PROJECT “Smart Justice: Tools and Models to Optimize Judicial Work” - Just Smart

Cultural Diversity Guidebook

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This Guidebook is an English translation from the Italian *Vademecum sulla diversità culturale* written for Italian judges in the context of a research project funded by the Italian Ministry of Justice (PON "Smart Justice: Tools and Models to Optimize Judicial Work" - Just Smart 2021-2023). The perspective is therefore that of an Italian judge, and when words like "Constitution", "legal texts", and "majority" are mentioned, they are intended as the Italian Constitution, Italian legal texts, and the Italian majority. Despite of the fact that this Guidebook is published within a national context, the team from the University of Cagliari, Sardinia, Italy who wrote it hope it may be useful to judges from different jurisdictions as the issues here analyzed are of global relevance.

In regard to the collective reflection and constant discussion between the authors in the drafting of this Guidebook on Cultural Diversity, the individual contributions are attributed to the authors as follows.

As for the **general part**:

- The introduction, section 3 (Definition of culture and cultural practice) and section 7 (The importance of emotionality in judicial inquiry) were written by anthropologist Dr Andrea Francesco Zedda.
- Sections 1 (Purpose and structure of the Guidebook) and 5 (How to use the Guidebook) were drafted by Dr Silvia Carta (jurist, University of Cagliari, Italy, Department of law).
- Sections No. 2 (The constitutional basis for the judicial recognition of culture), No. 4 (Definition of the judge's 'cultural test') and No. 6 (Illustration of a 'cultural test' and its functions) were drafted by Prof. Ilenia Ruggiu (jurist, Professor of Constitutional law at the University of Cagliari, Italy, Department of law).

Regarding the **special part**:

- Within cultural test questions No. 1 to No. 6, the anthropological insights into the practices of male circumcision; Gua Sha/coining and cupping (East Asian traditional medicine); parenting; mourning, burial and ancestor worship; and female genital mutilation were written by anthropologist **Dr. Claudia Cavallari**;
- Within cultural test questions 1 to 6, the anthropological insights into the practices of witch-hunting and witchcraft; kafala; kirpan; mangel (Roma begging); marriages with/among statutory minors; bride price; Ramadan; scarifications; Islamic veil; and voodoo (rituals) were written by anthropologist **Dr. Andrea Francesco Zedda**.
- The cultural test and the related legal and anthropological insights concerning the practices of displays of affection concerning children's genitals and homage to the child's penis were entirely covered by **Prof. Ilenia Ruggiu.**
- Within cultural test questions No. 7 to No. 12, the legal insights on the practices of witch-hunting and witchcraft; male circumcision; Gua Sha/coining and cupping (East Asian traditional medicine); parenting; kafala; kirpan; mourning, burial and ancestor worship; mangel (Roma begging); marriages with/among statutory minor; female genital mutilation; bride price; Ramadan; scarification; and voodoo (rites) were dealt with by **Dr. Silvia Carta**.
- Within cultural test questions No. 7 to No. 12, discussions on the practice of the Islamic veil were written by **Dr. Silvia Carta**;
- The legal insights on the practice of the Islamic veil was written by **Dr. Olimpia G. Loddo** (jurist, lecturer in philosophy of law at the University of Cagliari, Department of Law).

The English version of this Guidebook was revised by **Jeremy Daw**, JD Harvard University (MA), US. The entire work was supervised by Prof. Ruggiu, iruggiu@unica.it

This Guidebook is also available online at www.anthrojustice.net

Index

Table of Contents

General part

Tools for the Anthropologist judge

Introduction

The aim of the Guidebook

The purpose of this Guidebook is to provide the judge with a useful guide through multicultural disputes, in order to be able to deal with the **understanding of cultural *otherness*** with greater awareness whenever, in the legal case under analysis, culturally motivated behaviour by a foreigner, immigrant and/or member of a cultural minority comes to the judge's attention.

The purpose of this guide is, first and foremost, to focus on understanding the ***other's* point of view - understood as a person belonging to a different repertoire of symbols, norms, practices, meanings and social values** than the Italian cultural reference system - so that the legal case can be approached with cultural sensitivity.

In order to achieve this objective, a number of **cases of multicultural disputes** in Italy were analysed, and this analysis was accompanied by a reflection on the operational and theoretical approaches of cultural anthropology. Anthropology, in fact, with its analytical tools based on observation, is capable of making other socio-cultural contexts, their internal logics and semiotic horizons accessible, 'translating' them so that they are comprehensible to the cultural system to which the judge belongs. The '**translation**' of diversity, in the case of a trial concerning a multicultural dispute, is indispensable for the judge to be able to understand the views and backgrounds of the parties involved (whether accused or victims) through **a non-ethnocentric gaze**, which allows him or her to express an opinion on the plausibility of the events being analysed, and thus to decide whether or not to take into account a cultural 'motivation' for certain behaviours.

In a context in which Italian society is becoming increasingly multicultural as a result of global mobility, it is essential for legal systems to acquire the knowledge of anthropology, the science that studies human cultural diversity. This Guidebook therefore presents itself as a support to improve operations from a qualitative point of view - for a more conscious choice in the consideration of the 'cultural motivations' of certain behaviours - and consequently is a support for the optimisation of trial timing - for a more rapid identification of the relevance, or alternatively, of cultural aspects to be taken into consideration.

The cultural test as an operational tool

The key operational tool of this Guidebook is the 'cultural test' which, with the aim of supporting the judge confronted with issues of cultural diversity, summarises the most recurring elements used to resolve multicultural disputes in different legal traditions, showing some concrete 'cultural cases' and proposing scenarios of balancing cultural and other constitutional rights.

