Census (which includes all resident immigrants disregarding their administrative situation). Due to the high number of undocumented immigrants that live in the Spanish State, the 2001 Census has been used as source for data.

Egypt, FGM is practiced by Coptic Christians. Similarly, Ethiopian *falasha* Jews practice it.

Thus, neither African origin, nor Muslim religion of a group or family constitute an indicator of FGM practices, or risk situation with regard to this matter. Therefore, we need to know the prevalence of the practice according to the different States of origin⁵¹ (it can not be previously presumed on the basis of origin or religion).

Figure 1. Prevalence of FGM on the society of origin, according to significant nationalities.

	% of women mutilated at origin		% of women mutilated at origin
Morocco	- - -	Guinea	70 %
Algeria	- - -	Guinea-Bissau	70 %
Senegal	20 %	Equatorial Guinea	- - -
Mauritania	40 %	Mali	75 %
Gambia	80 %	Ethiopia	90 %
Ghana	30 %	Somalia	99 %

Source: UN Population Fund. (Kaplan 2002)

Figure 1 shows the diversity of situations in relation to the practice of FGM found in the African continent. On the other hand, in order to state the risk group, it is not only desirable to know the society of origin of immigrant groups, but also their composition by gender and age. The **risk group** susceptible of suffering the practice can be established as immigrant women, under 16 years of age, original from African states and territories where some sort of female genital mutilation is practiced, and women born in Spain within families of such origins. It is also interesting to establish the groups of adult women who belong to these groups and reside in Spain, since it can be

⁵¹ We refer to states because all information is referred in these terms. However, the clearest delimitation is that of ethnic group or people. Within the same State, there can be some ethnic groups that practice FGM whereas other don't, as happens in Senegal, where it is not practiced by the *wolof* people, whilst some *pular* people do practice it.

expected that —due to educational background or family regrouping— the number of girls of those nationalities who reside in Spain increases.

3.2. A minority group unevenly distributed in Spain. Territorial and situational typology.

According to Figure 2, the African immigrants who reside in Spain constitute highly masculinised groups, with the exception of those coming from Equatorial Guinea and Cape Verde. In many cases, for instance Senegalese, Mauritanian, and Malian immigrant groups, family regrouping is not produced, which generates high indexes of masculinity (19.9% of Senegalese are women, in the case of Mauritians, 20.5% are women, and 9,2% are women in the case of Malians). In other cases, there is family regrouping or creation of families here, in particular when the group has been residing in Spain for some time. This is the case of Moroccan immigrants, of which 35.5% are women, and Algerian immigrants, with 21,4%

Figure 2. Residents coming from African countries in the Spanish State, according to significant nationalities. 2001 Census.

Country	Total residents	Total no. of women	% of women	Women < 16 y.
Morocco	247,872	88,170	35.5	22,915
Algeria	22,647	4,868	21.4	1,344
Senegal	11,532	2,295	19.9	556
Mauritania	3,643	745	20.5	240
Gambia	8,473	2,838	33.4	1,265
Ghana	3,176	527	16.5	90
Guinea	3,710	1,523	41.5	343
Guinea-Bissau	2,218	407	18.3	154
Equatorial Guinea	7,602	4,828	63.5	976
Mali	3,313	308	9.2	96
Angola	1,523	615	40.3	148
Cape Verde	2,180	1,308	60.0	176
Cameroon	1,398	558	39.9	102
Rest of Africa	18,102	6,180	34.1	737

As stated above, FGM **cannot** be identified with African origin or Muslim religion. On the one hand, it must be pointed out that **the immense majority of African immigrants originate from the Magreb area, where this practice is not performed** (thus, women and men coming from Morocco are the 73% of the total African immigrants in Spain). Moreover, immigrants coming from African countries with medium or high prevalence of FGM constitute a **clear minority**. The most numerous among these are the nationals from Gambia, Guinea, Ghana, and Guinea Bissau (it must be taken into account that, although nationals from Senegal are more numerous, the prevalence of FGM in this country, 20% is less significant than the previous cases). On the other hand, the presence in Spain of nationals from Ethiopia, Somalia, Egypt and Eritrea, countries with indexes of prevalence of FGM of 80% or above, is much reduced.

It can be provisionally concluded, that groups with prevalence of FGM constitute a clear minority within the Spanish State. Among them, **Gambian girls** are the **most important risk group**, both due to their number —1,265 women under 16 in November 2001— and to the important index of women mutilated at their country of origin (80% according to the UN).

On the other hand, as happens with other aspects of the migratory phenomenon in the Spanish State, African immigrants in general, and those coming from countries with prevalence of FGM in particular, are **very unevenly distributed throughout the different Autonomous Communities**, as can be seen on the following tables:

Figure 3. Residents coming from African countries, according to some significant nationalities per Autonomous Communities. 2001 Census

	Andalusia	Aragon	Asturias	Balearic Islands	Canary Islands
Morocco	34,345	4,640	424	7,335	6,054
Algeria	1,736	2,667	90	446	313
Senegal	1,928	831	178	672	933
Mauritania	837	173	2	98	1,255
Gambia	168	900	- - -	42	49
Ghana	527	500	6	132	201
Guinea	195	369	26	93	201
Guinea-Bissau	930	51	3	26	197
Equatorial Guinea	231	466	88	170	320
Mali	581	391	4	227	28
Angola	66	57	18	3	34
Cape Verde	26	265	32	12	59
Cameroon	75	89	8	36	37
Rest of Africa	2,314	616	91	919	819

	Castile	Castile -La	Catalonia	Valencian	Extremadura
--	----------------	--------------------	------------------	------------------	--------------------

	Leon	-Mancha		Community	
Morocco	3,025	8,016	82,692	18,655	5,460
Algeria	469	700	3,353	6,910	60
Senegal	221	93	3,351	1,206	82
Mauritania	89	62	622	201	1
Gambia	70	11	7,019	71	9
Ghana	25	5	741	184	---
Guinea	14	25	1,454	251	4
Guinea-Bissau	8	10	369	42	---
Equatorial Guinea	119	86	622	980	17
Mali	68	156	1,212	149	---
Angola	31	23	116	81	9
Cape Verde	583	13	37	80	3
Cameroon	30	12	316	149	5
Rest of Africa	281	241	2,857	2,075	74

	Galicia	Madrid	Murcia	Navarre	Basque Country
Morocco	1,538	38,497	19,047	2,562	3,022
Algeria	176	1,076	1,230	1,924	777
Senegal	325	643	329	241	354
Mauritania	17	141	56	15	63
Gambia	6	58	39	3	17
Ghana	131	233	149	49	82
Guinea	19	837	59	47	60
Guinea-Bissau	8	367	72	44	90
Equatorial Guinea	49	3,916	135	32	321
Mali	1	226	121	47	39
Angola	66	722	12	20	243
Cape Verde	146	839	10	16	47
Cameroon	14	423	29	37	86
Rest of Africa	303	5,481	711	488	541

	Rioja	Ceuta Melilla
Morocco	2,641	9,500
Algeria	577	56
Senegal	20	3
Mauritania	2	---
Gambia	5	5
Ghana	141	3
Guinea	48	---
Guinea-Bissau	---	---
Equatorial Guinea	18	4
Mali	59	1
Angola	10	---
Cape Verde	6	---
Cameroon	22	6
Rest of Africa	181	14

The geographic delimitation can be further specified. According to Figure 3, and in coincidence with other studies (Kaplan 2002), five Autonomous Communities concentrate the greatest number of people coming from countries with prevalence of FGM: Catalonia, Andalusia, Madrid, Canary Islands and Aragon. Thus, 82% of Gambians, 39% of Guineans, and 36.5% of Malians reside in Catalonia, which is the Autonomous Community that concentrates the highest number of risk persons and groups. See, in this regard, the following Figure.

Figure 4. Residents coming from African countries, according to some significant nationalities, in the Autonomous Communities with greatest presence. 2001 Census

	Catalonia	Andalusia	Madrid	Canary Islands	Aragon	Total Spain
Gambia	7,019	168	58	49	900	8,473
Guinea	1,454	195	837	201	369	3,710
Guinea-Bissau	369	930	367	197	51	2,218
Ghana	741	527	233	201	500	3,176
Mali	1,212	581	226	28	391	3,313
Mauritania	622	837	141	1,255	173	3,643
Senegal	3,351	1,928	643	933	831	11,532

In conclusion, in the Spanish State, we can establish a **typology of territories and situations** in relation to FGM, according to the presence of groups susceptible of practising FGM and the existence or lack of existence of confirmed cases. Thus, there would be two types of situations.

Type 1. Autonomous Communities in which risk groups and groups that, in the society of origin, practice FGM as initiation rite concentrate. In addition, in two of these Autonomous Communities, cases of FGM have been confirmed. It would be the cases of Catalonia, and at a lesser degree, Aragon.

Type 2. Autonomous Communities with a scarce presence of immigrants coming from societies where this initiation rite is practice, and where there has been no confirmation of FGM practices.

Two Autonomous Communities, Catalonia, which corresponds to Type 1, and the Valencian Community, which corresponds to Type 2, have been selected for this study.

3.3. A territory without prevalence of FGM: The Valencian Community

According to Figures 5 and 6, there are a small number of the groups of residents coming from countries with high prevalence of FGM in the Valencian Community. This is the case for residents coming from Gambia (71 residents), Guinea Bissau (42), Mali (149) or Mauritania (201). In all these cases, as shown in Table 5, the groups are highly masculinised, with a very scarce presence of women, and few families settled here, and therefore, a much reduced number of women under 16 (as shown in Table 6). In addition, in the Valencian Community, the immense majority of girls of African origin come from the Magreb area, and in particular from Morocco, where FGM is not practiced.

Figure 5. Residents from African countries, some significant nationalities. Valencian Community. 2001 Census.

Country	Total residents	Total women	Women < 16
Morocco	18,655	9,615	1,311
Algeria	6,910	1,448	376
Senegal	1,206	128	31
Mauritania	201	45	21
Gambia	71	18	7
Ghana	184	24	5
Guinea	251	170	28
Guinea-Bissau	42	8	1
Equatorial Guinea	980	965	116
Mali	149	13	1
Angola	81	23	4
Cape Verde	80	47	6
Cameroon	149	53	5
Rest of Africa	2,075	984	65

Figure 6. Women residents from African countries, under 16, according to some significant nationalities and provinces

Country	Alicante	Castellón	Valencia
Morocco	605	417	1.633
Algeria	199	68	109
Senegal	13	1	77
Mauritania	6	---	27
Gambia	---	---	7
Ghana	1	1	18
Guinea	4	3	118
Guinea-Bissau	---	1	5
Equatorial Guinea	25	7	466
Mali	---	---	3
Angola	1	---	3
Cape Verde	6	---	---
Cameroon	3	---	2
Rest of Africa	19	10	428

That is to say, in the Valencian Community —at least according to the data of the 2001 Census— there are not a significant number of girls susceptible of suffering FGM. This result is coherent with two significant facts. First, as aforementioned, the quite uneven distribution per Autonomous Communities of the population with possible high prevalence of FGM, such as Gambians, Malians, etc. Within the state, the Valencian Community has —in this regard— a secondary place. On the other hand, this result focuses on the absence of confirmations of FGM inflicted on population residing in the Valencian Community. The juridical and sanitary sources consulted, and those provided by solidarity organisations, coincide in stating that there are no known or confirmed practices of FGM. Thus, for instance, from an in-depth recent research in the socio-sanitary field is deduced that “the sanitary system has no evidence as to the existence of FGM in the Valencian Community (Interview M5).

