FEMALE GENITAL MUTILATION IN ITALIAN CRIMINAL LAW BEFORE AND AFTER SO CALLED "CARTABIA REFORM"

[ESP] *La mutilación genital femenina en el derecho penal italiano antes y después de la denominada "reforma Cartabia"*

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Abstract: Female genital mutilation was the first culturally motivated crime to be introduced into Italian law. Article 583 bis of the Criminal Code, a symbolic provision, has given rise to limited case law. Almost ten years after its introduction into the Criminal Code and following the so-called Cartabia reform (Legislative Decree 150 of 2022), it is appropriate to reflect on how criminal law can address cultural conflicts.

Keywords: Female genital mutilations; Italian criminal law; cultural defense restorative justice.

Resumen: La mutilación genital femenina fue el primer delito motivado por razones culturales que se introdujo en la legislación italiana. El artículo 583 bis del Código Penal, una disposición simbólica, ha dado lugar a una jurisprudencia limitada. Casi diez años después de su introducción en el Código Penal y tras la denominada reforma Cartabia (Decreto Legislativo 150 de 2022), es oportuno reflexionar sobre cómo el derecho penal puede abordar los conflictos culturales.

Palabras clave: Mutilaciones genitales femeninas; derecho penal italiano; defensa cultural; justicia restaurativa.

1. THE ANTHROPOLOGICAL AND SOCIOLOGICAL SIGNIFICANCE OF FEMALE GENITAL MUTILATION

As it is well known, Italy, which has historically been a country of emigration, has in recent decades become a destination for various migratory flows. This historical aspect has led to less attention being paid in criminal law literature to so-called culturally oriented crimes. It is equally well known that in multicultural contexts such as the US or the UK, doctrinal reflection and case law have

focused more on this issue. Suffice it to mention, in this regard, the development of the so-called cultural defense in the US context[1].

The Italian legislation, which has been fairly insensitive to the doctrinal debate, that has developed several proposals, both in terms of *de lege lata* and *de lege ferenda*, introduced a culturally oriented offense for female genital mutilation, characterized by its clearly symbolic nature.

However, before analysing the prerequisites for the crime and the problems arising from it, it is appropriate to focus on the sociological and anthropological aspects of genital mutilation in order to better understand its significance.

Female genital mutilation refers to "*practices involving the total or partial removal of the external female genital organs, performed for cultural reasons or other non-therapeutic beliefs*."[2]. It is clear, however, that such a definition is completely imprecise and of little help to legal reflection, making it essential to focus attention on the various types of mutilation, their historical origins, their cultural and religious meaning, and the anthropological and sociological explanation of such practices[3].

In the absence of precise data, it is estimated that 80[4] million women in Africa[5] have undergone female genital mutilation, and a total of 135 million worldwide[6].

An important aspect is understanding the relationship between genital mutilation and Islam. On the one hand, some consider it lawful, referring to the need to resemble Abraham who circumcised Isaac (*Quran*: 16:123), while others consider it an unlawful injury, referring to verses that affirm the perfection of God's creation (*Quran*: 3:6; 3:191; 13:8; 23:115; 25:1-2) and to the one that forbids

[1] SACKS, V.L., «An Indefensible Defense: On the Misuse of Culture in Criminal Law», in *Ariz. J. Int'l & Comp*. 13 (1996); SAMS, J.P., «The Availability of the "Cultural Defense" as an Excuse for Criminal Behavior», in *Ga. J. Int'l & Comp. L*. 16 (1986); SELLIN, T., *Culture conflict and crime*, New York 1937; SHEIN, M.G., «Cultural Issues in Sentencing», in FRIDAMAN RAMIREZ, L. (ed.), *Cultural Issues in Criminal Defense*, III ed., New York 2010; SHEYBANI, M.M., «Cultural Defense. One Person's Culture is Another's Crime», in *Loy. L.A. Int. Comp. L. Rev.* 9 (1987); «The Cultural Defense in the Criminal Law», in *Har. L. Rev.* 99 (1986); TOMER-FISHMAN, T., «Criminology: "cultural defense", "cultural offence", "or no culture at all?"; an examination of Israeli judicial decision in cultural conflict criminal cases and the factors affecting them», in *J. Crim. L. Crimin.* 100.2 (2010); VAROL, K., «Ehre, Egrenmord, Blutrache, Hamburg 2016; C. Villareal, Culture in Lawmaking. A Chicano Perspectives», in *U.C. Davis L. Rev*. (1991); VOLPP, L., «(Mis)Identifying Culture: Asian Women and the "Cultural Defense"», in *Harv. Women's L. Rev*. 57 (1994); WANDERER, N.A., CONNORS, C.R., «Culture and Crime: Kargar and Existing Framewoork for a Cultural Defense», in *Buf. L. Rev*. (1999).