The 'cultural test' is structured as follows:

1. Can the category of 'culture' (or religion) be used?
2. Description of the cultural (or religious) practice and group.
3. Embedding the individual practice in the broader cultural (or religious) system.
4. Is the practice essential (to the survival of the group), compulsory or optional?
5. Is the practice shared by the group, or is it contested?
6. How would the average person belonging to that culture (or religion) behave?
7. Is the subject sincere?
8. The search for the cultural equivalent: the translation of the minority practice into a corresponding (Italian) majority practice.
9. Does the practice cause harm?
10. What impact does the minority practice have on the culture, constitutional values, and rights of the (Italian) majority?
11. Does the practice perpetuate patriarchy?
12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

The proposed 'cultural test', although conceived by an academic (Ruggiu 2012 and Ruggiu 2019) is not a doctrinal tool, but rather the **fruit of jurisprudential law**. It, in fact, puts together the questions that judges, at the Italian and comparative level, already ask themselves when they are faced with a culturally motivated crime or other multicultural dispute in civil, administrative or international protection law. The 'cultural test' proposed in this Guidebook is conceived, therefore, as a real practical support for judges, to ensure that all the relevant legal and anthropological assessments are included in the balancing act of the judge's consideration. The 'cultural test', in fact, in addition to bringing anthropological

knowledge into the trial, aims to offer the judge proposals for **balancing cultural and other constitutional rights** that come to the fore in the course of a trial.

This 'cultural test' is **not intended to replace the work of the anthropologist**, which is characterised by a prolonged ethnographic fieldwork, made up of observation, reflection and immersion in everyday life in context, nor is it intended to turn the judge into an anthropologist. Rather, it aims to provide a tool for the judge to analyse the cultural issues of the case s/he has to decide; a tool that allows him or her to understand whether it is possible to work autonomously, or whether it is necessary to request the help of a professional anthropologist who can offer research and analysis services, or who can help in the process of 'cultural translation', of understanding cultural *otherness.*

Similarly, the balancing proposals put forward in the 'cultural test' **are not intended to replace the judge's *ius dicere,*** but simply to offer him/her, in an overview, the recurring values that other judges already assess with respect to cultural cases, so that time can be optimised in the search for the interests and rights at stake, as well as in the assessment of how to balance them.

1. Purpose and structure of the Guidebook

This Guidebook is designed as an aid for judges faced with cases in which the culture of the parties is relevant, and aims at the following purposes:

- **Streamlining the judicial load**, avoiding trial delays and postponements due to difficulties in accessing anthropological knowledge. The judicial load weighs on the Italian justice system to such an extent that its containment is among the main challenges to be overcome for the realisation of an efficient system for the protection of citizens' rights as required by the European Union. In this context, which is already quantitatively emergent, culture-related issues reach the courtrooms with increasing frequency, due to growing migration flows. The phenomenon cuts across several areas of the legal system and concerns, in particular, criminal law (culturally motivated crimes), civil law, family law, migration law, and juvenile law;

- **Contributing to a fair justice system** that takes into account the rights of foreigners and/or persons belonging to cultural minorities. A judicial system cannot be defined as efficient from a quantitative point of view to the detriment of the fairness of its pronouncements; therefore, this Guidebook has not only the purpose of speeding up multicultural disputes, but also of providing a tool for justice. The Guidebook is intended to assist judicial activity that takes into account respect for cultural diversity and encourages a correct hermeneutics of the facts, thus preventing certain behaviours from being misunderstood and framed as crimes or offences without considering the cultural aspect. Since in the Italian legal system the criminal sanction is always the *ultima ratio*, the Guidebook aims to promote trials in multicultural disputes that are assisted by a correct balancing of the rights at stake, and that are assisted not only by legal but also by anthropological elements;

- To **disseminate an anthropological sensitivity** among legal practitioners, supporting the reading of different culturally determined habits, trying to raise awareness of the potential relevance of the cultural dimensions of the behaviour of foreigners, immigrants and cultural minorities. The 'cultural test'

contributes to the reconstruction of an agent's motivational background that takes into account the cultural dynamics of his or her group without relegating him or her to the margins of society. In this way, a continuous dialogue between majority and minority values will be set in motion with a view to a reasoned balancing act, in order to build a pluralist society that incorporates diversity by drawing the greatest possible benefit from it, while also mitigating factors of division and social malaise. The aim is also to avoid misunderstandings and *a priori* criminalisation of conduct;

- **Bringing anthropological knowledge into the trial**. In a context where university law faculties do not train judges in anthropology, this Guidebook aims to provide the judge with some basic knowledge on the meaning of certain cultural practices and to increase his or her multicultural sensitivity;

- To **Compensate for the difficulty in finding professional anthropologists**. In Italy, anthropologists are not registered in a database (from which the judge may draw to find experts from other fields such as psychiatrists, engineers, psychologists or other professions) and it can be difficult to identify the expert of reference for the subject under analysis. In order to remedy this situation, this Guidebook is intended to provide the judge with some basic knowledge of the cultural practices presented in court.

In the light of these aims, it is clear that the Guidebook is not intended to be an academic-theoretical tool containing an exhaustive description of each cultural practice/habit/behaviour, but rather to be an applied research tool, which is intended to be useful for understanding the way of thinking and behaving of the accused and/or victims, in order to arrive at a reflection on why a certain behaviour is legitimised (or not).

It is, therefore, an initial tool for approaching a multicultural case and may be supplemented, at the judge's discretion, by further research and, hopefully, the assistance of a cultural expert.

2. The constitutional basis for the judicial recognition of culture

Democratic constitutions that are based on the **principle of pluralism** of values and life choices cannot impose on a member of a minority cultural group the behaviour followed by the majority unless it conflicts with other fundamental rights.
In pluralist democracies, the constitutional principles underpinning the judge's assessment of the cultural factor underlying multicultural disputes are as follows:

- Protection of inviolable human rights
- Personalist principle
- Principle of the natural judge
- Principle of personalisation of punishment and re-education of the offender
- Principle of offensiveness
- Compliance with obligations under international law
- Right to a fair trial

These principles are referred to in the Constitution of the Italian Republic and the European Convention on Human Rights (ECHR) as follows:

Article 2 of the Italian Constitution
Protection of inviolable human rights
The Italian Supreme Court of Cassation, after having modelled the defendant's culture as a mere custom for several years, in 2018 recognised it as an inviolable right that must be balanced with other rights, thus stating: 'the right, also inviolable [...] not to disown one's own cultural, religious and social traditions' must be the subject of 'careful balancing' with 'the values offended and endangered by the conduct' criminally relevant (Supreme Court of Cassation, sec. III Criminal, 29 January 2018, no. 29613, case of an Albanian father kissing his son on the genitals for cultural reasons).