However, due to the extremely dynamic and changing character of the migratory process in our country, in particular during the past year, the possibility of an increase of the population coming from countries where FGM is practiced should not be excluded. This statement is supported by the spectacular increase, in relative terms, of the migratory inflow during the past two years (only partially collected at the 2001 Census). Both the number and the diversity of origins have increased.

This possible increase of the resident population susceptible of practising FGM can be due to two factors. On the one hand, due to the general increase of the migratory inflow; we should consider perhaps that the population of Gambians, Malians, nationals from Guinea Bissau, etc., may be increasing, although it would be logical to think that these people will mainly tend to go to Autonomous Communities such as Catalonia, where already vast groups of expatriates have settled⁵². On the other hand, this increase of resident population susceptible of practicing FGM can come from countries not previously represented in the Valencian Community, the number of nationals of which has increased during the past year.

This could be, for instance, the case of Nigeria. According to the UN, there is a 60% of prevalence of FGM in this country. The Nigerian population has had a spectacular increase, which will be represented in the next Census. It must be considered that, in the city of Valencia, according to the 2002 Municipal Register, 2002, 808 residents had Nigerian nationality⁵³, whereas two years ago, their number was purely anecdotic. Thus, a partial conclusion that will be reconsidered later on is the need of a careful follow-up of the evolution of the composition of the migratory inflow and the nationality of residents coming from the countries of interest in this research.

3.4. A Territory with cases of FGM: Catalonia

From the study of population migrated to the Autonomous Community of Catalonia, according to data obtained from the National Statistics Institute, according to the 2001 Census, only those corresponding to resident population of African origin have been

⁵² This, at least, has been the behaviour during the last decade of Gambians, Malians and Guineans.

⁵³ However, according to some sources, Nigerian immigration is mainly of urban origin, which implies a lesser prevalence of the practice of FGM.

represented.⁵⁴ Over 50% of the population coming from countries where female genital mutilations are practiced concentrate in Catalonia and Andalusia (59.2%).⁵⁵ In any case, it should be pointed out that during the year 2002, in Catalonia, the number of foreign residents has been calculated to be 341,668 (5.3% of the total population in Catalonia), distributed as follows: 247,540 in Barcelona, 45,926 in Gerona, 31,335 in Tarragona and 16,847 in Lleida. Most of them, aged between 25 and 44, are nationals from Morocco, (30.5%), followed by Ecuadorians, Peruvians, Chinese, Rumanians, Dominicans and Senegalese.⁵⁶ Thus, Catalonia presents, without any doubt, a greater percentage of foreigners than the rest of the Spanish state, in relation to the total population. Two reasons can explain this difference.⁵⁷

- On the one hand, the economic differential existing between Catalonia and most other of Spanish regions. Due to economic growth, Catalonia has become a particularly attractive territory for those coming in search of better economic conditions, which cannot be found in their countries of origin.
- On the other, due to geographical proximity of Catalonia with the rest of Europe, converting it into a trampoline for immigrants who aim to move to European territories.

Recent data outline that the number of immigrants in Catalonia has an increasing trend. Thus, and in relation to the end of the year 2002, 341,668 foreigners live in Catalonia (in front of 280,167 of the year 2001). This number implies the 5.3% of the total population of Catalonia (whereas it was 4,4% in 2001). This increase could be

⁵⁴ It must be taken into account that these data correspond to those considered by the National Statistics Institute (www.ine.es), as well as other sources, such as the Ministry of the Interior (www.mir.es). These last data are not classified according to Autonomous Communities, and for this reason have not been used for this research. They do not offer new information, although they help to offer a new viewpoint about the volume of migrated population in the Spanish State, as reference data.

⁵⁵ Cfr. KAPLAN, A., BEDOYA, M. H., FRANCH, M., MERINO, M., “Avances interdisciplinarios en el conocimiento de los procesos VV.AA., GARCÍA CASTAÑO, F. J. y MURIEL LÓPEZ, C., (eds.), *La inmigración en España: contextos y alternativas. Volumen II. Actas del III Congreso sobre la inmigración en España (Ponencias)*. Laboratorio de Estudios Interculturales, Granada, 2002, p. 300. This study has been based on the database used by the *Observatorio Permanente de la Inmigración* (Permanent Immigration Observatory), (Ministry of the Interior) for 2001, the *Anuario de Migraciones* (Migration Statistics) and the Catalan Institute of Statistics, both for the year 2000.

⁵⁶ These data are obtained from a research work about to be published elaborated by research from the University of Lleida and the Rovira i Virgili University in Tarragona: PURCALLA BONILLA, M. A. (dir.), *Inmigració i polítiques d'integració. Estudi jurídic i estadístic del fenomen de la immigració a les comarques de Lleida i Tarragona*, Ed. de la Universitat de Lleida, Lleida, 2003.

⁵⁷ Cfr. BELZUNEGUI, A., BRUNET, I. and PASTOR, I., *Tècniques d'investigació social. Fonaments epistemològics i metodològics*. Pòrtic, Barcelona, 2002.

explained through the increase of family regrouping processes and the regularisations due to rooting.

Regarding sex, taken as a relevant study variable for our research, it must be pointed out that there has been an increase in the number of migrated women residing in Catalonia, and, in particular, it can be pointed out that the number has increased from 64,580 resident women in the 1998 (43,4% of the total migrated population) to 113,944 in 2001 (40,67 % of the total migrated population), which implies an increase from 1998 to 2001 of 76,43 % of the total.⁵⁸ Of these data, it should be pointed out that the percentage of foreign men residing in Catalonia has always been greater than that of foreign women. The difference in percentage was almost 10 points in 1998, and almost 18 points in 2001.

According to the tables presented below, the groups of residents coming from countries with high prevalence of female genital mutilation are little present in Catalonia, although it is greater than in the rest of Autonomous Communities (with the only exception of Andalusia). Few municipalities have presence of significant contingents: Barcelona and Mataró, with over 1,000 residents in the Barcelona province, and Banyoles and Blanes, where there are more than 700 residents, in the province of Gerona, and in the city of Lleida, where over 500 people reside. This population is concentrated mainly in the provinces of Barcelona and Gerona, and, on them, on coastal municipalities. According to a recent study, the Catalan municipalities where there is greater concentration of nationalities from countries where female genital mutilation is traditionally practiced, and therefore, a greater number of girls in a risk situation are: Arbúcies, Barcelona, Banyoles, Blanes, Calella, Figueres, Girona, Granollers, Lleida and Mataró.⁵⁹ Residents come from Gambia, Guinea Bissau, Mali, and Mauritania. Moreover, in all these cases, and as shown in Figure 7, these are highly masculinised groups, with very little presence of women and families living in Catalonia, and, therefore, with little presence of girls, as shown in Figure 2. On the other hand, it must be pointed out that most girls of African origin come from the Magreb area, in particular from Morocco, where female genital mutilation is not practiced.

⁵⁸ Data obtained from CRESC, taking into account that the percentage distribution of sexes does not add up to 100, due to the statistical omission of the category "unknown sex". The study has been elaborated by several authors. See PURCALLA, *Immigració i polítiques d'integració*, cit..

⁵⁹ Cfr. KAPLAN, A., BEDOYA, M. H., FRANCH, M. and MERINO, M., "Avances interdisciplinarios en el conocimiento de los procesos de cambio e integración social: la situación de las mutilaciones genitales femeninas en España", cit., p. 305.

Therefore, it must be pointed out that in the Autonomous Community of Catalonia, according to official data from the 2001 Census, there is not a significant number of girls susceptible from suffering genital mutilations, although it is slightly above than that of the rest of the autonomous communities in the Spanish State. However, it must be pointed out that, obviously, this study does not contemplate the number of irregular immigrant population, which is not reflected on the Census of any Catalan municipality, which would constitute an important number, causing official numbers not to reflect reality. Nevertheless, data obtained from the National Statistics Institute are coherent with two significant data:

- On the one hand, data obtained from other studies, mainly the work by A. Kaplan and other (2002), which show a greater concentration of “risk” population in Catalonia.
- On the other, this result focuses on the existence of evidence of practices of female genital mutilation in population residing in Catalonia.

In addition, a possible increase of population residing in Catalonia coming from countries where female genital mutilation is practiced must be considered, taking into account that it is practiced once settled here, and there is evidence of practices in some residents. Catalonia can therefore become one of the referents for immigrant population when coming to Spain. This statement is based on the existing increase of the migratory flux during the past two years, even more taking into account that the migratory movement tends to move towards areas where wide groups of resident compatriots are settled. Taking into account all these data, it must be pointed out that, in view of the population already living in Catalonia, it is likely that during the next years the contingent of girls of “risk” nationalities, increase. In conclusion, taking into account such a changing reality, a careful follow-up of the evolution of the migratory flux and the stock of residents belonging to the groups object of this research must be carried out.

**Figure 7. Residents from African countries, some significant nationalities.
Catalonia. 2001 Census.**

Country	Total residents	Total women	Women < 16 years
Morocco	82,692	31,232	9,490
Algeria	3,353	888	237
Senegal	3,351	827	269
Mauritania	622	94	31
Gambia	7,019	2,455	1,138
Ghana	741	125	20
Guinea	1,454	548	125
Guinea-Bissau	369	38	12
Equatorial Guinea	622	430	67
Mali	1,212	174	70
Angola	116	39	8
Cape Verde	37	22	5
Cameroon	316	130	19
Rest of Africa	2,857	854	123

Figure 8. Women residents from African countries under 16, according to some significant nationalities per provinces

Country	Tarragona	Barcelona	Lleida	Gerona
Morocco	1,116	6,277	456	1,641
Algeria	47	139	41	10
Senegal	12	133	28	96
Mauritania	.....	11	1	19
Gambia	1	334	74	729
Ghana	.....	20	.....	.....
Guinea	1	109	13	2
Guinea-Bissau	.....	12	.....	.....
Equatorial Guinea	1	55	8	3
Mali	.....	32	15	23
Angola	1	1	5	1
Cape Verde	2	3	.....	.....
Cameroon	.....	16	1	2
Rest or Africa	5	76	27	15

In order to analyse data obtained and reflected in Figures 7 and 8, it is relevant to determine and select, among all nationalities specified, only those in which there is a high index of FGM practice, and indicate the number of women under 16 residing in Catalonia. In order of prevalence, it is the case of: Gambia (1138); Mali (70); Guinea (125); Guinea-Bissau (12); Mauritania (31), Ghana (20); and Senegal (269); which constitute a total 1665 girls susceptible of FGM practices.

Regarding the classification per provinces, it must be pointed out that the greater number of “risk” population is concentrated in Gerona, where there is a total 869 women of these nationalities, under 16, which represent 52.2% of the total in Catalonia, after that, we find Barcelona, with 39.1% of the total; later on, Lleida, where the total is not highly significant; scarcely 7.85%, and, finally, Tarragona, where an almost null risk of FGM practices is verified, since only 0.85% of the total risk population in Catalonia is settled in this area.

These data are coherent with the conclusions drawn from the research and the surveys, since it is in Gerona where the highest number of denounces of practices of FGM has been detected, and where there is a greater preparation to deal with these cases both at police level (Mossos d'Esquadra), and at sanitary level. A similar situation can be found in Barcelona districts. However, there is lesser knowledge and professional preparation in the districts of Tarragona and Lleida, consistent with the scarce risk of encountering denounces of FGM, since in Tarragona, and taken as an example, there is only one Gambian girl under 16 registered.