[2] WHO, *Female Genital Mutilation, Information Pack*, in www.who.int/docstore/frh-whd/FGM/infopack/English/fgm-infopack.htm.

[3] DORKENOO, E., *Cutting the Rose. Female Genital Mutilation. The Cutting and its Prevention*, Minority Rights Publications, London 1995.

[4] SKAINE, R., *Female Genital Mutilation. Legal Cultural and Medical Issues*, McFarland, Jefferson 2005, p. 35; RENTELN, A. D., *The Cultural Defense*, Oxford University Press, Oxford-New York 2005, p. 51.

[5] TOUBIA, N., *Women and Health in Sudan,* in N. TOUBIA, *Women of the Arab World*, Zed, London 1988, p. 101.

[6] www.amnesty.it/flex/cm/Pages/ServeBLOB.php/L/IT/IDPagina/535, TURILLAZZI, E., NERI, M., «Luci e ombre nella legge in tema di mutilazioni genitali femminili: una visione di insieme medico-legale», in *Riv. it. med. leg.* (2006), p. 291; cf. Fonds des Nations Unies pour l'Enfance, *Mutilations génitales féminines/excision, aperçu statistique et étude de la dynamique des changements*, Unicef, New York 2013.

cutting off the ears of livestock, as this would mean altering Allah's creation, which is, on the contrary, sublime and unchangeable (*Quran*: 4:118-119)[7].

From an anthropological point of view, according to some, genital mutilation has the purpose of 'cutting off' the male part of the woman[8], the clitoris, so that the girl can be placed in the correct sexual gender[9], in exactly the same way as male circumcision[10].

Another anthropological explanation considers infibulation as the transition from puberty to adulthood. The operation is almost always accompanied by dancing and singing, and then the mutilated girls spend a long time, about forty days, in isolated huts with instructors, demonstrating the nature of the rite of passage that characterizes mutilation. It is very significant that, during this ritual, there is a dancing mask, which anthropologically does not serve to hide the identity of the person wearing it, but expresses a meaning and allows the participants to share and internalize it[11].

It is therefore possible to argue that, originally, mutilation was not specific to Islam, having originated in other cultures. This does not mean, however, that female genital mutilation did not subsequently become a practice almost exclusive to Muslim believers.

It is clear, however, that mutilation has the anthropological meaning of a rite of passage and, in societies where it is practised, its purpose is, in most cases, to guarantee the virginity of women before marriage.

2. ITALIAN CRIMINAL LEGISLATION

Before Law No. 7 of 2006, female genital mutilation was classified as personal injury, which, depending on the case, could result in illness lasting less than or more than 20 days, or be serious or very serious. Furthermore, the offense could have been subject to the aggravating circumstances referred to in Articles 577, paragraph 1, letter a) and 585 of the Italian Criminal Code, if the act had been committed by one of the parents against their daughter.

[7] ALDEEB, S. A., SAHLIEH, A., «Introduction à la société musulmane», in ARENA M. (a cura di), *Il diritto islamico. Fondamenti, fonti, istituzioni*, Carocci, Roma 2008, p. 573; AL-QARADAWI, Y., *The Lawful and Prohibited in Islam (Al-Halal Wal Haram Fil Islam*), Shorouk International, London 1985, p. 88 ss.
[8] KOSO-THOMAS, O., *The Circumcision of Women. A Strategy for Eradication*, Zed, London 1987.
[9] RENTELN, *The Cultural Defense*, cit., p. 52.
[10] GRIAULE, M., *Dio d'acqua. Incontri con gli Ogotommêli*, Bollati Boringhieri, Torino 2002, p. 57; EPSTEIN, L. M., *Sex, Laws and Customs in Judaism* (1949), Ktav Publishing House, New York 1967, p. 3 ss.
[11] RENTELEN, *The Cultural Defense*, cit., p. 52; DE MAGLIE, *I reati culturalmente motivati*, Pisa 2010, p. 44., PIZZORNO, *Il velo delle diversità*, Feltrinelli, Milano 2007.

Law No. 7 of January 9, 2006 introduced Article 583-*bis* into the Criminal Code, which penalizes the conduct of anyone who performs female genital mutilation[12].

The decision to criminalize only mutilation among all culturally oriented crimes is essentially based on the fact that it is by far the most common cultural offense in many Western countries.

The crime is harmful to the legal right of women's physical integrity and their psychosexual health. Correctly, according to part of the doctrine, the criminal offense would also be established to protect women's dignity, since mutilation is a means of external control exercised by men in the sphere of female sexuality.