Personalist principle
The Constitution places the person and his rights at the centre, both 'as an individual and in the social formations in which his personality takes place'. The cultural group to which one belongs can be qualified as one of the 'social formations' in which the person's development

takes place. As such, the behaviour and life choices that develop in one's cultural group and are shared by the individual should be taken into account by the legal system.

Article 25 of the Italian Constitution

Principle of the natural judge

The principle of the natural judge implies that when the party comes from another culture, it is entitled to a judge who is able to hermeneutise the facts as would the judge of the place to which the defendant belongs. That of the natural judge, in fact, is a principle created during the French Revolution to ensure that the judge examining the dispute would be the 'judge of the village', capable of understanding the context in which the parties operated, and no longer the judge sent from Paris by royal appointment, totally detached from the reality of the place. In multicultural societies, the constitutional principle of the natural judge is interpreted in the sense that the Italian judge is required to make an anthropological interpretative effort to be able to frame the behaviour of the parties without falling into misunderstandings due to belonging to the Italian cultural system.[1]

Article 27 of the Italian Constitution

Principle of personalisation of punishment and re-education of the offender

A basis for the recognition of culture in the trial can also be found in the criminal sphere. The constitutional principles of the personality of criminal responsibility and of the re-educative function of punishment, contained in Article 27 of the Constitution, in the first and third paragraphs respectively, are in fact capable of justifying the enhancement of cultural instances in the criminal trial. Placed at the basis of culpability, they anchor criminal liability to a wide-ranging judgement of culpability aimed at ascertaining not only the existence of intent and guilt, but also of further elements such as the knowability of the criminal law or the possible existence of other

[1] G. Ubertis, *Multiculturalismo e processo penale*, in AA.VV., *La condizione giuridica di Roma e Sinti in Italia*, I, edited by P. Bonetti, A. Simoni and T. Vitale, Milan 2011, 1127 ss.

causes of exclusion of culpability (Constitutional Court no. 364/1988). Since, in culturally related offences, these elements could well be influenced by the cultural motivations underlying the offender's actions, the evaluation in the trial of such instances would therefore be fully within the range of elements assessable under the aforementioned constitutional principles and would facilitate the identification of the exact impact that the cultural component had on the offender, affecting both the attribution of criminal liability and the determination of the punitive treatment. In this way the State's punitive response would be better measured and the re-education intervention fully justified, rather than conflicting with the cultural rights recognised as belonging to the offender.

Art. 25 c. 2 and 27 of the Italian Constitution

Principle of offensiveness

Also on the subject of culturally motivated offences, the principle of offensiveness may also justify the recognition of culture in the trial. This principle, albeit implicit and derived by interpreters from the combined provisions of Article 25(2) and Article 27 of the Constitution, on an interpretative level, operates as a constraint for the judge who is required to exclude the criminal relevance of conduct that, although it may *prima facie* conform to punishable behaviour, turns out in concrete terms to be devoid of damaging profiles to the legal assets protected by the rules.

The assessment of the cultural connotation could sometimes be of assistance in ascertaining the damaging profiles of the conduct and the interactions with the different legal rights and interests at stake, leading to a lesser sacrifice of cultural rights in the event that the offensiveness, in concrete terms, is deemed to be absent.

Art. 111 c. 6 of the Italian Constitution

Duty to declare rationale. The Italian Constitution requires all judicial decisions to declare rationale. When culture is at issue in a trial, the decision may satisfy this obligation by explaining the anthropological investigation underlying the decision. Saying 'it is the culture that moved the subject to this behaviour' cannot in itself be considered a requirement that satisfies the duty to declare rationale. In order to be able to submit the validity of the judge's reasoning to public opinion, it must be clear what kind of conduct is

being referred to, what interests the party is claiming, and what part of the vast universe that is a cultural system is being considered.

Article 117 of the Italian Constitution

Compliance with obligations under international law: Since 1966, cultural rights have become part of the catalogue of human rights, having been recognised by the International Covenant on Civil and Political Rights in Article 27. Italy has ratified the Covenant although it has not implemented this provision with a law. Since 2001 (reform of Title V of the constitution), obligations arising from international law are sources superior to law and, therefore, the legal system must comply with them.

Art. 6 c. 3 of the European Convention on Human Rights (ECHR)

Right to a fair trial

Sec. 3 of Art. 6 ECHR provides for the right of the accused to "an interpreter if he does not understand or speak the language used in court". Just as the accused has the right to have his language translated, he similarly has access to the 'translation' of his behaviour, an action that can be accomplished by introducing anthropological knowledge of that cultural behaviour into the process. Cultural translation is thus assimilated to linguistic translation,[2] and both are indispensable to make communication about what is at issue possible.

[2] A clear similarity unites the goals of the **translator** and those of the **anthropologist**, as **both break free from their reference signs**, be they linguistic or cultural, to enter a completely different semiological system and 'translate' it. To be able to do this, both must master *another* symbol system, and if the linguistic translator can enter the other reality from a linguistic knowledge, the anthropologist must enter, in most cases, from everyday life in order to arrive at the intelligible transmission of the *other*, i.e. he must enter into the more social aspect of language, in direct contact with the speakers and the symbol system of the culture to which he belongs. For more on the subject of "cultural translation" from an anthropological point of view, we recommend Geertz, C., 1973, *The Interpretation of Cultures*, New York, Basic Books and Malighetti, R., 1991, *Il filosofo e il confessore*. *Antropologia ed ermeneutica in Clifford Geertz,* Milan, Edizioni Unicopli.