The Parliament of Catalonia, in its session held on the 20th of June 2001 approved a Resolution 832/VI (BOPC n. 206, of July 11 2001), regarding the adoption of measures against the practice of ritual female genital mutilations, which urges the Government of Catalonia to improve the information and formation on this matter, facilitate the adequate protection to women and girls who have been forced to abandon their countries in order to avoid being victims of female genital mutilation, to state on the medical record of each girl born of immigrant family the possible risk situation in relation to female genital mutilation, promote cooperation with groups of women that fight against this practice, etc. In general, actions against female genital mutilation, mainly of preventive character. (see annex)

3.5. Some conclusions and suggestions

The Valencian Community presents a scarce number of girls who belong to groups in which there is risk of female genital mutilation. However, due to the extremely dynamic character of the migratory process in our country, it must not be discarded that, during the coming years, immigrant population coming from countries where FGM is practiced settle in the area. This implies, first, the need for a careful follow-up of changes on the composition of the migratory inflow and the origin of residents coming from the countries of interest for this research.

Secondly, according to information collected, neither the sanitary system, nor the social services, nor the judicial system, are aware of cases of FGM in the Valencian Community. However, the almost total absence of possible population concerned — according to data from 2001— and the non-existence of known cases, does not imply that it does not take place, and that some guidelines must be elaborated. These

guidelines, in the case of the Valencian Community must have preventive and formative character, directed in particular towards some professional groups —juridical, sanitary, educational, and social services—.

The concretion of these possible guidelines will depend, among other, of two factors. First, the experience offered by the Catalan case, where there is a Protocol and some cases have been taken to court, and some aspects of interest can be deduced from them. Secondly, a starting factor in fact, must be the opinion of the different professionals concerned in the case of awareness of FGM.

Lastly, and in order to conclude the chapter dedicated to the Valencian Community, in the present situation, specific information and formation measures directed to certain professionals, such as sanitary and education personnel⁶⁰ seem convenient. Informative and formative guidelines about this practice, which would banish several mites or prejudices and increase the criteria to face situation of intercultural conflict, seem appropriate.

On the other hand, as the number of families and populations susceptible of performing this practice increase, other preventive-formative measures directed to this population (with the appropriate work of intercultural mediation, a matter that will not be treated here), should be promoted.

In the Autonomous Community of Catalonia, there are not a significant number of girls susceptible of suffering genital mutilations, although the number is slightly greater to that of the rest of Autonomous Communities in the Spanish state. On the other hand, a possible increase of the population settled in Catalonia coming from countries where female genital mutilation is practice should not be uncared for, taking into account that there are communities that practice it already settled in the area, and the existence of some practices in resident population has been confirmed. Catalonia can therefore become one of the referents for immigrant population when coming to Spain. In conclusion, taking into account such a changing reality, a careful follow-up of the evolution of the composition of the migratory flux and the stock of residents who belong to the population groups object of this research, must be promoted.

⁶⁰ Given the present state of the matter, it does not seem convenient to give a greater dimension to this informative and formative guideline, in the form of an open campaign directed to indiscriminate public. Moreover, this last orientation could have several disadvantages (to promote a negative image, generalisation to groups that do not practice FGM, etc.)

4. Procedure followed in case of a legal intervention to prevent or to penalise the performance of Female Genital Mutilation

In this chapter we describe What is the procedure to be followed in case of a legal intervention to prevent or to punish the performance of Female Genital Mutilation. Legal provisions with the possibility of being applied in a case of prevention or promotion of female genital mutilation are found in a variety of sources including criminal laws, civil laws, procedure laws or child protection laws. In order to concretise these legal provisions, a succession of actions should be undertaken, involving the competent public officials and respecting prescribed formalities. Referral procedures describe such scenarios and as such they are a tool to put the legal provisions into practice. Once the crime is committed, criminal procedures should be started with the objective to punish parents, guardians or other performers of female genital mutilation. On the other hand, if the main concern is to protect the child's wellbeing and physical health and to prevent harm, one should rely on child protection provisions. Both procedures, emphasising respectively the dimension of punishment and prevention, contain an established series of steps, starting with a report of a case or a suspicion of female genital mutilation, going through an investigation phase and ending with the decision whether to take a legal intervention or not.

There is not, in the case of the Spanish State and particularly in the specific areas that have been analysed, any specific proceedings in the case of FGM, but general proceedings. Only in Catalonia can we find the protocol which we referred to previously and that can be taken as performance and prevention for a possible supposition. See Protocol of proceedings to prevent female genital mutilation by virtue of Resolution 832/VI by the Committee of Social Policy of the Parliament of Catalonia (20 June 2001) and Protocol for the prevention of female genital mutilation in the area of Girona (June 2002, modified in 2003)⁶¹. In Aragon a Interdisciplinary Commission to elaborate a protocol has been constituted, in november the 14th 2003.

⁶¹ In other cases we find other instruments of information: A.KAPLAN and C. MARTINEZ (coord.); *Mutilación genital femenina: prevención y atención. Guía para profesionales*, ed. Associació Catalana de Llevadores (<http://www.llevadores.org>), Barcelona 2004; F.Javier ROMEU SORIANO (Coord.) Sandra SIMÓ, M^aJosé MARTÍNEZ, Emilo MAS, , *El papel del ámbito sanitario en la detección y abordaje de situaciones de desprotección o maltrato infantil*, Direcció General de la família, Menor i adopcions,

*Protocol of Proceedings to prevent female genital mutilation*⁶²

The Parliament of Catalonia, in its session held on the 20th of June 2001, approved the Resolution 832/VI, about the acceptance of measures against the practice of ritual female genital mutilations. The Commission on Social Politics, in its session held on the 20th of June 2001, studied the text of the Proposal not of law about the adoption of measures against the practice of ritual female genital mutilations, presented by all the parliamentary groups. Among the different actions to which the Parliament of Catalonia urged the Government of the Generalitat, there was the one of creating an interdisciplinary commission of experts, to design an action plan against the practice of ritual female genital mutilations in Catalonia. The interdisciplinary Commission has elaborated a protocol of proceedings for the different professionals. It has foreseen the actions which hereunder are exposed to prevent its practice, promoting the information and training, and the respect for human rights as a basis for the prevention. Judicial intervention should be, in any case, the last resource to be used against the behaviour that wants to be avoided. The Commission has been composed by the departments of Health, Interior, Justice, Social Welfare, Education and of Presidency, through the Catalan Women's Institute and the Secretariat for Immigration. This protocol also includes the work realised by the Sub-commission on Female genital mutilation of the Work Commission on Domestic Violence of Girona.

*Protocol for the prevention of female genital mutilation in the area of Girona (June 2002, modified in october 2003)*⁶³

Conselleria de Benestar Social, Generalitat Valenciana, Valencia, 2002 [http://www.tra.gva.es/espa/familia/publicaciones/bibliografia/Manual%20Sanidad.pdf]; F.Javier ROMEU SORIANO (Coord.), Emilo MAS, Sandra SIMÓ, M^aJosé MARTÍNEZ, *El papel del ámbito educativo en la detección y abordaje de situaciones de desprotección o maltrato infantil*, Direcció General de la família, Menor i adopcions, Conselleria de Benestar Social, Generalitat Valenciana, Valencia, 2002 [http://www.tra.gva.es/espa/familia/publicaciones/bibliografia/Manual%20Educacion.pdf]; F.Javier ROMEU SORIANO (Coord.) M^aJosé MARTÍNEZ, Emilo MAS, Sandra SIMÓ, *El papel del ámbito policial en la detección y abordaje de situaciones de desprotección o maltrato infantil*, Direcció General de la família, Menor i adopcions, Conselleria de Benestar Social, Generalitat Valenciana, Valencia, 2002 [http://www.tra.gva.es/espa/familia/publicaciones/bibliografia/Manual%20Policia.pdf]

⁶² Comissió Interdisciplinària d'Experts. Integrada per tècnics dels Departaments de Sanitat, Interior, Justícia, Benestar Social, Ensenyament i de la Presidència, *Protocol d'actuacions per a prevenir la mutilació genital femenina*, Barcelona : Generalitat de Catalunya, Secretaria per a la Immigració, 2002. http://www.gencat.net/presidencia/immigracio/guia_ab/index2CAS.html

⁶³ Comissió de seguiment dels protocols en casos de violència domèstica i maltractaments infantils de Girona; *Protocol de prevenció de la mutilació genital femenina a la demarcació de Girona*, Departament de Justícia, Generalitat de Catalunya, 2003; <http://www.gencat.net/justicia/ciudadans/atencio/cvdgir/protocolm/index.htm>

A Work Commission on Domestic Violence of Girona, Department of Justice of Generalitat de Catalunya (Comissió de seguiment dels protocols en casos de violència domèstica i maltractaments infantils de Girona; Departament de Justícia, Generalitat de Catalunya) decided in June 2001 to establish a Protocol in cases of Female genital mutilation. A Sub-Commission decided the guidelines, criteria and general principles in order to give information to professionals.

Criminal Procedures

Article 264 Criminal Procedure Law states that every citizen has an obligation to denounce to the prosecutor, to the competent court; to the investigating judge or to police whatever knowledge they have about a performed crime. Although there is no sanction foreseen in case of omission of denounce, except in case of witness of a crime. According to article 262 Criminal Procedure Law anyone who by reason of their status or profession has knowledge about a committed crime, has a duty to report it to the prosecutor, to the competent court, to the instruction judge or to police. In case of omission of denounce an administrative sanction is imposed. There is no exemption related with professional secrecy. An investigating judge treats cases directly reported to the competent court and may decide to open a criminal investigation. Cases reported to the police are referred to the prosecutor. He requests the opening of a criminal case, which is then handed over to an investigating judge who will lead the investigation as described in article 311 Criminal Procedure Law. In the process of evidence gathering, the investigating judge may request a medical/genital examination of the victim. After this investigation phase, the prosecutor may ask the investigating judge whether to close the case or to open the oral phase of the criminal procedure.

Child Protection Procedures

As described in article 450.2 Penal Code, every citizen who can prevent the commission of a crime or an attempt to somebody's life, to his physical integrity or to his sexual liberty, by an immediate action without incurring danger for himself or others and voluntarily fails to do so, is punishable. In this context, citizens can report a suspicion of a future crime to the prosecutor, to the investigating judge or to the police. Apart from this duty to report, professionals having knowledge about a child at risk, have to inform the relevant authorities about this situation as regulated in the Child Protection Laws (Ley 21/1987, 11/11 and Ley Orgánica 1/1996 de 15/01, de *Protección Jurídica del*

Menor). If there is an impending risk that FGM will be performed, protective measures in co-operation with the family are taken by social authorities or by a judge. A hearing with the family is organised and parents or guardians are counselled. If there is an immediate need for care or protection, which cannot be met by means of voluntary solutions, compulsory measures are taken by the judge. The judge can take a variety of measures in order to protect the minor, such as the prohibition to leave the country, the order to come back after a delimited period of time, to take the passport of the girls, to demand a medical examination by a doctor.

Knowledge of cases

The majority of the interviewed professionals deny having been in contact with affairs related to the FGM in Spain, approximately half of them admit that the knowledge they have about the performance of circumcisions in the Spanish territory comes from the press (for example, *El Mundo* 10-03-2002 and *El País* 09-07-2003) or from seminars organized for this topic. This way, for instance, M6 (Valencia) points out “apart from the information obtained from the mass media, occasionally, in articles about this speciality, there is some information about the topic. The reference to religious or cultural motivations, I think, responds to socio-cultural motivations that are part of some groups, which mainly belong to African population”.

Knowledge of Practice

The level of knowledge about FGM of the professionals that were interview is varied, although in general terms, it is scarce and not very precise. It is correctly identified as a mutilation, however, its connections with an initiation rite, its geographical incidence, etc. are not clear. It is considered, in every case, that the FGM is a negative practice, resembling a serious body injury offence and therefore, it is rejected. In some cases, it is expressed as contrary to human or fundamental rights.