The penalty is significantly high since, in the first paragraph, imprisonment from four to twelve years is provided for all mutilations, coinciding with the maximum penalty established for very serious injuries. The legislator therefore shows that it does not take into account the distinction between clitoridectomy, excision, and infibulation, which are considered different types of mutilation but equally harmful. Not only that, but the law contains a general clause that equates any other practice that causes similar effects with the latter operations. This clause is so generic that it raises problems of compatibility with the prohibition of analogy *in malam partem*, unless it is considered to impose the essential requirement of having caused mutilation. This would obviously not rule out any problems of interpretation, given that even this latter concept is not entirely clear.

[12] BASILE, F., «I reati cd. "culturalmente motivati" commessi dagli immigrati: (possibili) soluzioni giurisprudenziali», in *Quest. Giust.* 1 (2017), pp. 126 ss.; ID., «Commento sub art. 583-bis», in DOLCINI, E., GATTA, G. L. (a cura di), *Codice penale commentato*, II, Ipsoa, Milano 2015, IV ed., pp. 2994 ss.; ID., «Il reato di "pratiche di mutilazione degli organi genitali femminili" alla prova della giurisprudenza: un commento alla prima (e finora unica) applicazione giurisprudenziale dell'art. 583 bis c.p.», in *Stato, chiese e pluralismo confessionale* 24 (2013), in *http://www.statoechiese.it/images/stories/2013.7/basile_il_reato.pdf*; ID., «Commento sub art. 583-bis», in DOLCINI, E., MARINUCCI, G. (a cura di), *Codice penale commentato*, II, Ipsoa, Milano 2012, III ed., pp. 5328 ss.; ID., *Immigrazione e reati culturalmente motivati*, Giuffrè, Milano 2010; ID., «Premesse per uno studio sui rapporti tra diritto penale e società multiculturale», in *Riv. it. dir. proc. pen.* 1 (2008), pp. 149 ss.; ID., «Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)», in *Riv. it. dir. proc. pen.* 4 (2007), pp. 1296 ss.; ID., «Commento alla legge n. 7 del 2006», in *Dir. pen. proc.* (2006), pp. 678 ss. DE MAGLIE, C., «*voce Reati culturalmente condizionati*», in *Enc. dir. Ann.*, VII, Giuffrè, Milano 2014, pp. 875 ss.; EAD., *I reati culturalmente motivati*, Ets, Pisa 2010; EAD., «Premesse a uno studio su Società multiculturali e diritto penale», in HASSEMER, W., KEMPF, E., MOCCIA, S. (hrsg.), *In dubio pro libertate. Festschrift für Klaus Volk zum 65. Geburtstag*, Beck, München 2009, pp. 129 ss.; EAD., voce *Multiculturalismo (dir. pen.)*, in GIUNTA, F. (a cura di), *Dizionario di diritto penale*, Pirola, Milano, 2008, pp. 732 ss.; EAD., «Culture e diritto penale. Premesse metodologiche», in *Riv. it. dir. proc. pen.* 4 (2008), p. 1088 ss.; EAD., «Multiculturalismo e diritto penale. Il caso americano», in FORTI, G., BERTOLINO, M. (a cura di), *Scritti per Federico Stella*, I, Jovene, Napoli 2007, pp. 3 ss.; EAD., «Società multiculturale e diritto penale: la cultural defense», in PALIERO, C. E., DOLCINI, E. (a cura di), *Scritti in onore di Giorgio Marinucci*, I, Giuffrè, Milano 2006, pp. 215 ss.; EAD., «Multikulturalismus und Strafrecht», in *Jahrbuch* 7 (2005/2006), pp. 265 ss.

The joint use of medical terminology (clitoridectomy) with non-scientific terminology (excision and infibulation) is also questionable. Excision, for example, always involves clitoridectomy, thus blurring the line between the two practices. The legislator has also overlooked one type, circumcision (the so-called *sunna*), which must therefore be classified on a case-by-case basis according to the harmful effects it produces.

A distinction is made, however, in the second paragraph of the article in question, which punishes female genital injury. This no longer refers to mutilation, but to practices that cause physical or mental illness. The last sentence of the second paragraph also provides for the possibility of reducing the penalty by up to two-thirds if the injury is minor.

The absence of therapeutic requirements, an element of the fact constructed negatively, is provided for in both the first two paragraphs of Article 583-*bis* of the Criminal Code. This requirement must be interpreted objectively, thus referring to the medical *leges artis* recognized in the international scientific community.