3. Definition of the judge's 'cultural test'

The practical, applied research tool that this Guidebook proposes to use to facilitate the encounter between law and anthropology in courtrooms is the 'cultural test'.

What is a cultural test?

The term cultural test refers to **a set of questions and assessments that guide the judge in deciding whether to recognise a cultural practice and balance it against other rights**. The instrument belongs to the broader category of balancing **tests**, which are used comparatively by many courts to set stable standards for deciding a dispute. Balancing tests originated in the *common law* tradition around 1910-20 and have since spread to other jurisdictions, to the extent that today even courts of European states use them (e.g. **the reasonableness test** used by constitutional courts). The expression 'cultural test', so specific and textual, was created by the Canadian Supreme Court, which forged the first cultural test in 1996.[3] Consider that since 1963[4] there had already been 'religious tests' in the United States to verify the conditions for the recognition of religious practices.

Today, a cultural test refers to an **instrument used to resolve disputes that arise from claims made by immigrants, foreigners or national minorities** to consider profiles pertaining to their own culture. This test is characterised by the fact that it includes numerous anthropological issues in the questions being assessed. The purpose of the cultural test is to proceduralise the judge's argumentation process (in the opinion, or prior to it) so that all relevant issues, when a different culture is at stake, are considered in the process. This is a reasoning scheme that the judge is called upon to follow when resolving any multicultural dispute. The cultural test, with appropriate adaptations, **can work across different branches of civil, criminal, administrative, juvenile, and international protection law**. It can be used to assess a culturally motivated crime, a family law case, a compensation case, a child custody case or to respond to asylum seekers' claims.

The cultural test is not to be understood as a categorisation of culture - an approach that would contribute to a sterile exoticisation

[3] In *R. v. Van Der Peet* [1996], 2 S.C.R. 507.

[4] *Sherbert v. Verner* (1963), 374 U.S. 398.

of cultures and which has been abandoned in anthropology since the interpretive turn of the 1970s[5] - but solely and exclusively as an **orientation tool for the judge** who is faced with cultural diversity, diversity that he or she must understand and '**translate**' in order to be able to resolve the legal case in question.[6] Rather, what we refer to here as the judge's 'cultural test' is a set of questions useful for understanding whether to give recognition to a cultural practice and under what conditions.

The test constitutes a rationalizing schema, a pre-established procedure that the judge can follow in resolving a multicultural conflict; its purpose is to proceduralise the judge's argumentative process in the opinion, so that all issues relevant to cultural recognition are considered in the process.

To summarise, we could argue that a 'cultural test' is useful to provide judges with a procedure that allows them to

- become **aware of the cultural component** of a dispute;
- **assess what weight to give to the cultural component** by helping to balance cultural and other rights; and
- have a **standardised and concise method** to frame a multicultural conflict resolution, to evaluate a family law case, a compensation case, a child custody case or to respond to asylum seekers' requests.

The cultural test can be used both in cases concerning the **protection of culture**, i.e. those cases in which a subject belonging to a cultural minority requests the recognition of a cultural right (e.g. wearing the veil, the kirpan; burying the dead according to one's traditions; cuddling one's children according to one's affective/emotional ways), and in cases of **protection from culture**, in which the legal system is asked, through the judge, to prevent the application of cultural practices that infringe other rights. The latter

[5] Geertz, C., 1973, *Ibid*.

[6] It is good to bear in mind, when reading the 'cultural test' proposed in this Guidebook, that culture is not something static, that it cannot be enclosed within a map or a list, but rather that it is an articulated system undergoing potential change, subject to numerous variables, and that it takes time to be understood and 'translated'.

cases occur, in particular, in applications for asylum and international protection (e.g. voodoo, witch hunts, coercion to become a king or shaman), as well as in criminal law by victims of culturally motivated crimes (e.g. honour killings, female genital mutilation).

What is most desirable, through the use of this test, is for the judge to be *prima facie* aware of the motivations and cultural determinants that inform the parties' behaviour, and, in more complex cases, to be able to recognise the need for the advice of an anthropologist. This will allow the latter to assess the credibility of the events narrated by the parties in order to have as objective a verification as possible. For these assessments to take place, therefore, it is advisable to develop a certain anthropological sensitivity, and it is on this aspect that this Guidebook focuses by providing, in its special part, cultural cases illustrated in the light of the test.

4. Definition of culture and cultural practice

It is important, in order to understand how to frame **the *cultural otherness*** under analysis within the legal case, to be clear about **the concept of culture as understood in the discipline of anthropology**.

For the purposes of the effective use of the Guidebook, we could define **culture as a 'web of significances'**,[7] a semiotic system within which communication takes place that everyone is able to understand because they know the codes for interpreting the signs of the social group.[8] In short, it is that set of rules, lifestyles, ways of thinking, feeling and acting that are shared by the group and socially acquired by the members of a society.[9]

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[7] Geertz, C. *Ibid*.

[8] For a closer look at the definition and meaning of culture in anthropology, we recommend Kilani, M., 1994, *Anthropology. Una introduzione*, Dedalo, Bari, or Hannerz, U., 1998, *La complessità culturale*, Il Mulino, Bologna and Remotti, F., *Cultura. Dalla complessità all'impoverimento*, Roma-Bari, Laterza.

[9] It is important to remember that this process of symbolisation and collective organisation of the members of a social group is not linear, not homogenous or easily definable, and not static in time. Rather, it presents itself as a set of changing relationships and in constant redefinition and re-symbolisation, which is

At the same time, the expression '**cultural practice**' considers **that set of customs, norms, behaviours and values that guide, regulate and characterise the actions of a given social group**. Cultural practices, or culturally motivated behaviours, are thus that repertoire of practices and habits (including religious ones) that a human being recognises as part of the society to which he or she belongs, and towards which he or she feels a feeling (and a need) of belonging and identification.