Knowledge of Procedure

In the Valencian Community there is not, unlike in Catalonia, any official-professional document that establishes the procedure to be followed in should there be knowledge of a case of FGM. This absence is underlined in several interviews. In spite of that, and cautiously expressed, the interviews do reflect a variety of procedures. Furthermore, the answers to this question stress the variety of emphasis already verified

in the “punish /prevent” binomial, although in this case it seems to be a “professional” slant. Thus, in the case of the police officers and judge who were interviewed, the proceedings that were mentioned are the “judicial accusation” or the “arrest of the author” (Valencia, Interview P31). On the other hand, the professionals of health and of social services that were interviewed preferred a double channel. It must be reported, by means of judicial accusation but, at the same time, a “social worker”, and the “social services” or in other cases, the “Department of Public Health” should be informed (Valencia, Interview M4). These professionals highlight the socio-sanitary dimension, although they do not give specific data.

From the interviews carried out, and mostly due to the fact that there have been very few cases in the Spanish territory, the various professionals that were interviewed agree on the need for derivation in case of suspicion of practice of FGM or in case of fear of a future practice. There is not, however, any knowledge about the procedure to be followed; in this particular aspect we can appreciate an important difference between professionals from Valencia, where there is no protocol, and those from the Catalan area, where the protocol exists and is known locally, although not in detail. A noteworthy example is the opinion of a medical-sanitary group from the districts in Barcelona, who work in an area of population with risk of suffering FGM, who consider that in case of knowing about a practice of FGM would analyse the particular case by means of a team meeting and they would then decide what to do according to the circumstances of the situation. In the case of Valencian sanitary professionals it is pointed out, for instance M4 (Valencia) “There is not any specific protocol; but after informing the coordinator of the centre, the routine would be to contact the municipal social services and, on the other hand the Department of Public Health”. On the contrary, a person responsible for the Women’s Care Unit in the Catalan area (M9, Tarragona) points out, for example, “up to the present day, I do not know of any case of mutilation within our district. One must presume that, with the assistance of my superiors, in case it is needed, we would find the best solution to follow the steps established in the protocol”.

Opinion about the sanction

We can say that, in the body of the interviews carried out, there is unanimity in considering positive and necessary “a juridical intervention in order to prevent or punish the practice of a FGM”. This was the formulation of the questionnaire but, as has been

already mentioned, the issues of prevention and/or punishment are indeed quite different (or palliating the negative consequences, which is another possible function of an intervention). In diverse cases, this distinction is made implicitly. This way, together with the pointing out of punishment, --“accusation”--, it is underlined the fact that the juridical intervention must come together with the preventive socio-educational measures and, we add, palliative measures when the practice has been carried out. Although the need for the preventive dimension is pointed out, which must be complementary to the punitive juridical intervention, there is no clear information concerning the specific content of the socio-educational measures that should be implemented.

5. Implementation of legislation on Female Genital Mutilation

Implementation of the legislation constitutes the totality of actions that are undertaken to give effect to the legal provisions, at distinct levels of interaction, by a number of different agents, who make use of multiple strategies. That is, it is the legislation concerning Female Genital Mutilation applied. While the referral procedures describe what to be followed, the implementation is about the performance of this the stakeholders involved.

Types of intervention depending on professionals

Among the different professionals, there is some general knowledge about the connection between mutilation and the serious body injury offence fixed in the Penal Code. Most of the socio-sanitary professionals prefer the intervention of social services, as is pointed out in the example M2 (Valencia), in which, in the supposition of knowing about a possible case of FGM (which has not happened up to now) “they would make an urgent call to the social services for the protection of minors”.

In the group of police officers there exist a highlighted tendency to act at the court’s level. Thus, for instance, we can see it in one of the interviews in which P 2 (Valencia) is in favour of the judicial intervention, “there is not specific protocol, but we would assist the victim, we would collect the instruments, materials and tools that were used and we would arrest the authors, paying attention to their relationship in order to inform the judicial authorities about all this”.

Police Level

In relation to the performance at a police level in the cases of FGM in Catalonia, we must point out the existence, among the Autonomous Catalan police (Mossos d’esquadra), of some police officers in charge of pursuing these practices. However, as far as other police sectors are concerned (Civil Guard, Local Police, State Police), from the interviews carried out, one can appreciate ignorance about the existence of practices of FGM, about the different ways of FGM, and the scarce preparation before the possible accusation of a practice of FGM. Among them, we must underline that the

police bodies in the districts of Girona and Barcelona have a detailed knowledge about the rites of FGM. This is due to the succession of cases and to the larger number of population coming from areas where the FGM is usually practised; and also because they have participated and have at their disposal the protocol for the prevention of the FGM.

Attitudes of immigrants

In Catalonia, as much as in the Valencian Community, to carry out interviews about FGM to immigrants was a particularly difficult task. In general terms, the practice of FGM is a topic which people do not wish to talk about. The contacted immigrants are conscious, in every case, about the very negative perception that the society has of this initiation rite. In some cases, in which people have not accepted to be interviewed, we could notice the inconvenience that was obvious in expressions such as “I do not know”, “ we do not do that”, or “no, there is not any here, and it gives us very bad reputation”.

Actually, the interviews that here presented correspond to cases in which there is a connection with the researcher and, based on those previous bonds, they accepted to be interviewed. In both cases, they showed themselves to be against this practise and declared to be in agreement on a juridical intervention. For that, it is worth underlining that the interviewees consider the FGM as something negative that they would not do it to their daughters; as it is expressed in interview number I.2 “I have many friends who have daughters and they are not going to mutilate them, they find it disgusting ”.

Even so, this situation shows us one of the difficulties in getting to know the reality of this topic. Immigrants coming from countries with medium or high incidence of FGM are very reluctant to talk about this topic, given the cultural difference and the very negative social consideration of the practice of FGM in the recipient society.

In this section, we could particularly highlight the interview number 12, among the group of immigrants, whose interviewee says “Senegalese people do not practice it in here (in Spain), the most conservative go to Senegal. The Senegalese know that in Spain it cannot be done, it is very dangerous, and you can be taken to the court if the child talks about it in the school, the parents can be taken to the court! There was a lady, from Mali, in France (I do not know the generic name of this kind of women) who practised it, I learnt in from the news, and she was put in prison for two years”.

Judicial Level

Concerning the performance at the judicial level, we would only highlight that it is like this in the districts of Gerona, precisely because it is there where there has been a larger number of reports of FGM, where magistrates and public prosecutors have wide knowledge of the rituals of FGM (see, for instance, *El País* 07-02-99). A similar situation occurs in the districts of Barcelona, unlike Tarragona or Lleida. On the other hand, we must emphasize, as has been said, the elaboration of a Protocol of intervention by the Public Prosecutor's Office in Catalonia.

All the interviewed professionals, knowing more or less the applicable laws in the case of FGM in Spain, agree on the need of juridical intervention in order to prevent or punish FGM. The Catalan areas insist on the need that the intervention must be preventive, and only taken to court as a last resort, because it initially seems that it is not a widespread practice and, for that reason, specific regulation is not necessary but can be included in the general types of injuries set forth in the Penal Code.

In the case of Catalonia, it is pointed out that the proceedings that have been initiated up to the present day have been stopped at their onset because in the majority of cases, there was no legislation applicable (see, for example, *El País* 29-04-01). Like that, for example, P2 (Girona) declares, "no accusations have been reported because they have always been stopped at the beginning of police proceedings and they have not gone beyond an inquest". For that reason, the same interviewee maintains that the kind of policy followed in the accusations in case of FGM is mainly "preventive, in view of possible future mutilations". This particular interview, is particularly interesting because the interlocutor is an expert in this matter who, after having dealt with "alleged" cases of FGM, emphasizes, (in relation to the question of whether he is in favour of a juridical intervention in order to prevent or punish FGM), "we must think of a minimum intervention: it is a fundamental principle!!" mainly because "what must be sought is prevention (as a complement to another type of actions)" (see annex interview n.2). In the same sense, M2 (Sabadell, Barcelona) concludes, "it is a matter of preventing more than suppressing". In the same sense, P1 (Gerona) states, "the intervention must be preventive, the Penal Code must necessarily exist, the possibility of a sanction as a last resort. Compared to domestic violence, it must be taken to court as a last resort (in the strictly necessary cases)".

Grades of intervention: prevention and punishment

As a conclusion, we can state that there is unanimity concerning the need for the intervention of the law. There are varying degrees and kinds of emphasis concerning the content of this intervention. In some cases, it is formulated stressing the “punishment”; in other cases, the dimension of prevention is emphasized, that is, measures for information and for education for health. One of the most detailed formulations of this idea states “I find the juridical intervention in relation to FGM adequate... but I consider that it must come together with measures for the information of families and of the countries in which it is practised. To try to implement our system on people or countries different from ours is a failure. I find education for health more adequate, by means of women who would be in charge of informing the community, with the intercultural mediation which implies, at the same time, a source of work” (interview M3). The point is not establishing an antagonism between one and the other aspect (that is not appreciated in any of the interviews). The point is to highlight that, under the common agreement on the need for intervention, there is a recurrence of elements of a debate that is by no means finished in a conclusive way, involving the juridical field as well as the social sciences, about how to treat the cases of FGM. This debate concerns the main pathways for penal sanction, or any other type of juridical intervention, as much as the social consequences of the different channels and interventions that have been used.

It is pointed out that a juridical intervention is not the same in order to prevent than in order to punish. Preventing is very different from punishing, and this way is implicitly established in several interviews. In other words, what is it considered necessary in the intervention of the law? Nevertheless, in some cases, this intervention is expressed as an “accusation”, “legal proceedings” or similar, that is, the aspect “punishment” is emphasized. In other cases, even though agreeing on a punitive legislation, the need for “prevention” is pointed out. The need for judicial intervention, understood as punitive, must be accompanied by “campaigns of information, education and public awareness aimed at informing about the dangers this practice involves” (Interview M5). In other words, when answering the question about the advantages and disadvantages of the legislation, they state “without law there is impunity... (but) I think it is not adequate to stop at the legal level. The law is fundamental but it must come with the corresponding preventive measures; it is a similar case to that of gender violence” (interview M3). Although the preventive dimension is stated, complementary

to the punitive juridical intervention, there is not clear information about the precise content of those measures, nor their juridical and/or socio-educational character.

The knowledge about the applicable legislation is, in general terms, very scarce. In all the interviews, it is taken for granted the fact that FGM is a punishable practice and it is considered as a crime. This is clearly stated, that is, there exists a deep conviction about the fact that it is a crime. However, in many cases, no further information about the applicable legislation is known. A very “typical” answer, in that sense, would be the following: “the FGM is punishable, but I do not exactly know how it is punished” (Interview M3). On the other hand, a minority identifies female genital mutilation with a serious body injury offence and/or “against sexual freedom” (Interview P7).

However, obviously, the more specialised in police and justice topics the group of interviewees is, the more knowledge of the legislation they have, particularly due to the geographical closeness to the areas in which cases of FGM have been reported.

6. Obstructing and favouring factors for the implementation of legislation applicable to Female Genital Mutilation

a) Concerning the knowledge of this practice

Although the majority of the interviewees declares being able to describe and distinguish the different practices of FGM, when asking about the various types, one can observe they have some general knowledge but it is not always precise, nor do they say much about the religious and cultural practices carried out mainly in Africa.