The mens rea is generic (*dolo generico)* for the crime referred to in the first paragraph and specific (*dolo specifico)* for that referred to in the second paragraph. For the crime referred to in the first paragraph, the perpetrator must intend and wish to cause mutilation; in the case of genital injuries, they must also pursue the goal of impairing sexual functions.

In legal theory, it has been argued[13], on the one hand, that the cultural offender's beliefs about possible 'ethnic' therapeutic needs can be assessed as a subjective element, since they could exclude intent, and, on the other hand, that even for this purpose, such beliefs should not be relevant. However, it is clear that the legislator intends to consider only those therapeutic needs that are recognized by medical science. Therefore, any individual belief of the offender should remain completely irrelevant.

It should also be considered that only in a small number of cases the cultural offenders are unaware that they are causing injury and that, in any case, it can be said, based on the previous anthropological-sociological reflection, that mutilation is almost never practiced for 'ethnic' therapeutic purposes.

[13] Cf. BASILE, F., «Società multiculturali, immigrazione e reati culturalmente motivati (comprese le mutilazioni genitali femminili)», in *Riv. it. dir. proc. pen.* 4 (2007), pp. 1343 ss.; VANZAN, A., MIAZZI, L., «Modificazioni genitali: tradizioni culturali, strategie di contrasto e nuove norme penali», in *Dir. imm. citt.* 1 (2006), pp. 29 s.; FACCHI, A., *I diritti nell'Europa multiculturale*, Roma-Bari 2008, p. 160; FORNASARI, G., «Mutilazioni genitali femminili e multiculturalismo: premesse per un discorso giuspenalistico», in AA.VV., *Legalità penale e crisi del diritto, oggi. Un percorso interdisciplinare*, (a cura di) BERNARDI, A., PASTORE, B., PUGIOTTO, A., Milano 2008, p. 192.

However, the specific intent (*dolo specifico)* f the crime of female genital mutilation risks rendering the law inapplicable, as it could be argued that the cultural offender's intention is never to cause injury, even if they are aware that they are doing so.

It can therefore be argued that Italian legislation, with Article 583 *bis*, has not given any importance to the cultural orientation of the conduct.

3. ITALIAN CASE LAW

An initial judgment[14] is very interesting in the parts dedicated to the concept of illness, the model for assessing cultural offense, and the relevance of cultural orientation in relation to the systematic categories of crime.

On the first point, the judge ruled out that the incision made at the clitoral glans could be considered mutilation, as it was not medically considered to be infibulation, excision, or circumcision. Furthermore, the clause referred to in the first paragraph of Article 583-bis of the Italian Criminal Code relating to any other practice that causes effects of the same type as the operations mentioned above was not considered applicable, because in this regard, mutilation would still have to be caused.

The defendant's conduct therefore caused only an injury, resulting in an illness, understood as an anatomical or functional alteration of the human body which, although localized, causes a functional limitation or a significant pathological process. According to this approach, if a contusion, hematoma, or ecchymosis are illnesses, then the laceration of the clitoral tissue should also be considered a pathology. However, the incision did not result in loss of sensitivity of the clitoral organ and, therefore, according to the judge, the injury should have been considered minor within the meaning of paragraph 2 of Article 583-bis of the Criminal Code.

The judge did not consider that the cultural orientation of the conduct constituted grounds for justification under the code, nor did he consider that it eliminated culpability.

Following an appeal, the Venice Court of Appeal[15] was also called upon to rule on the case, acquitting the parents of the minor on whom the attempted mutilation had been

[14] Tribunale di Verona, 14 aprile 2010, Est. Ferraro, in *Riv. it. dir. proc. pen.* 2 (2011), pp. 838. ss., PECORELLA, *Mutilazioni genitali femminili: la prima sentenza di condanna*, in *Riv. it. dir. proc. pen*., 2011, p. 853 ss.

[15] Corte d'Appello di Venezia 23.11.2012 (21.2.2013), n. 1485, BASILE, F., «Il reato di "pratiche di mutilazione degli organi genitali femminili" alla prova della giurisprudenza: un commento alla prima (e finora unica) applicazione giurisprudenziale dell'art. 583 bis c.p.», in *Stato, chiese e pluralismo confessionale* 24 (2013), (http://www.statoechiese.it/images/stories/2013.7/basile_il_reato.pdf).

carried out. The most significant part of the ruling concerns the exclusion of the subjective element on the part of the defendants. Article 583-bis, paragraph 2, of the Italian Criminal Code requires specific intent to cause sexual impairment, a purpose which, unlike the judge of first instance, the territorial court affirms to be non-existent. The anthropological and identity-related 'function' of the injury, known as arruè in the Edo-bini community, is to allow the girl to become part of the social group, and therefore those who practice it do not act with the aim of damaging sexual functions. It is clear, however, that the aim of sexually mutilating occurs in cases where the injury is necessary to achieve the aforementioned ethnically connoted purpose. Certainly, the provision of paragraph 2 of Article 583-bis of the Criminal Code remains problematic, because specific intent could, depending on the various approaches, prevent its application. Furthermore, the same provision could lead to more frequent charges for the offense referred to in the first paragraph, exploiting the clause in the last parenthetical phrase that allows for a certain degree of interpretative discretion, in order to avoid the evidentiary problems concerning the intent required by the second paragraph.