In light of this, when questioning someone about their cultural (and religious) practices and customs or symbol system, it is advisable to bear in mind **that most practices are performed out of habit, out of conformity, and not in a reasoned** and organised manner. Suffice it to consider how we ourselves, in all our socially conditioned behaviour, do not act with our culture and its social implications consciously in mind, but rather operate in a **spontaneous and unconscious manner.**

5. How to use the Guidebook

This Guidebook is designed as an **aid to the work of judges operating in multicultural societies**. It can be read in its entirety by judges in order to have an overview of some of the most frequent cultural practices that come to the attention of Italian and comparative courts and, subsequently, consulted on a case-by-case basis by reading the individual cultural practice that may arise in a trial.

If the behaviour at trial is included among the cultural practices in this Guidebook, the judge may read the "**cultural test**" compiled for the individual cultural case in order to acquire a basic anthropological knowledge of the characteristics, functions and values underlying the behaviour as well as a hypothesis of balancing the party's right to perpetuate the cultural behaviour with any other rights at stake. The judge may supplement the anthropological research offered in this Guidebook with the help of a cultural expert; likewise, with respect to the rights to be balanced, the judge may supplement the proposal in this Guidebook on the basis of his or her own assessments.

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potentially subject to change, just like the other social aspects of any civilisation, such as religion and language.

The Guidebook does not contain all existing cultural practices, as it is an **illustrative tool**, so the absence of the practice from the Guidebook does not mean that it does not exist and that the cultural reasons put forward by the party are not real. Whenever the judge is faced with a foreign subject, it is a good idea to always check, even if the lawyer has not raised any cultural *defence*, whether the behaviour being tried has any cultural component.

Since **some cultural practices are widespread among several groups,** in the event that the Guidebook does not include such groups in the description of the practice, this may be due to a limitation of the research, so it may be necessary to supplement the investigation with the help of a cultural expert from that group.

The Guidebook can also be used as a **template for future cultural expertise** (in Italian CTU, technical office consultations) that the judge may require: since anthropologists often need to know what kind of information the judge wants to know, the 'cultural test' could form the canvas of the questions to be asked to the cultural expert (CTU).

This Guidebook **should not be used as a definitive tool**, but as an accompaniment to the decision. In particular, the questions of the proposed 'cultural test' with which the practices are presented in the special part should not be conceived in an absolute way: such as in the sense that they must all be answered positively for the cultural practice to be recognised. It is possible that some questions in the test may not be answered positively and nevertheless the cultural practice may be recognised. Furthermore, it is possible that the judge supplements the test questions with his or her own evaluations and additional questions, in their own analysis.

6. Illustration of a 'cultural test' and its functions

The 'cultural test' proposed in this Guidebook as a tool for analysing certain cultural cases that frequently come to the judge's attention is explained in detail below. The test could also be used by judges as an analytical framework for examining other cultural cases not selected for this Guidebook.

The test consists of twelve questions and is the result of a synthesis of cultural and religious tests currently used in North America as well as a survey of the main arguments developed by Italian and European judges when resolving multicultural conflicts. The test could be used for both cultural and religious practices.

The test is structured as follows:

Objective Part (anthropological questions)

1. Can the category 'culture' (or religion) be used?
2. Description of the cultural (or religious) practice and group.
3. Embedding the individual practice in the broader cultural (or religious) system.
4. Is the practice essential (to the survival of the group), compulsory or optional?
5. Is the practice shared by the group, or is it contested?

Subjetive Part

6. How would the average person belonging to that culture (or religion) behave?
7. Is the subject sincere?

Relational Part (intercultural)

8. The search for the cultural equivalent: the translation of the minority practice into a corresponding (Italian) majority practice.
9. Does the practice cause harm?
10. What impact does the minority practice have on the culture, constitutional values, and rights of the (Italian) majority?
11. Does the practice perpetuate patriarchy?
12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

The proposed 'cultural test' is designed with a triadic structure.

1. The first five questions make up **the objective part of the test**, which seeks to ascertain whether the behaviour being judged is indeed a cultural practice, whether it is described in detail and whether all **anthropological descriptions of the behaviour** are sufficient to ensure full understanding.
2. Questions six and seven represent the **subjective part of the test** in which the concrete embodiment of culture in the agent and the agent's level of adherence to its culture are ascertained.
3. Questions eight to twelve are the **relational part of the test, which can also be defined as the intercultural part**, aimed at bringing the minority culture into dialogue with that of the Italian majority.

Responses to the objective part of the test (the first five questions of an anthropological nature) have been provided in some cases in this Guidebook: in the special part, examples of already completed tests are examined.

When this Guidebook does not describe the cultural practice, the questions may be answered by the cultural expert (e.g. an anthropologist or other scholar who has studied the group and the behaviour under scrutiny) or, if one cannot find one, by hearing from qualified 'lay' experts (e.g. embassies, consulates, mayors, other official authorities representing the minority) or *quisque de populo* belonging to the cultural group who can give an opinion on the cultural practice under scrutiny.

For the best-known cultural practices (e.g. male circumcision), autonomous searches by the judge are also conceivable. The responses to the subjective and relational parts of the test are part of the fact-finding and balancing activity of the judge and helps to take into account all the interests at stake.