In general terms, there is limited and vague knowledge about FGM. They usually state that it is “a mutilation” or “the extirpation of the clitoris”. However, there are some outstanding exceptions that show a thorough knowledge of the topic. (Interview M5). Whoever is more precise states that it is carried out in “certain African countries” (Interview P1). All the answers affirm that it is a cultural and religious practice, although some of the answers confer a bigger weight to the cultural aspect and some others do it to the religious one. In any case, the knowledge is not direct. That is, nobody from the group of interviewees has been in touch with or has had direct knowledge about the carrying out of FGM. Therefore, it is knowledge of an indirect kind, in which the most mentioned channels of information are the mass media, the specialized professional magazines, or Conferences on the subject as well as various networks of social organizations.

Among the difficulties found in order to ensure that the law is upheld, the majority of interviews coincide in the ignorance about this topic existing in the professional world. This ignorance makes the person who could come across a possible FGM not to know what to do. In this sense, M4 (Valencia) asserts, for instance, that it is necessary “to widen the information of those professionals who could be involved”. In many cases, the question is not answered and it is explicitly said that they do not know what to answer given the insufficient knowledge about the topic or the lack of practice experience. In other various cases, it is considered that the difficulties focus on “the social secretiveness of some of the social groups who carry out this practice (the

FGM)” (Interview P3) or the secrecy as a consequence of the “fear of the accusation... or of the reprisal” (interview M2), or sometimes it can be explained by the attachment felt towards the own cultural norms. It is worth pointing out the interview to a Senegalese immigrant I2, who considers that “there would not be any obstacle to ensure that the law is upheld because people know that it is a stupid thing (female circumcision) and it should not be done. In the small villages this practice is still carried out but progressively less and less, I think ”.

In relation to the third group of interviewees, immigrants, we must take into account that the reluctance felt by most of them before the interviews has led to a smaller number of interviews with this group and, therefore, is less illustrative. The interviewees deny having learnt about the carrying out of a FGM in Spain or in the country of origin (Senegal), and they point out that in this country it was forbidden two years ago.

Concerning the Spanish legislation to be applied in the case of FGM, they mention the application of the imprisonment penalty and show a positive attitude towards juridical intervention. They admit that it is a cultural practice that immigrants might keep on carrying out in the recipient country, even though their fellow citizens disapprove it. Thus, for example, I1 (Valencia) says “I presume people keep on doing it, although they come here, they are still dependant from their culture, because in their own country people do not understand it either. I am an African and I do not understand it either”. In the same sense I 1 (Tarragona, see annex, interview n.1) declares, “in Senegal this practice cannot be punished because all the population should, in that case, be punished (because it is still done. It is an issue in which the authorities cannot intervene because it is an absolute taboo). The President or the Minister have also done it to their children, then, who is going to be punished? The <Wolof> (ethnic group from Senegal) do not do it. The <Toucouleurs> and the <Sarakoles> do it, but with the system of justice, there nothing can be solved. Mutilated women are like dolls, they feel nothing, and they are like dead. Many Senegalese men do not want to marry a mutilated woman. This shows that little by little the practice will be dying out ”.

In relation to the attitude shown by sanitary professionals before female genital mutilation, we can highlight a recent study by the Llavaneres Team of Primary Health Care (Barcelona)⁶⁴, in which they verify the doubts, provoked by these practices in our

⁶⁴ Study partially published by the magazine PRIMARICS, number 14, 2nd quarter 2002, pp. 14-15, and signed by J. MORENO and M.J. CASTANY.

sanitary personnel, concerning the meaning of this mutilation, where it is carried out and why. In order to analyse and solve the doubts about the FGM, they developed a transverse and descriptive study by means of a survey among 280 professionals of the medicine and nursing fields. The polled belonged to the fields of general medicine, paediatrics and gynaecology from 13 teams of primary health care at the Servei d'Atenció Primària (SAP) (Primary Health Care) Mataró-Maresme, where the first accusation about FGM in Catalonia took place. The variables under study were age, gender, service, knowledge about FGM (identification of a female circumcision, reasons to carry it out, countries where it is done, wish to widen the knowledge) and attitudes before mutilation.

From the 280 sent questionnaires, 215 answers were obtained (75%). From the total of answers, 96% said that they knew what FGM was but only 44,5% identified it correctly. 49,4% said that they knew the reasons of why it is carried out, but only 24,6% could identify them in a correct way.

Whereas there were not significant differences in the answers given to the previous set of questions by the various groups of sanitary professionals, they are very different concerning the attitude to follow in case of FGM. Near 75% of the professionals from the paediatrics service believe that the best is to educate. 45% of the general medicine professionals have the same opinion; and 30% of the professionals in gynaecology and general medicine consider that, apart from educating, it must be reported to the police. The highest percentages of professionals who think that it must be reported to the police belong to general medicine: 20 %. In addition, 90% of the workers in paediatrics say that they assist people coming from sub-Saharan Africa; 76% in general medicines and 60% in gynaecology. Even those the cases reported are only a few. In addition, 16% of the interviewed professionals declare to not be interested in the issue and, after the question "What would you do in case of FGM?", their answer is "I would ignore it".

As a conclusion from this study, we must point out that there are important differences between the perception sanitary professionals have of their knowledge about FGM and the answers obtained. It is also remarkable the small number of mutilations that have been detected, taking into account that the majority of professionals admits that in their surgeries they deal with people who fall within a risk group. From this, we can presume that an infra-diagnosis is possibly occurring, given that the percentage of professionals who express their lack of interest in this issue is relevant.

b) Concerning the knowledge of juridical aspects

There exists some knowledge, at least theoretical knowledge, of the legislation applicable in case of FGM. The different professionals know it is a practice connected to the serious body injury offence and, in general, they prefer not to modify this legislation, although they undoubtedly consider that it would be necessary to complete it with measures of information, education, public awareness, etc. Like that, M 3 (Valencia) declares, “I find adequate the juridical intervention in relation to genital mutilation and I am in favour of the extraterritorial consideration, but I think it must come together with the measures of information for families and the countries in which this practice is carried out. Trying to impose our system on people or countries different from ours is a failure. I find it more adequate to educate towards health, through women, who should be in charge of informing the community, and the intercultural mediation evolves, at the same time, a source of work”.

c) Concerning perceptions and values

The largest part of the interviewees insists on the tight link existing between this practice and the cultural and religious aspects, which makes it a very complicated issue. In this sense, P1 (Tarragona, see annex interview n. 5) says “I consider that the main obstacle when trying to ensure that the law is upheld would be the lack of accusation to the police, taking into account that it happens in closed familial and religious circles whose cultural environment is very poor. Therefore, the first step to take, on the way to eradication, would not be the application of the law –which would be necessary once it has happened- but the education of people that are susceptible of this practice and victimization”.

d) Concerning practical and juridical proceedings

1) Proof:

Among the obstacles that are impediments to compliance with the legislation, they point out the difficulty in proving that this practice has been carried out, where it happened, who did it, etc. Thus, for example, interview P1 (Gerona) states, “the problem is the proof of where it was done and who did it”, and interview P 2 (Valencia) declares “in the police environment we suspect that these actions might happen in our

societies, but the fear suffered by these people means that the number of accusations is very low indeed. ”.We may see the problems of proof in all the cases described in *Chapter 2*.

2) Extra-territoriality

Another reason would be the extraterritorial aspect (see in *Chapter 2, case F* year 2001 and *case G*, year 2002), that is, the fact that this practice can be carried out in the country of origin, during the holidays, for example, makes it difficult for a sanction to be applied in the host country. In this sense, for instance, in some cases some preventive measures were taken in order to prevent the FGM in the country of origin, as P 2 (Gerona) points out “There were proceedings of a previous character, (to prevent the mutilation of the girl when she was going to her country), they were given the document by the court and like that, it was presumed the FGM would not be done to the girl, but the danger was that the girl would not come back”. In relation to prevention aspect, see *cases B* (year 2000), *D* (year 2001) and *E* (year 2001), where the mutilation was avoided. In this sense, prevention practices as are described in the Protocol of Girona are effective. For example, in two months of 2003 (august and september), six mutilations were avoided in Girona, as it is said by the Judge in charge of coordination of Protocol. Preventive measures were taken: as informing, counselling, warning, and periodic medical examination after travel to Africa. Besides, it is remarked that african women are changing their attitudes too and avoiding travelling to Africa⁶⁵. But, at the same time, in some cases measures taken do not have enough effectivity, as we may see in the *case F* (year 2002).

⁶⁵ See interviews in newspapers of 23-9-2003: *ABC* and *El Punt*.

Conclusions

1) The responses that our legal system can possibly give to Female Genital Mutilation may vary depending on the focus of analysis and on the parameter we measure it with. One could consider FGM as a conflict between a cultural practice and the minimum standards required for social integration and social peace (this is, a human rights' violation). One could also look at FGM as a conflict between two world views, two life styles or two cultural and value systems.

2) In any case, the basic aim of the legal and social measures is, or should be, the social integration of individuals and groups. We understand the widespread and yet unclear concept of integration in the following sense. Integration comprises three major issues or factors: equality of rights and duties, respect of differences and inter-culturality. Along with this, we must also consider the main, though diverse and gendered, ways or channels towards social integration within a given political community: legal status, working position, public participation in the political, cultural and social arena.

To our understanding, the category "integration" refers to a two-sided process of interaction rather than to a one-way assimilationist model, as it has been traditionally understood, in a very limited and reducing way.

3) Being the aim integration in a plural society, the sole legal vision and answer from the legal system is inappropriate and insufficient. A multidisciplinary effort is required aimed at understanding and getting to know the target culture, the analysis of the practices and the comprehension of the social functions attributed to them in a given context. Even if FGM are acts that we confront, they nevertheless play a role, other than symbolic, in the societies in which they are practised. However, to know a reality does not mean to legitimise or justify it.

4) Taking cultural pluralism seriously is a strong point to maintain a presumption in favour of any culture and a respect and value of diversity of cultures. It is a starting

point, by virtue of which, any culture is valuable in so far as, or in the sense that it permits and brings together identity and humanity. We must, thus, consider that all cultures have somehow contributed to do *something*, they have all contributed to make sense of life for human beings, to express ways of seeing and living the world, to give sense to attitudes, behaviours, values, preferences and finalities.

However, being it a presumption, it admits contradiction by proof. It does mean that we must admit that all cultures are valuable to human beings. But, in every culture there is the possibility and the actual reality of practices that operate against human beings. On the other hand, no single culture expresses or extinguishes the human ideal, but they all can, and all have, at some stage, seriously compromised human dignity.

5) We need to withhold our own ideas or judgements until we have listened to the experiences of the members in the culture in question as a crucial part of our own deliberation. However, this does not imply that we must then accept the practices or endorse them. The prevalence of the practice should not be taken as the final word, given that there are also many women in and from African cultures who struggle against it and, given that those who perpetuate it may do so in background conditions of intimidation and inequality. Furthermore, it is not the practice of a single cultural or religious group or group of cultures, nor there is any religious group in which the practice is universal and FGM is illegal in most of the countries in which it occurs. (Nussbaum, 1999, p. 122)

6) From the survey carried out on the presence of FGM in the Land of Valencia and Catalonia, basically in *Chapter 3*, we can conclude that there are very few female children in the Land of Valencia who may be at risk of undergoing a practice of FGM. However, even if the risk group is extremely small, the dynamics and the changing nature of migratory flows towards our country oblige us to consider the possibility, along the years, of an increase in migrant population coming from countries in which FGM is performed. This implies, first of all, the need to keep an eye on the changes in migration flows and their settlement. The interviews in this geographical area show

clearly a deep ignorance about the practice among the professionals that would be most directly in contact with it.