In another case, the Supreme Court[16], after reiterating the impossibility of giving precedence to cultural reasons that are detrimental to the centrality of the human person and other fundamental legal rights, stating that the fact that the woman had acted in her own country of origin was far from supporting the argument of inevitable ignorance of the law regarding the lawfulness or otherwise of her own behaviour, thus excluding the excusable nature of the alleged *ignorantia legis* (mistake of criminal law excuse in US criminal law).

The case is also interesting because, for the first time, the mother of the girl who underwent infibulation was held responsible in the first instance for not preventing the mutilation. In reality, the crime could not be considered one of omission, as the mother had actually accompanied her daughter to the doctor's office in Egypt where the infibulation was performed.

The latest judgment[17] known to date is that of the Court of Pordenone. In this case too, the crime committed by the parents of the mutilated girl would be one of omission, for

[16] Corte di Cassazione n. 37422 del 2 luglio 2021. Si veda V. Galvan, Stigmate identitarie: riflessioni a margine della sentenza di primo grado del Tribunale di Pordenone sul reato di mutilazioni genitali femminili, in *Arch. Pen*. (2022), pp. 2 ss.
[17] Tribunale di Pordenone, 19 dicembre 2023 (18.3.2024), n. 1346.

not having prevented her from being subjected to the practice by relatives. In this case too, the judge did not attribute any relevance to the cultural orientation of the conduct.

It is therefore clear that in the few cases reported in case law, the cultural element has not been assessed as grounds for exclusion of liability, either in terms of the objective element or the subjective element.

4. FUTURE PERSPECTIVES THANKS TO RESTORATIVE JUSTICE

Prior to the enactment of the Cartabia reform[18], restorative justice[19] should be used for culturally oriented crimes, but only in a criminal policy perspective[20]. By adopting a concept of offence that is not instantaneous but protracted and relational[21], it was proposed that, if the offence caused were completely repaired, the crime would be extinguished following the successful outcome of the restorative justice process. This could also be achieved for some culturally oriented crimes, as some of them do not infringe fundamental rights and do not cause irreparable harm. One such offence is, for example, gambling. Understanding the precept and implementing restorative measures would, in this case,

[18] EUSEBI, L., «Giustizia riparativa e riforma del sistema sanzionatorio», in *Dir. pen. proc*. (2023), p. 79; BORTOLATO, M., «La riforma Cartabia: la disciplina organica della giustizia riparativa. Un primo sguardo al nuovo decreto legislativo», in *Questione giustizia* (10 ottobre 2022); PARISI, F., «Giustizia riparativa e sistema penale nel decreto legislativo, 2022, n. 150, Parte I. Disciplina organica e aspetti di diritto sostanziale», in *Sistema penale*, 27.2.2023; BOUCHARD, M., «Commento al titolo IV del decreto legislativo 10 ottobre 2022, n. 150 sulla disciplina organica della giustizia riparativa», in *Questione giustizia* 7.2 (2023); IANNUZZELLO, M., «La disciplina organica della giustizia riparativa e l'esito riparativo come circostanza attenuante comune», in *Leg. pen.* (2022); BONINI, V., «Una riforma organica della giustizia riparativa tra attese decennali e diffidenze contemporanee», in SPANGHER, G. (a cura di), *La riforma Cartabia*, Pisa 2022, p. 733 ss.; MATTEVI, E., «La giustizia riparativa: disciplina organica e nuove intersezioni con il sistema penale», in CASTRONUOVO, D., DONINI, M., MANCUSO, E. M., VARRASO, G. (a cura di), *La riforma Cartabia. La nuova giustizia penale*, Padova 2023, p. 233 ss. Sulla legge delega 131/2021, PALAZZO F., «I profili di diritto sostanziale della riforma penale», in *Sistema pen*. 8.9 (2021); BOUCHARD, M., «Cura e giustizia dell'offesa ingiusta: riflessioni sulla riparazione», in *Questione giustizia* 25.7 (2022); PRESUTTI, A., «Porte aperte al paradigma riparativo nella l. 27 settembre 2021, n.134 di riforma della giustizia penale», in *Sistema penale* (20 luglio 2022); PARISI, F., «Giustizia riparativa e sistema penale. Considerazioni a partire dalla "legge Cartabia"», in *Foro it.* 4 (2022), p. 142; MANNOZZI, G., «Nuovi scenari per la giustizia riparativa. Riflessioni a partire dalla legge delega 134/2021», in *Arch. Pen*. 28.3 (2022); EUSEBI, L., «Il cantiere lento della riforma in materia di sanzioni penali. Temi per una discussione», in *Arch. pen*. 28.3 (2022).