The questions comprising the test are explained below in their individual functions as an aid to *ius dicere*:

1. Can the category 'culture' (or religion) be used?	This question is preliminary to the conduct of the test and is intended to expose the erroneous or opportunistic use of the cultural argument, which is sometimes made by parties in litigation or asylum claims by alleging false practices or practices not recognised as such by the group.
2. Description of the cultural (or religious) practice and group.	Once it has been ascertained that we are dealing with culturally-motivated behaviour, this second step of the test aims to provide more information by detailing the contents of the cultural practice, its historical origin, mode of manifestation, and meaning. The description of the cultural practice injects anthropological knowledge into the trial; it fulfills the obligation of rationale by explaining exactly what is at issue and enabling the community of interpreters who will read the judgment to understand exactly the contents of the conduct that is being justified and/or condemned.
3. Embedding the individual practice in the broader cultural system.	Starting from the idea that culture is an 'interconnected system' (a complex whole), it is important to perceive individual practices not as isolated, but in interaction with the entire 'web of meanings' (web of significances) in order to fully appreciate their characteristics and scope. Once the individual cultural or religious practice has been identified, the judge is, therefore, invited to interpret it systematically within the 'cultural order' in order to ascertain its connections and further illuminate its meaning, as well as to provide the audience with a greater understanding of it in the light of the entire cultural horizon of the minority (e.g. the Islamic veil should not be treated as something isolated from the role of the Arab woman, the meaning of modesty, the view of the body and sense of modesty in that group). This ascertainment also serves to prevent the majority from reading the practice in a distorted way as they contextualise it in their own semiotic system where it might have a completely different meaning (e.g. the Islamic veil is read in the western "web of meanings" as female oppression while in the Islamic world it has aesthetic functions, of a fashionable garment, or practical, of protection from wind and sand; the bride price is seen in Italy as enslavement and buying and selling of a person, while if placed in the broader context of Roma marriage it shows that it is a gift given to the bride's father that expresses the recognition of the woman's value).
4. Is the practice essential (to the survival of the group), compulsory or optional?	The question is used to investigate the level of importance of the cultural practice for the claimant in order to assess, in the subsequent balancing act, what kind of sacrifice is being demanded of the minority. We move from cultural practices without which the group would not exist as such (e.g. Jewish circumcision is considered essential to the survival of the group); to practices that are obligatory (e.g. wearing the kirpan/ritual knife for Sikhs; wearing the veil for Muslim women); to cultural practices that are merely optional (e.g.

	kissing one's child on the genitals) and that are more habits than structured practices. The more cogent a practice is for the individual, the greater should be the effort towards its recognition by the legal system, if, of course, other conditions of the test are met.
5. Is the practice shared by the group or is it contested?	Cultures are dynamic and constantly changing systems; if the intergenerational transmission of a practice is being interrupted because some members of the group assign less value to it, this may or may not play a role in the assessment of the case (e.g. facial scarification has been abandoned in certain groups; female genital mutilation itself is contested in many African and Asian groups), because for a certain minority group, within the minority, the practice may continue to be shared. Through this part of the test it is possible to delve into the dynamics of cultural groups and the differentiations that often characterise them. On the one hand, this question avoids the endorsement of controversial practices, ensuring a voice for those subgroups that contest the cultural practice, while on the other hand, it highlights the reasons that may lead to the continuation of the same in other internal groups: in both cases, an attention to the "minorities within minorities" is solicited.
6. How would the average person from that culture (or religion) behave?	The question serves to benchmark the party's behaviour to that of the model agent (reasonable person in North American jurisprudence) and to exclude behaviour that does not find the support of the group as disproportionate (e.g. the Mexican who kills at the insult 'chinga tu madre' cannot invoke the mitigating factor of provocation as no average Mexican would react to such an insult with murder, but at most would beat up the antagonist). This question is not a statistical calculation on the whole group; one must, in fact, take into account the presence of subgroups wherein the practice might persist while dying out in the larger group.
7. Is the subject sincere?	This question serves to relate the objective data gathered from the previous questions to the concrete subject in dispute, in order to assess the legitimacy of his claims. It is a factual ascertainment that can take place by verifying whether in the subject's life there is consistency between the claimed practice and overall behaviour (e.g. a subject asks for a day off on Fridays to go to mosque, but never goes to pray; a woman asks to be allowed to wear the veil in her work uniform, but never wears it in the rest of her day). If the subject is not sincere in her claim, even if the cultural practice exists, it cannot be recognised in that concrete case because the request is specious.
8. The search for the cultural equivalent. The translation of the minority practice into a corresponding (Italian) majority practice.	It is crucial, in any multicultural dispute, to 'translate' the practice into an equivalent of the majority culture by indicating what that behaviour/symbol/ritual/habit would correspond to in the host country. The purpose of such ascertainment is to make the minority's behaviour more intelligible, avoiding attributing meanings to it that are distorted by the cultural lenses worn by the majority. In this way, the terms of the balancing act are precisely fixed. It is a relational ascertainment, aimed at putting the groups in

	inter-cultural dialogue, which judges often already carry out autonomously, without the help of the anthropologist, inserting in the opinion comparisons between the immigrant's practice and that known to them in their own cultural universe (e.g. forcing an Islamic woman to go to work without the Islamic veil would be like asking an Italian woman to go to work in a bikini; kissing a child on the genitals in Albania corresponds to caressing the child naked after a bath in Italy).
9. Does the practice cause harm?	This part of the test assesses whether the practice has caused harm and to what legal rights. The concept of harm must be considered from an anthropological perspective and not exclusively through the cultural lens of the majority. This question is part of the balancing test. With respect to the axiological scale of values, it should be noted that damage to the rights to life and permanent damage to the physical integrity of a subject are, to date, considered by comparative living law to be an insurmountable limit to cultural recognition (except in the case of male circumcision, which although implying a permanent and irreversible alteration is recognised in all European states).
10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?	The question is intended to illustrate what kind of reactions the cultural practice elicits on the majority in order to show the minority how its practice is read and perceived by Italians. The judge is asked to indicate precisely the values, rights and cultural elements of the majority that are compromised by the behaviour of others. This indication serves to avoid the generic argument 'the other's culture violates Western values' as it invites judges to identify more precisely the values actually at stake (e.g. the burqa in France impacts on the value of fraternity and living together that is felt particularly strongly in that country). The question has intercultural value: if the minority's practice is banned, at least the minority will know the precise reasons why this is the case and will be able to reflect on the need for a change within its own culture. It is important, however, that the majority does not use this demand to impose an ethnocracy, based solely on the values of the majority, for this must be truly essential values and rights. For example, values such as security, public order, urban decency cannot be considered superior in the axiological scale of rights and values to the protection of culture. Otherwise, there is a risk of replacing the model of pluralist democracy with that of a majority ethnocracy.
11. Does the practice perpetuate patriarchy?	Patriarchy is a 'system of oppression' that intersects with culture, but also constitutes a reality in its own right. Considering that gender equality is one of the most hotly debated issues and that many constitutions, international documents and judges resort to it as a counter-limit to multiculturalism, it seems appropriate to consolidate this topos in the test. At the comparative level, judicial arguments reconfiguring many cultural crimes as gender crimes (e.g. female genital mutilation, honour killings) are increasing. The reference to patriarchy can be made in the test with these