7) On the other hand, the survey shows that neither the health care system nor the social services, nor the Judiciary have any evidence of the practice of any FGM in the Land of Valencia. The almost non-existent population from countries where FMG takes place (data from 2001) and the non-existence of cases does not mean that no action should be taken or that the issue should not be treated. In the Land of Valencia, preventive measures and educational programs should be designed, specially addressed to professionals in the health, the social, the educational and the judicial systems.

The enforcement of such measures may depend on two factors: first, the experience collected in Catalonia. Catalonia has a Protocol Procedure of actions and several cases have been gone before the courts. All these experiences are valuable in terms of *learning* from good and bad practices. The second factor, or rather, the starting point, is the degree of knowledge that the different agents, that may face a case of FGM, have, both about the practice and about how to act.

8). Last, the present situation in the Land of Valencia does require preventive and education measures, information and training for health-care personnel, teachers, and social workers, which are much more in contact with female migrant children coming from countries in which FGM is performed. This should never be a public campaign, which would have inevitably, perverse effects on migrant populations. Rather, we suggest the implementation of information and training programmes within the institutions that would increase the knowledge and comprehension of the practice. These programmes would also fight myths and prejudices and would work on the design of action lines, establishing parameters and criteria to manage the situation in case it appears and ways of solving cultural conflicts that may arise. The minimisation of cultural conflict would be an important element in the overall strategy plan.

On the other hand, little by little, as more families from countries in which FGM is practised arrive, other types of preventative and educational measures can then be drawn addressing the migrant population (through cultural mediation or other forms of social education).

9) .In Catalonia, the number of female children that may undergo FGM is not significant, although higher than in the rest of the Autonomous Communities in the State. Taking into account the existence of well-established population coming from countries in which such practices take place, the target population may indeed increase. Some of them have actually proceeded to submit their female children to FGM. Since Catalonia may be a referent for migrants coming from countries in which FGM is practised, and given the growth and dynamics of migratory flows, we should be aware of a possible increase of the risk.

10). From a constitutional point of view, conflicting rights cannot be solved in favour of the parent's religious freedom or freedom of conviction and conscience. Female children undergo FGM usually because her parents' set of beliefs makes them decide to do so. However, this freedom is not covered by art. 16 of the Spanish Constitution because the limits set in that article clearly exclude it. Article 16 states that the limits to any right or liberty are the rights or liberties of others. Therefore, the child's right to integrity, health and well being overrides the parents claim. Recent jurisprudence has furthermore stated that children have a special constitutional status that gives them the maximum protection and it is not disposable.

11) The Spanish Penal provisions do respond to FGM. The Penal Code now in force does have a specific provision for FGM, not in the norms in force until September, the 30th, 2003. However, FGM before the new regulation falls under the general provision of inflicting bodily injury. A variety of practices with different consequences on health are included under the term FGM. Therefore, we should be careful when defining the criminal type. Clearly, the anterior provision in Article 149 is the one that would best suit the type and variety of practices (loss or serious damage of a major organ or part of the body). The penalty is prison sentence from six to twelve years. New change in the Penal Code including specifically FGM among the acts penalised under Art. 149, thereby avoiding, therefore interpretative problems.

12.) No evidence was found to state that specific criminal law provisions are necessary to guarantee the punishment of FGM. Therefore, it is not essential to enact a specific

legislation as the change done in Spain, because general criminal law provisions can be applied. Although specific legislation raises the issue of FGM, such legislation may be stigmatising and discriminating against specific groups and/or other cultures

13) From the point of view of criminal law, the main problem for law enforcement in relation to FGM concerns its verification in the country of origin, that is, outside Spanish jurisdiction. There are several proposals aiming at extending Spanish jurisdiction over the matter: to eliminate the requirement of double incrimination (in some countries the practice is not criminalized); to extend jurisdiction via *personae*, this is to claim jurisdiction over acts committed abroad by legal residents or to include FGM among crimes justifying universal jurisdiction. Any solution eluding the modification of art. 23 LOPJ, Law of the Judiciary Power, (such as bringing automatically all acts to the notion of preparatory punishable acts) makes it very difficult to suit our penal law system.

14) Typifying such acts and practices as crimes is surely the easiest and clearest way, from a legal point of view, to deal with the problem. However, this response poses some problems from the perspective of social integration in the intercultural society. From a social point of view, it clearly shows the limits and difficulties of law as the only instrument for social engineering. Law or legal instruments may oversimplify highly complex social processes.

The legitimate use of the state's *ius puniendi* as means for protecting essential women's rights, such as physic and psychological integrity, or the right to choice is very clear. However, this does not eliminate the convenience and even the need of laying down other measures, whether they be social, educational or alike, which would prove to be equally and even more useful and effective than penal law instruments for prevention. It is important to remember that the state's punitive intervention in Spain is subject to the *principle of minimum intervention*. Therefore, the use of penal law- the branch of the legal order establishing the hardest sanctions for the convicted person rights- is only legitimate for protecting the most valuable and fundamental rights and goods and for the hardest aggressions. On the other hand, it is important to take into account the social effects that a merely penal solution would bring about. Among them, we are thinking of the clandestine and secretive aspect of the practice, the resistance to the prohibition, the

victimisation of the group opposite to the majority, the intrusion in family life, the questioning of the membership to one's own family...

15) We should differentiate from penal sanctions to individuals and penal condemnation of the cultural institutions and/or the group in itself. It seems convenient to consider, in this sense, the symbolic character of the sanctions: a measure expressing the incompatibility of a value belonging to the culture of the minority group and the legal order's principles would have to tend to reduce the negative social effects.

16) In the report, chapters 4 to 6, the unanimous position of the interviewees regarding the need of legal intervention is clearly shown. There is, however, a less clear or unified opinion regarding what kind of intervention is actually required or would be adequate. The diversity of opinions demonstrates the terms and elements of an open debate brought about in both the legal field and the social sciences, regarding the kind of response that needs to be given to FGM. The debate includes not only the main actions to be taken, penal or otherwise legal, but also the social effects of the different measures and interventions, either established or proposed.

Most professionals, however, do consider that legal intervention should focus on prevention rather than punishment. They indeed consider that preventive measures carried out by professionals in contact with female children (health-care professionals and teachers) are the best. The avoiding or eradication of the practice requires a task aimed at raising consciousness in society and to bring an awareness of the life-long harm effects of FGM among migrant groups that may practice it. It also requires the establishment of preventive and protective measures for female children, taken and laid down under the legal principle of protection of the child.

17) The interviewed professionals agreed that in case they knew a FGM had been practised or risked to be practised, considering the little incidence that it has had up to now, the case should be derived. There is not a sound knowledge about what to do or what the procedures are, specially in the Land of Valencia. In this point, there is a difference among professionals from both areas, given that Catalonia does have a Protocol. However, although its existence is well known, its contents are little known even among Catalan professionals. On the other hand, a group of health-care professionals working in an area in which there is a considerable number of residents

coming from countries in which FGM is practised, consider that in case they came across a case of FGM, they would analyse the particular case in a personnel meeting and would agree what to do according to the particular circumstances of the case. It is important stress this interdisciplinary work and to take decisions in group.

Another element to take into account is the extreme difference between the professional's own perception of their own knowledge about the matter and the actual reality of that knowledge, which is shown in the interviews.

We would also like to point out the little incidence of the practice in the region, considering that all professionals admitted to be in contact with population and female children that may undergo FGM. That is the reason why we consider that there might be an infra-diagnosis since the percentage of professionals expressing their lack of interest is high.

18) Regarding the protection of female children, the Spanish legal order has undergone great changes affecting the legal status of children. Before the changes, only residual charity was accorded and the state's protection intervened when parents' action under the *patria potestas* did not reach. The change has meant the recognition of children as entitled to human rights, the consideration of the child as a subject of rights. Such rights are not the mirror of the parents' interests but rather an expression of the needs and value of the autonomy of the child. On the other hand, the operated change demands that social and legal institutions protecting children and their rights have the obligation to intervene in situations of risk for the child or his/her rights.

19) One of the biggest difficulties is actually defining and delimiting what might be considered a risk situation, since protective measures may be seen as an invasion of the liberty and privacy of family life. In such cases, we have conflicting principles (the interest of the child and the autonomy of parents), which need to be pondered in each particular case. For instance, there are measures oriented at avoiding situations that may be reasonably risky for the female child to suffer a mutilation (trips to the country of origin). Such measures consist in preventing children from going with their parents in such trips. But this measure is a big invasion of privacy on the life of the family which needs to be strongly legitimised.

We do consider, however, that the interest of the female child requires extreme caution in pondering over which criteria the gradual autonomy of will in the child has to be

considered. In the personal sphere of human rights, the criteria of gradual autonomy implies that the interest of the minor has to be determined taking into consideration both, the present and future life of the female child.

Bibliography

- ALÁEZ CORRAL, B. *Minoría de edad y derechos fundamentales*, Madrid, Tecnos, 2003.
- BELZUNEGUI, A., BRUNET, I. Y PASTOR, I., *Tècniques d'investigació social. Fonaments epistemològics i metodològics*. Pòrtic, Barcelona, 2002.
- CALVO GARCÍA, M.; *La incidencia de la inmigración en el ámbito de la Administración de Justicia, 2000-2001*, CGPJ, Madrid, 2002.(<http://www.poderjudicial.es/>)
- DE LUCAS, J.; *Europa: ¿convivir con la diferencia?*, Tecnos, Madrid, 1992.
- DE LUCAS, J.; “Para una discusión de la nota de universalidad de los derechos. (A propósito de la crítica del relativismo ético y cultural)”, *Derechos y Libertades, Revista del Instituto Bartolomé de las Casas*, nº 3, 1994, pp. 259-312
- DE LUCAS, J.(ed.); *Derechos de las minorías en una sociedad multicultural*, Cuadernos de Derecho Judicial, Consejo General del Poder Judicial, Madrid, 1999.
- DE LUCAS, J.(ed.); *La multiculturalidad*, ed. Javier De Lucas, Cuadernos de Derecho Judicial, CGPJ, Madrid, 2001
- FACCHI, A.; “La escisión: un caso judicial” en Contreras, Jesús (comp.), *Los retos de la inmigración. Racismo y pluriculturalidad*, Talasa, Madrid, 1994 [“L’escissione: un caso giudiziario”, *Sociologia del Diritto*, XIX, 1992.]
- FACCHI, A.; “Mutilaciones genitales femeninas y derecho positivo”, en *Derechos de las minorías en una sociedad multicultural*, ed. Javier De Lucas, CGPJ, Madrid, 1999, pp.143-167
- KAPLAN, A, *De Senegambia a Cataluña. Procesos de aculturación e integración social*, Fundació La Caixa, Barcelona, 1998.
- KAPLAN, A.; “Integración social, identidad étnica y género: la salud sexual y reproductiva de las mujeres migrantes subsaharianas. Retos e implicaciones”; II Congreso sobre la Inmigración en España, Granada 2000.
- KAPLAN, A.; “Mutilaciones genitales femeninas: entre los derechos humanos y el derecho a la identidad étnica y de género”, en *La multiculturalidad*, ed. Javier De Lucas, Cuadernos de Derecho Judicial, CGPJ, Madrid, 2001, pp. 195-216. [<http://www.xtec.es/crp-pladelestany/formacio/mgf/Kaplan1.pdf>]
- KAPLAN, A., BEDOYA, M. H., FRANCH, M. Y MERINO, M., “Avances interdisciplinarios en el conocimiento de los procesos de cambio e integración social: la situación de las mutilaciones genitales femeninas en España”, en F.J. García Castaño y C. Muriel López (eds.), *La inmigración en España: contextos y alternativas. Volumen II. Actas del III Congreso sobre la inmigración en España (Ponencias)*. Laboratorio de Estudios Interculturales, Granada, 2002. [<http://www.xtec.es/crp-pladelestany/formacio/mgf/Kaplan2.pdf>]
- KAPLAN A. and C. MARTINEZ (coord.); *Mutilación genital femenina: prevención y atención. Guía para profesionales*, ed. Associació Catalana de Llevadors (<http://www.llevadors.org>), Barcelona 2004
- LAZARO GONZALEZ, I. (coord), *Los menores en el Derecho español*, Tecnos, Madrid, 2002
- MIR PUIG, S.; *Derecho penal. Parte general*, 6ª ed., ed. Reppertor, Barcelona, 2002.