[19] MANNOZZI, G., LODIGIANI, G.A., *La giustizia riparativa. Formanti, parole e metodi,* Torino 2017*;* MATTEVI, E.*, Una giustizia più riparativa*, Napoli 2017; MANNOZZI, G., LODIGIANI, G.A. (a cura di), *Giustizia riparativa. Ricostruire legami, ricostruire persone*, Bologna 2015; REGGIO, F., *Giustizia dialogica*, Milano 2010; MAZZUCATO, C., *Consenso alle norme e prevenzione dei reati*, Roma 2005; BOUCHARD, M., MANNOZZI, G., *La giustizia senza spada*, Milano 2003. CORNACCHIA, L., «Vittime giustizia criminale», in *Riv. it. dir. proc. pen*. (2013), p. 1760 ss.; DI GIOVINE, O., «Delitto senza castigo? Il bisogno di pena tra motivazioni razionali ed istinti emotivi», in *Riv. it. dir. proc. pen*. (2021), p. 855 ss.; FIANDACA, G., «Note su punizione, riparazione e scienza penalistica», in *Sistema penale* 9.11 (2020); MANNOZZI, G., *La giustizia senza spada. Uno studio comparativo su giustizia riparativa e mediazione penale*, Milano 2003.

[20] PROVERA, A., *Tra frontiere e confini. Il diritto penale dell'età multiculturale*, Napoli 2018, pp. 313 ss.

[21] DONINI, M., «Il delitto riparato. Una disequazione che può trasformare il sistema sanzionatorio», in *DPC*; ID., «Riparazione e pena da Anassimandro alla CGUE», in *Sistemapenale* 20.12 (2022); ID., «Le due anime dalla riparazione come alternativa alla pena-castigo: riparazione prestazionale vs. riparazione interpersonale», in *CP* (2022), pp. 2027 ss.

completely eliminate the offence. This would lead to a similar outcome to that proposed by some scholars who, for such offences, consider applicable a cause of non-punishability of the type referred to in Article 649 of the Criminal Code, but it is preferable to the latter option, as it allows for a comparison between different cultural approaches, communication between social groups and the creation of links between them. Exclusion from punishment would, on the other hand, be perceived by members of minority cultures as a mere opportunistic choice on the part of the legal system, unrelated to any real recognition aimed at promoting greater social cohesion.

With the so-called Cartabia reform, Legislative Decree 150 of 2022, a comprehensive system of restorative justice[22] was introduced, governed by Articles 42-67. This important new legislation – which can be described, as is often the case, as epoch-making – offers the opportunity to mention, without claiming to be exhaustive, as the subject deserves much more extensive treatment, some future scenarios facing criminal law, which will hopefully generate thoughtful reflection.

A few preliminary remarks on the provisions of the Cartabia Reform are essential before analysing its relevance to culturally oriented crimes. Article 42 of Legislative Decree 150 of 2022 defines restorative justice as any programme that allows the victim of the crime, the person identified as the perpetrator of the offence and other members of the community to participate freely, consensually, actively and voluntarily in the resolution of issues arising from the crime, with the help of an impartial, suitably trained third person known as a mediator. These restorative justice processes can be accessed at any stage of the proceedings, including during enforcement, and, significantly, for any type of crime (Article 44). In addition to these initial remarks, it is always important to remember the system of guarantees relating to restorative justice processes (pursuant to Article 43): confidentiality, which