	caveats: the notion of patriarchy may be a Western construct to be corrected therefore with the anthropological gaze; and there are forms of benevolent patriarchy with which women themselves negotiate and from which they derive advantages, so the decision should take these profiles into account.
12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.	The judge is called upon to ascertain and then explain in the opinion why the minority wants to continue a cultural practice. Such a question, when asked by judges, produces useful results from an intercultural perspective: on the one hand, it may lead to the discovery that the values followed by the minority do not differ that much from those of the majority; on the other hand, when the logics are opposed, understanding those of others may open up unexpected spaces for recognition. By demonstrating that, even if opposed to a practice of the majority, the same contains a model of life that is equally meaningful (meaningful life), the balancing could be resolved in the sense of recognising the equal validity of the minority's behaviour (e.g. the Amish in the USA have been granted two years' exemption from school attendance because they practice forms of practical teaching-learning by doing in a non-competitive and equally formative context for children). This ascertainment is useful in describing the value framework underlying a behaviour and thus illuminating its understanding and fostering an intercultural dialogue from which the majority itself could learn. Indeed, in the long run, the majority might even decide to abandon its own cultural practices and adopt those of the minority. Letting the ruling explain to its audience the meaningful life of the minority could be the start of a fruitful intercultural transformation.

After answering these twelve questions, the judge will have a more accurate anthropological view of the case and the issues involved in the balancing act. This is not, however, a one-sided and definitive instrument. The same judges who have already experimented with this test have, on occasion, supplemented it with questions they deemed necessary to better understand the case under examination.

7. The importance of emotionality in judicial inquiry

Emotions in procedural activity: understanding cultural otherness through emotional reactions

In the context of judicial activity, the treatment of emotions is of great importance, and this aspect is particularly evident when dealing with cultural otherness. In fact, although the law is concerned with regulating human behaviour and the life of people in society, often, for various reasons - reduced timeframes, language

difficulties, lack of attention to the 'other' perspective - one tends to neglect the observation of the ways of interacting with cultural otherness, thus forgetting the impact that participation in the discourse may have on the emotions of a foreigner, immigrant and/or member of a cultural minority.

The effort that is attempted during trial activity seems to be mainly to rationalise and thus minimise the role of emotions, in line with the idea that law should be conceived as purely rational and distant from the emotional world. However, procedural and communicative activity with the subjects is intrinsically connected to emotions, and elicits emotional reactions that can determine the course of the trial activity and the communicative development of the defendant and/or asylum seeker. For this reason, special attention should be paid to these emotional profiles during court procedures and their impact should not be minimised; this does not mean setting aside an approach of rationality and neutrality, but rather it means understanding which communicative tools to put into practice during the inquiry in order to ensure that the emotional component does not become limiting for the foreign subject.

Moreover, emotions, if interpreted appropriately, do not exclude rationality; on the contrary, they can become a tool for a greater understanding of cultural otherness, for accessing ways of life and experiences that would otherwise remain unknown. [10] The process of understanding the 'other', therefore, can be accessed by observing the way one looks, sits, answers or does not answer questions on certain issues, or by observing the difficulties that some subjects may have in dialoguing with people of a certain gender or age group. These emotional manifestations not only can, but should be integrated into the processes of legal understanding, as they could be, to borrow the words of the French sociologist Daniel Bertaux,

[10] For more on the role of emotions from an anthropological analysis perspective, the following texts are recommended: Geertz, H., 1959, 'The Vocabulary of Emotion: A Study of Javanese Socialization Processes', in *Psychiatry*, No. 22, pp. 225-237, and Reddy, W. M., 1999, 'Emotional Liberty: Politics and History in the Anthropology of Emotions', in *Cultural Anthropology*, No. 14 (2), pp. 256-288 and Reddy, W. M., 2001b, 'The Logic of Action: Indeterminacy, Emotion, and Historical Narrative', in *History and Theory*, no. 40, pp. 10-33 and White, G., 1990, 'Moral discourse and the rhetorics of emotions', in L. AbuLughod, C. Lutz, eds., *Language and the Politics of Emotion*, Cambridge, Maison des Sciences de l'Homme-Cambridge University Press, pp. 46-68.

real 'clues'[11] of observation and research, i.e. descriptions that refer to 'other' social mechanisms, and which can help the judge to better understand how to direct the inquiry. Observing these 'clues' therefore allows one to enter into an 'other' culture, to observe the omissions, exaltations and denials that emerged from the inquiry, and thus transforming emotions into real vehicles of understanding that, in order to be interpreted, need a good knowledge of the literature on that culture, or the help of a cultural expert. Concrete examples of this can be seen in keeping one's eyes downcast and not looking at the interlocutor or speaking in a soft voice. Such attitudes are a sign of respect in some groups, but could be interpreted in Italy as a gesture of distance or ambiguity, or even as signs that the person is lying or unsure of their statements. Consider again the difficulties that some people may have in making confessions to the police when they come from states where the police are corrupt and, therefore, not considered capable of protecting their rights.