NUSSBAUM; M.C.; "Judging Other Cultures: The Case of Genital Mutilation", en M. Nussbaum: *Sex and Social Justice*, Oxford University Press, Oxford, 1999, p. 118-129.

PUENTE ALCUBILLA, V. *Minoría de edad, religión y derecho*, Ministerio de Trabajo y Asuntos Sociales, Madrid, 2001

PURCALLA BONILLA, M. A. (dir.), *Immigració i polítiques d'integració. Estudi jurídic i estadístic del fenomen de la immigració a les comarques de Lleida i Tarragona*, Ed. de la Universitat de Lleida, Lleida, 2003.

RIVERO HERNÁNDEZ, F. *El interés del menor*, Dykinson, Madrid, 2000

RIVERO HERNÁNDEZ; F. "Límites de la libertad religiosa y las relaciones personales de un padre con sus hijos. (Comentario a la STC 141/2000, de 29 de mayo)", *Derecho Privado y Constitución*, núm. 14, 2000, pp. 245-299.

ROMEU SORIANO, F.J. (Coord.) Sandra SIMÓ, M^aJosé MARTÍNEZ, Emilo MAS, , *El papel del ámbito sanitario en la detección y abordaje de situaciones de desprotección o maltrato infantil*, Direcció General de la familia, Menor i adopcions, Conselleria de Benestar Social, Generalitat Valenciana, Valencia, 2002
[<http://www.tra.gva.es/espa/familia/publicaciones/bibliografia/Manual%20Sanidad.pdf>];

ROMEU SORIANO, F.J. (Coord.), Emilo MAS, Sandra SIMÓ, M^aJosé MARTÍNEZ, *El papel del ámbito educativo en la detección y abordaje de situaciones de desprotección o maltrato infantil*, Direcció General de la familia, Menor i adopcions, Conselleria de Benestar Social, Generalitat Valenciana, Valencia, 2002
[<http://www.tra.gva.es/espa/familia/publicaciones/bibliografia/Manual%20Educacion.pdf>];

ROMEU SORIANO, F.J. (Coord.) M^aJosé MARTÍNEZ, Emilo MAS, Sandra SIMÓ, *El papel del ámbito policial en la detección y abordaje de situaciones de desprotección o maltrato infantil*, Direcció General de la familia, Menor i adopcions, Conselleria de Benestar Social, Generalitat Valenciana, Valencia, 2002
[<http://www.tra.gva.es/espa/familia/publicaciones/bibliografia/Manual%20Policia.pdf>]

ROPERO CARRASCO, J.; "El Derecho penal ante la mutilación genital femenina" (I), *La Ley*, 26-9-2001.

SEVILLA BUJANCE, J. L. : "Transfusiones de sangre, conciencia y derecho a la vida. Especial referencia a los menores", *Revista General del Derecho*, núm. 676-677 (Enero-Febrero), 2001

Annexes

- 1. Standard interview guide**
- 2. Selected interviews**
- 3. Protocols**
- 4. Penal Law**

Annex 1. Standard interview guide

Sex: male/female

Age:

Country:

Profession:

Organisation:

Competence: *(in the research)*

Territorial competence:

1. What do you know about female genital mutilation (FGM) or female circumcision *(assessment of knowledge about cultural and religious aspects)*
[Subjects can be asked whether they know the types of genital mutilation]
2. Have you been in contact with FGM related issues in your country (UK, Sweden, France, Spain, Belgium)? If yes, how?
3. Have you ever heard about circumcisions being done in your country (UK, Sweden, France, Spain, Belgium)?
4. What's your attitude towards a possible legal intervention in order to prevent or to penalise the performance of FGM?
(assessment of possible fear of being accused of racism, of possible pressure of the African community, or fear for confrontation)
5. What is the legislation with regard to FGM in your country (UK, Sweden, France, Spain, Belgium)?
(assessment of knowledge about penal law and child protection law)
6. What are the advantages and disadvantages of such legislation?
7. What are the difficulties or obstacles to implement the law?
(assessment of obstacles related to knowledge about FGM, to knowledge about legislation, to attitudes and values, to practice and procedures)
8. (For Public Prosecutors) Are there any guidelines or decisions concerning the persecution of FGM?
9. (For Public Prosecutors) What is the policy with regard to the prosecution of FGM?
10. What is the procedure to be followed in case of FGM?
(assessment of procedure, codification, referral...guidelines or protocol)

Annex 2. Selected interviews

Within the present project, forty-two interviews have been carried out with Judges, Public Prosecutors, Members of the Armed Forces, Medical Doctors, Social Workers and Immigrants in Catalonia and in the Land of Valencia. In addition, further research carried out within the socio-sanitary field has been taken into account. Interviews have been classified in two zones (Catalonia and Valencia) and in three different groups identified with a letter: P (Judges, Public Prosecutors, Members of the Armed Forces, lawyers...); M (Medical Doctors, Social Workers,...); I (Immigrants).

Five representative interviews have been selected, and transcribed below.

Interview number 1

Sex: Male

Age: 45

Country: Senegal

Occupation: Blacksmith

Competence: immigrant

Territorial competence: Salou (Province of Barcelona)

1. What do you know about female genital mutilation or female circumcision?

It is a bad thing that I dislike, and I am not going to have it practiced on my daughters. They used to say that it was a matter of religion (but it is not so). In my country —and in general in all Muslim countries— much importance is given to the virginity of the woman (if you are not a virgin when you reach matrimony, your husband will never trust you, because if you go to a club you can go with other men...). Men treat you better if you are a virgin. The woman's family asks for money and, if you are not a virgin, you can... I have many friends who have daughters and are not going to have them mutilated, because they say it nauseates them.

2. Have you been in contact with matters related to female genital mutilation in your country? In your case, how?

In my family. My cousin, for instance. I have had quite close-hand experience.

3. Have you had any knowledge of the practice of circumcisions in your country?

Before it was a common practice. Nowadays, it is only practiced in small towns, but not much.

4. What is your attitude towards a possible juridical intervention aimed to prevent or punish the practice of female genital mutilation?

In Senegal, this practice cannot be punished, because the entire population would have to be penalised (since right now it is already done. It is a matter that neither the police nor justice can deal with. This matter is completely taboo). The President or the Minister have had it practiced on their children, then, what do they want to

punish? The Wolofs (an ethnic group of Senegal) do not practice it. The Toucouleurs and the Sarakoles practice it, but justice cannot solve anything. Mutilated women are like as dolls, they do not feel anything, as though they were dead. Many Senegalese men do not want to marry a mutilated woman. For this reason, it can be seen that it will be less and less practiced.

5. What is the legislation with regard to female genital mutilation in your country?

People talk about it, but there are no laws. During the election campaigns, everybody talk about it, but they do not it carry out afterwards; they are “trouard”, (shameless)! Laws are not necessary because people are increasingly aware that it is a wild practice, and that it is very negative, because girls do not like it! Neither hospitals nor doctors want to practice it, they do it in private houses, to girls aged two, three and four years, depending on the families.

6. What are the advantages and disadvantages of this legislation?

I think there should be a law. Old women have not studied —there were no schools then—, and neither have the girls. At that moment, girls believed everything the father said; it is a matter of tradition. Nowadays, girls go to school, and things are changing; that is the reason why this practice is dying out.

The Senegalese do not practice it here —in Spain— (the most conservative people go to Senegal). The Senegalese know that it cannot be practiced in Spain, that it is very dangerous, and that they can take you to court because the child can talk and explain it at school, and take the parents to court!

In France, there was a lady (I do not know the generic word used for this sort of women) —from Mali— who practiced it, I knew it from the news, and she was sent two years to prison.

7. Which are the difficulties or hampering factors in the implementation of the legislation?

There would be no difficulties for the implementation of the legislation, since people know that it (ablation) is silly and that it must not be performed. In small villages it is still performed, but less and less, in my opinion.

Interview number 2

Sex: female

Age: 32

Country: Spain

Occupation: Public Prosecutor. Provincial Court of Girona.

Competence: Lawyer

Territorial competence: Province of Girona.

1. What do you know about female genital mutilation or female circumcision?

I have an in-depth knowledge of this subject after I enrolled on the NGO “Médicos del mundo” and the “Asociación humanitaria de solidaridad” (Association from Girona).

This rapprochement occurred because there were several specific projects to sensitise the immigrant population, working the preventive effect over the (Senegalese) population, but without leaving aside the cultural and religious aspects. They did not want to raise any feelings of guilt. It was handled from the point of view of children protection, and with very much information.

Through some of the cases that were made known to the public opinion 2 years ago, the public prosecution office stated that there was a need to be more active and take interest on the matter in order to focus a juridical position from the public prosecution office for future cases.

2. Have you been in contact with matters related to female genital mutilation in your country? In your case, how?

I know two cases: in St. Feliu de Guíxols and in Banyoles (supposedly there was a woman who practised it). This area has a large immigrant population. In Arbúcies, it was considered a preparatory practice, because mutilations were performed right there. It was different, since the other cases had already been perpetrated... The juridical treatment was considered, in case it was carried on. There was an attempt to coordinate the judges, in order to agree on the same criterion for all the judges of the area in order to avoid different treatment of the question in other areas. Afterwards, I do not know what happened.

3. Have you had any knowledge of the practice of circumcisions in your country?

The only thing I know about mutilations (through the NGO), is through the same population who said that it was practiced here, but they would not say where or who. The problem is that they cannot be put under pressure, because that would break the information chain. It is not suspected to have been massively practised (would that have been the case, statistical surveys would have detected infections that would have required medical treatment).

4. What is your attitude towards a possible juridical intervention aimed to prevent or punish the practice of female genital mutilation?

If it were determined, at a level of punishment, those who practice mutilations, it is highly debatable to punish the parents, since we are dealing with matters related to cultural aspects, which need a wider approach). Otherwise, there would be a marked judicialisation of social matters, which is usually the case when no political solution is given, and the matter remains unsolved, as happens with domestic violence. The minimum intervention should be made: it is a fundamental principle!

The intention in Girona was preventive, although it was not easy to obtain condemnatory sentences (the use of a condemnatory sentence is even questioned), and therefore the aim is to focus on prevention (as the complement to other sorts of actions).

5. What is the legislation with regard to female genital mutilation in your country?

The legislation is to apply the general criminal law provisions of the Penal Code. There is no a specific regulation for this, because it would be a repressive and counterproductive solution.

6. What are the advantages and disadvantages of this legislation?

If what we are after is to obtain a condemnatory sentence, it is a disadvantage (because it is very difficult to prove). However, a preventive aim permits to commence a proceeding. I insist, the solution is not the judicialisation, and therefore we should not be speaking about advantages and disadvantages.

7. Which are the difficulties or hampering factors for the implementation of the legislation?

There is lack of knowledge within the professional world related to this matter, maybe due to the scarce tradition of immigration in Spain (it is now when matters such as the ones we are handling are being discussed, since there are some cases arriving at courts, social services and hospitals), and because it is new, they often do not know what law must be enforced. The Protocol acts as a cohesive, unifying element for all the professionals concerned and makes for team-based decision making. This problem is also affected by international legislation, which is unknown, and therefore people do not know how to proceed.