[22] On restorative justice see BRAITHWAITE, J., *Crime, Shame and Reintegration. Cambridge*, Cambridge University Press 1989, ID., «Setting Standards for Restorative Justice», in *British Journal of Criminology* (2002), p. 563; ID., *Restorative Justice & Responsive Regulation*, Oxford 2002, CONSEDINE, J., *Restorative Justice: healing the effects of crime*. Lyttelton, NZ: Ploughshares Publications 1995, DIGNAN J., *Repairing the Damage,* University of Sheffield 1992; ID., «Reintegration through reparation: a way forward for Restorative Justice?», in DUFF, MARSHALL, DOBASH, DOBASH (Eds), *Penal Theory & Practice*, Manchester University Press 1994, ID. and CAVADINO, M., «Towards a framework for conceptualising and evaluating models of criminal justice from a victim's perspective», in *International Review of Victimology* 4 (1996), pp. 153-182, UMBREIT, M., GESKE, J., LEWIS, T., «Restorative Justice Impact on Multinational Corporations?: A Response to Andrew Brady Spalding's Article», in *Ohio State Law Journal* 41, BERTAGNA, G., CERETTI, A., MAZZUCATO, C., (eds), *Il libro dell'incontro. Vittime e responsabili della lotta armata a confronto*, Milano 2015.

prevents the disclosure of the content of the process itself, the impartiality of the mediator, but above all the consent of the individuals involved, which excludes any form of coercion that requires access to restorative justice. All statements made by participants are inadmissible in criminal proceedings, in order to ensure spontaneity; only statements taken in court with the necessary guarantees dictated by the code of criminal procedure are admissible. At the end of the process, the mediator sends a report to the proceeding authority (Articles 57 et seq. of Legislative Decree 150 of 2022). In view of the above, the introduction of the restorative justice system in the criminal sphere is certainly of considerable importance in terms of the consequences of the positive outcome that can be achieved at the end of the process. Consequences refer to the repercussions that a positive outcome has in the criminal trial. Firstly, however, it is necessary to define the restorative outcome, which can be of two types: symbolic or material (Article 56). The symbolic outcome may include formal statements or apologies, behavioural commitments, including public or community-oriented ones, and agreements relating to the frequentation of people or places. The material outcome may include compensation for damage, restitution, efforts to eliminate or mitigate the harmful or dangerous consequences of the offence, or to prevent it from having further consequences.

With regard to the relationship between restorative justice and criminal proceedings, the legislator of 2022 opted for a composite model: for some offences, restorative justice and criminal justice are presented as alternatives, while for all other offences they are complementary systems. Starting with the first of these scenarios, the positive reparative outcome, both symbolic and material, can primarily have the effect of extinguishing the offence, where the offence is prosecutable upon complaint. The positive outcome of the process is, in fact, valid as grounds for remission of the complaint (Article 152 as reformulated by Legislative Decree 150 of 2022).

However, there is also another institution that could be applied to culturally oriented offences that do not violate fundamental rights and that would lead to non-punishment due to particular insignificance: Article 131 bis of the Criminal Code. In legal theory, it had already been observed, also on the basis of some jurisprudential openings in this sense, that it would be possible to take into account, for the purposes of applying the minor nature of the offence (so called de minimis defense in common law systems), conduct or facts

subsequent to the commission of the offence, such as having participated, with a positive outcome, in the restorative justice programs[23].

This possibility, i.e. taking into account facts subsequent to the commission of the offence, is one of the most significant innovations of Legislative Decree 150 of 2022 on the minor nature of the offence, in addition to the elimination of the maximum penalty previously provided for the application of the institution.

This extension of the conditions for the application of Article 131 bis of the Criminal Code reflects the hope that the principle of offensiveness be interpreted from a perspective linked to the functions of punishment, while at the same time enhancing the selective scope of the principle of subsidiarity. In fact, the emergence of the penal aspect of justice and, even before that, of the idea of reparation, is in itself a factor that further strengthens the principle of subsidiarity, if only because of the emergence and increasing consolidation of a concrete alternative or, in any case, complementary path to traditional criminal justice.

In the case, however, of a culturally oriented offence that violates the fundamental rights of the individual, the offence should not be extinguished or rendered non-punishable, since restorative conduct would not eliminate the offence. However, participation in the restorative justice programme is subsequent conduct to the offence, that affects the overall negative value of the act, mitigating it. Therefore, it would have been possible to provide for mitigating circumstances in the case of a specific restorative process with a positive outcome. In this way, the response to the offence would not only determine a suffering, allowing for dialogue between the convicted person and the legal system, which would satisfy the human need for confrontation with cultural systems, but would also allow for a better understanding of the real motivation or justification for the criminal conduct than in the traditional process.