8.*(For Public Prosecutors)* Are there any guides or decisions (recommendations) related to the prosecution of female genital mutilation?

When the Protocol was being elaborated, colleague public prosecutors were asked, and it was disseminated. The Chief Crown Prosecutor is in charge of disseminating the Protocol, and helps to centralise the task and give the necessary information.

9.*(For Public Prosecutors)* What is the policy adopted in relation to bringing charges for female genital mutilation?

No charges have been brought, since the proceeding has also been stopped at the beginning, and it has never been beyond the preliminary enquiries. Preventive politics for future mutilations.

10. What is the proceeding for the case of knowledge of a female genital mutilation?

The complaint was heard in court, and since the mutilations had already been practiced, the proceedings commenced, looking for witnesses (without success), and looking for evidence from the parents. It is a complex problem, because the mother said she did not know anything, and that the father knew, and the father said it was the mother... There were proceedings in which previously (so that the girl would not be mutilated when brought to her country), the parents were given the paper at the court, and supposedly, they would not have it practiced on her, but the danger was that the girl may not come back...

Interview number 3

Sex: Woman

Age: 49

Country: Spain

Occupation: Nurse. Primary Health Care Centre.

Competence: Health professional

Territorial Competence: Sabadell, (Province of Barcelona)

1. What do you know about female genital mutilation or female circumcision?

I know it is a practice with deep cultural roots, a tradition for some African ethnic groups, which consists of a total or partial extirpation of the clitoris, the labia minora or the labia majora of the female genitalia, depending on the local tradition, in a more or less harmful way.

2. Have you been in contact with matters related to female genital mutilation in your country? In your case, how?

Not directly, I have not seen nor treated any mutilated patient, although in the Centre we have suspected a patient who might have had it practised to his daughter, but we cannot prove it. On the other hand, I know the incidents that occurred in the provinces of Barcelona and Gerona.

3. Have you had any knowledge of the practice of circumcisions in your country?

I refer to the previous answer; I have known the incidents occurred in Barcelona and Girona through the mass media.

4. What is your attitude towards a possible juridical intervention aimed to prevent or punish the practice of female genital mutilation?

This matter has been much talked about and debated in the centre, during team meetings. We have drawn a conclusion that could be extensible to all the people who work here, because our attitude must always be preventive, aiming to avoid injuries inflicted on children, trying to avoid the practice of mutilation. For this reason, we attempt to obtain the trust of people from those ethnic groups, which, due

to tradition, practice genital mutilations, and dissuade them from have it practiced on their daughters.

5. What is the legislation with regard to female genital mutilation in your country?

I do not have much knowledge about legislation; I only know that it is punished as serious bodily injury offence, with penalty of imprisonment.

6. What are the advantages and disadvantages of this legislation?

The truth is that I do not have a deep knowledge of this legislation, but I feel it has more disadvantages than advantages, since, in my opinion, the aim in these cases is to protect the girl, and to achieve it, it is more convenient to prevent than to repress. In addition, it must be taken into account that the family would be left at its own fate when the father (usually the economic support of the family) is condemned to prison, and, besides, harm has already been inflicted on the child.

7. Which are the difficulties or hampering factors for the implementation of the legislation?

I refer to the answer to question 6, it is more important to prevent than to repress.

8. What is the procedure should there be knowledge of a female genital mutilation case?

We do not have in the Centre an internal Action Protocol established by the Regional Government. However, even if it is not written, we do have action guidelines, which have been deeply debated among us, and that is that if we found a mutilation case, I, as a nurse, would communicate it to the paediatrician in charge of the girl, and, later on, the entire medical team would meet, including social workers, in order to reach a decision commonly agreed upon for the specific case in question. I do not think I would directly report it, I think I would rather think and analyse each specific case.

Interview number 4

Sex: Woman

Age: 47

Country: Spain

Occupation: General Practitioner

Competence: Health professional

Territorial Competence: Sabadell. (Province of Barcelona)

1. What do you know about female genital mutilation or female circumcision?

I know it is a cultural practice performed in some African countries, depending on the tribe or ethnic group of belonging. I know the three types or four (according to the WHO classification).

2. Have you been in contact with matters related to female genital mutilation in your country? In your case, how?

Not directly, but we suspect of the case of a girl to whom we think it has been practiced. This situation is based on the fact that the family went on holidays to their country of origin (risk country) and did not come back. But it is only a hypothesis.

3. Have you had any knowledge of the practice of circumcisions in your country?

Yes in the provinces of Barcelona and Girona.

4. What is your attitude towards a possible juridical intervention aimed to prevent or punish the practice of female genital mutilation?

Our team thinks that the best thing to do is to prevent. It is true that injuries to the child must be avoided, but it will be much easier to attain this aim through prevention than through any other way. Confidence must be built up among patients, in order to convince them in favour of child protection.

5. What is the legislation with regard to female genital mutilation in your country?

I know it is considered on the Penal Code as a serious bodily injury offence.

6. What are the advantages and disadvantages of this legislation?

I think that it has more disadvantages than advantages, since preventive and not repressive solutions should be looked for.

7. Which are the difficulties or hampering factors for the implementation of the legislation?

I think I have answered this question already answering the previous one.

8. What is the proceeding for the case of knowledge of a female genital mutilation?

The first thing we would do would be to inform the rest of the team, and make a joint decision.

Interview number 5

Sex: Male

Age: 50

Country: Spain

Occupation: Sub-inspector National Police.

Competence: Police

Territorial Competence: Reus (Province of Tarragona)

1. What do you know about female genital mutilation or female circumcision?

Extirpation of the clitoris on girls, on African countries, of Muslim religion, with clear “sexist” indicators, in relation to the role women play in that culture.

2. Have you been in contact with matters related to female genital mutilation in your country? In your case, how?

I have not.

3. Have you had any knowledge of the practice of circumcisions in your country?

No.

4. What is your attitude towards a possible juridical intervention aimed to prevent or punish the practice of female genital mutilation?

Due to the present situation of the immigration in our country, the aforementioned problem can be raised in several groups of our society; the matter should be specifically regulated in our legal system, which is not the case right now.

5. What is the legislation with regard to female genital mutilation in your country?

The Spanish legal system contemplates the aforementioned mutilation, considered as an “INJURY”, aggravated by the fact that the victim is aged under 12, but it could also be considered “SEXUAL ABUSE” or “AGAINST MORAL INTEGRITY”. These children are at present protected under the present Civil Code, Organic (Parliamentary) Law 1/1996, of January 15 for the Protection of Children in each Autonomous Community.

6. What are the advantages and disadvantages of this legislation?

Since it is not specifically regulated by our legal system, it is highly problematic to be able to differentiate advantages or disadvantages, which would always depend on the norm applied.

7. Which are the difficulties or hampering factors for the implementation of the legislation?

I consider that the main obstacle for the implementation of the legislation would be that the fact would not be reported, taking into account that it is practiced inside reduced family and religious circles and on very poor cultural environments, and therefore the first step to be taken, in order to foster its eradication, would not be to enforce the law —necessary though when the practice has already occurred— but the education of people susceptible of carrying out this practice and also to target possible victims.

Annex 3. Protocols

*Comissió Interdisciplinària d'Experts. Integrada per tècnics dels Departaments de Sanitat, Interior, Justícia, Benestar Social, Ensenyament i de la Presidència, *Protocol d'actuacions per a prevenir la mutilació genital femenina*, Barcelona, Generalitat de Catalunya, Secretaria per a la Immigració, 2002.

http://www.gencat.net/presidencia/immigracio/guia_ab/index2CAS.html

*Comissió de seguiment dels protocols en casos de violència domèstica i maltractaments infantils de Girona; *Protocol de prevenció de la mutilació genital femenina a la demarcació de Girona*, Departament de Justícia, Generalitat de Catalunya, 2002 (modified in 2003)

<http://www.gencat.net/justicia/ciudadans/atencio/cvdgir/protocolm/index.htm>

Annex 4. Penal Law

Amendment of art. 149 of the Spanish Penal Code of 1995

Article 149 of Penal Code of 1995 has been amended and is in force since October the 1st, 2003 adding a second paragraph:

«Any person performing whatever form of genital mutilation, shall be punished with a sentence of imprisonment of between six and twelve years. Where the victim is a minor or is incompetent, the judge may see to dictate a sentence of particular disqualification for the exercise of custody, guardianship, tutorship by will, protection or care of minors between four to ten years, in the interest of the minor or incompetent individual.»⁶⁶

⁶⁶ The change is introduced by a *Law on specific measures relating to the security of citizens, domestic violence and the social integration of foreigners* (LEY ORGÁNICA 11/2003, de 29 de septiembre, de medidas concretas en materia de seguridad ciudadana, violencia doméstica e integración social de los extranjeros; BOE 29-9-2003, n. 234): «El que causara a otro una mutilación genital en cualquiera de sus manifestaciones será castigado con la pena de prisión de seis a 12 años. Si la víctima fuera menor o incapaz, será aplicable la pena de inhabilitación especial para el ejercicio de la patria potestad, tutela, curatela, guarda o acogimiento por tiempo de cuatro a 10 años, si el juez lo estima adecuado al interés del menor o incapaz.»

Authors

Dr. Javier de Lucas is Senior Professor on Philosophy of Law (Catedrático de Filosofía del Derecho, Universitat de València) and Director of *the Group of Studies on Citizenship, Migration and Minorities* (University of València). <http://www.uv.es/immigracio>

Dr. María José Añón Roig is Professor on Philosophy of Law (Profesora Titular de Filosofía del Derecho, Universitat de València)

Maria Helena Bedoya is lawyer and, Abogada y criminóloga (Barcelona)

Isabel Maria Fernández is lawyer (Tarragona).

Dr. Fernando Flores Giménez is professor on Constitutional law (profesor Titular de Derecho constitucional, Universitat de València).

Dr. Angeles Galiana Saura is Assitant Professor on Philosophy of Law (Profesora ayudante de Filosofía del Derecho. Universitat Rovira y Virgili in Tarragona)

Dr. José García Añón is Professor on Philosophy of Law (Profesor Titular de Filosofía del Derecho, Universitat de València).

Dr. Adriana Kaplan Marcusan, is Professor on Social Anthropology (Profesora Titular de antropología social. Universidad Autónoma de Barcelona)

Dr. Antoni Llabrés i Fuster is Professor on Penal Law (Profesor Titular de Derecho Penal, Universitat de València)

Maria Isabel Martínez is lawyer (Tarragona)

Dr. Ruth Mestre i Mestre is Assitant Professor on Philosophy of Law (Profesora Ayudante Filosofía del Derecho, Universitat de València)

Dr. Javier Mira Benavent is Professor on Penal Law (Profesor Titular de Derecho Penal, Universitat de València)

Dr. José Manuel Rodríguez Uribes, is Professor on Philosophy of Law (Profesor Titular de Filosofía del Derecho, Universitat de València)

Maria Olivé Elias is Researcher (GEIM, Universitat Rovira y Virgili, Tarragona)

Dr. Mario Ruiz Sanz, Profesor Titular de Filosofía del Derecho. Universitat Rovira y Virgili. Tarragona

Dr. Angeles Solanes Corella, is Professor on Philosophy of Law (Profesora Titular de Filosofía del Derecho, Universitat de València)

Dr. Carmen Tomas y Valiente, is Professor on Penal Law (Profesora Titular de Derecho Penal, Universitat de València)

Francisco Torres Pérez, is Researcher on Sociology, (Universitat de València)

Ana Valero Heredia, is Researcher on Constitutional Law (Universitat de València)