It is appropriate to provide for an autonomous mitigating circumstance that would determine a specific sentencing framework for culturally oriented crimes that have been repaired. In order not to nullify this provision, it would also have been necessary to make the circumstance non-balanced with others. This very stimulating thesis also paved the way for the use of instruments that could develop that capacity for cultural penetration specific to

[23] FORTI, G., «Il fatto di reato e un'idea di diritto penale sostanziale», in GARGANI, A., NOTARO, D., NOTARO, L., RICCARDI, S., RICCI, L., SAVARINO, A., VALLINI, A. (a cura di), *Tra principi del diritto penale e teoria del reato*, Pisa 2022, pp. 156 ss.; DE FRANCESCO, G.A., *Punibilità*, Torino 2016; PALIERO, C.E., *Il mercato della penalità*, Torino 2021, pp. 51 ss.

rights. It is believed that this can be achieved by recognising a mitigating circumstance for the cultural offender that is explicitly linked to participation in a restorative justice process, so as to avoid it being dependent solely on factors that do not affect the content of the offence.

Even in the case of culturally oriented crimes that damage fundamental rights, Legislative Decree 150 of 2022 seems to allow in practice this interpretation, that was proposed years ago in terms of criminal policy[24]. In fact, the reform establishes that a positive outcome, in addition to the consequences already mentioned above in relation to the withdrawal of the complaint and the minor nature of the offence, which do not concern the more serious culturally oriented crimes, may be relevant for the purposes of applying other institutions as well. Among these, the common mitigating circumstances referred to in Article 62 and the criteria for determining the sentence referred to in Article 133 of the Criminal Code are particularly important. Once again, the approach of the legislator can be highlighted, who considers it possible that events subsequent to the commission of the offence may mitigate the offence, thereby affecting the quantification of the sentence.

As suggested, both the newly formulated mitigating circumstance and the reformed Article 133 of the Criminal Code can certainly be applied to culturally oriented offences, since they are general rules applicable to all offences. However, some critical issues cannot be ignored. Firstly, the new circumstance, which depends on the positive outcome of the restorative justice programme, is not "ironclad", which makes it subject to balancing and the possibility of defeat under Article 69 of the Criminal Code. Given the importance of the restorative justice programs, it might have been more appropriate to make it non-balanced. Otherwise, there is a risk that it will become irrelevant. The possibility of taking into account the positive outcome of the restorative justice programs in both the circumstances and the criteria for determining the sentence may then lead to a duplication of the factors that are taken into account in determining the sentence.

Shifting the focus to another aspect, which does not concern the consequences of the restorative process but is no less relevant, it is necessary to focus on the community and the mediator, albeit briefly. Starting with the community, which, as mentioned, is the subject of restorative justice programmes, this should not be understood exclusively as the community to which the offender belongs, but also that of the victim, if they are different. In any case, when the offender's community is the same as that of the victim, representatives of the host

[24] PROVERA, A., *Tra frontiere e confini. Il diritto penale dell'età multiculturale*, Napoli 2018, pp. 313 ss.

community should always be involved, primarily to ensure greater social dialogue, which can, in fact, also generate greater sharing of values. Secondly, it would be dangerous for the victim to have contact only with their own community, as they share the same culture as the offender and secondary victimisation would therefore be much more likely. Obviously, this risk must be averted by the mediator in all cases.

The so called "Cartabia reform", in accordance with the UN's Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, merely stipulates that the mediator must be specifically trained and impartial. However, this principle risks being too generic, unless it is interpreted in a multicultural context. This would mean that the mediator's training would be specifically aimed at understanding cultural conflicts. There is one important warning, however. It is clear that mediators cannot be expected to have knowledge of every culture, so they should be supported and assisted in their work by expert anthropologists who can provide them with the necessary knowledge.

The use of restorative justice for culturally oriented crimes is certainly to be welcomed[25], as mending the relationship not only between the offender and the victim, but also between the offender, the victim and society can only lead to a reduction in social conflict caused by cultural pluralism and the difficulty of bringing different cultures together within the same legal system.

With regard to the specific issue of female genital mutilation, the use of restorative justice can be of considerable importance, because it can help not only the perpetrator but also the communities concerned to understand the deep meaning of women's dignity in all its fundamental aspects. Communication between social groups can give rise to a virtuous dynamic that can also have positive effects in terms of prevention. Understanding the need to protect women in accordance with fundamental human rights, which should be the subject of mediation, could lead to a reduction in the number of unreported cases, ensuring greater protection for certain categories of vulnerable victims within communities.

[25] ALBRECHT, B., «Multicultural Challenges for Restorative Justice: Mediators' Experiences from Norway and Finland», in *Journal of Scandinavian Studies in Criminology and Crime Prevention* (2010), pp. 3-24, p. 19; TÖRZS, E., «Restorative Justice Approaches in Intercultural Conflict Settings – Findings of a Survey and implications for Practice», in *Temida* (2014), pp. 87-101, link http://www.alternativeproject.eu/assets/upload/Temida_3-17.pdf, p. 90.