Language difficulties and the role of the translator

The role of translation, both in criminal and civil contexts in relation to asylum and refugee claims, can be extremely complex, not only because of the difficulties in interpreting and 'restitution' of the 'other' perspective, but also and especially in relation to the emotional disparities between the participants in the inquiry. In these circumstances, one can often witness extremely challenging and stressful situations, characterised by a climate of fear and insecurity, as well as deeply painful narratives. It is common, in fact, for immigrants arriving in a new country to come up against various emotional obstacles stemming from their culture and social context: lack of trust in institutions, lack of positive experiences in the country of arrival and unfulfilled expectations; or family responsibilities in the country of origin and consequent difficulties in expressing themselves, as well as religious barriers or differences in gender roles; or more simply a lack of knowledge of the resources available in the country of arrival.

These elements can influence the interpreter and generate a series of tensions, misunderstandings and emotional closures, which

[11] Bertaux, D., 2008, *Tales of Life. La prospettiva etnosociologica*, Milan, FrancoAngeli (orig. ed. 1998).

consequently lead to reflection on the limits of his or her role. Faced with these difficulties, in fact, the translation inevitably assumes a function that goes beyond translation, and becomes a key element in understanding different cultures, thus occupying a prominent position in the arguments of the parties involved. This leads to a complex role for the interpreter, who on the one hand has to deal with the legal world, with which he collaborates on a daily basis, but from which he often feels estranged because he is not a legal professional, and on the other hand has to be the spokesperson for the communities for which he conveys communication, which he often disregards, or towards which he has a limited understanding in relation to the complexity of the socio-cultural dynamics that characterise them.

This complexity of the translator's role is often overlooked, and it would seem that there is a tendency to see his or her role as a simple channel of communication that tries to overcome linguistic differences between the various parties - lawyer, judge, suspect or asylum seeker - without ever considering the possibility that the interpreter, if well trained, could act as a true intercultural mediator, thus becoming a valuable collaborator in conveying mutual understanding between the parties.

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Special Part

Recurring multicultural disputes in the Italian courts

Introduction

Sample list of some cultural practices

This Guidebook is an applied research tool; it is not intended to be an academic-theoretical instrument containing an exhaustive description of each cultural practice, habit and/or behaviour. In fact, it would be impossible and erroneous to create a cultural catalogue, because each case is singular, just as each subject's experience is unique and his or her connection with a given context may vary from that of others in the same social group and may change over time.

By way of example and demonstration only, therefore, some recurring 'cultural cases' in Italian civil, criminal, administrative and juvenile proceedings will be set out below. Of the practices listed here, the judge will find a detailed description in this special part of the Guidebook:

- Witch-hunting and witchcraft
- Male circumcision
- Parenting
- Gua Sha/coining and cupping (East Asian traditional medicine)
- Kafala
- Kirpan
- Mourning, burial, ancestor worship
- Mangel (Roma begging)
- Displays of affection concerning children's genitals
- Marriages with/among children younger than 14
- Female genital mutilation
- Homage to the child's penis
- Bride price
- Ramadan
- Scarification
- Islamic veil
- Voodoo (rituals)

In all the cases enunciated there is a cultural component that the Guidebook intends to bring to the judge's attention by reading the cases in the light of a 'cultural test' that is compiled as a proposed decisional schema for the judge. The way in which each cultural case is treated may provide a matrix for the judge to deal with other cases not analysed in this Guidebook that may come to his/her attention in the future.

1. Witch-hunting and witchcraft

Cases: Women and men accused by the group to which they belong of being witches or sorcerers and, as such, subjected to persecution which can lead to murder, who apply for international protection (international protection); women and men forced to become witches or sorcerers (international protection); witchcraft rites to subjugate individuals and cast evil spells on them (criminal law - see also the entry Voodoo rituals in this Guidebook)

Cultural test

1. Can the category 'culture' (or religion) be used?
It depends. While it is certain that the practice of witch-hunting is to be seen in the context of witchcraft-related beliefs, and thus has a well-defined social function, at the same time the practice is often used as a political tool by various governments and social groups, with no other function than political machination.

2. Description of the cultural (or religious) practice and group.

The term 'witch hunt' is used to refer to the **persecution of a perceived enemy of the community**, often a woman, who is accused of practising witchcraft with methods and objectives that the social group perceives as dangerous. The practices that are condemned include a wide range of acts and circumstances, from medical practices to divination, magic and some sexual and healing practices; generally speaking, these are social behaviours that are rejected by the majority of the community and religious authorities, and are seen as dangerous for the group.

The term witchcraft indicates a set of **practices aimed at obtaining a transformation of reality by resorting to particular powers**; it is not a religion (unlike voodoo, see the entry Voodoo rituals in this Guidebook) endowed with systemicity, but a set of layered behaviours.

We could therefore define witchcraft as **the set of beliefs, skills and activities attributed to certain persons called witches** (there is also the male form, sorcerer, although it is less frequent) who are supposed to be endowed with certain magical abilities useful for the production and resolution of conflicts and the entire mechanism of social control and self-regulation of the community. They act as a release valve in social relations and define certain spaces of interrelation between social groups and between people; a fundamental characteristic of witches, for instance, is the fact that most of the people who exercise

such knowledge or are accused of such practices, even without exercising them, are **cultural intermediaries,** and a large number of them are also cultural mestizos, i.e. 'middle' figures, mediators.

These people who occupy an intermediate position in society, and who often move not only between popular and elite culture or between social groups, but also between different cultures and ethnicities, are exposed to the gaze of the entire community and, because of their role in society, are frequently **accused of stirring up enmities and being at the centre of conflicts**. They are known to many and this visibility makes them easy scapegoats and means that their violations of religious, social, ethical or moral conventions are more quickly highlighted or denounced. Not only are they often accused, but they also often become accusers of others, as they usually know many people, communicate and interact so much with members of the community.

Behind every accusation of witchcraft lies the fear of something not fully known, something strange or unknowable. Witch-hunting is therefore an attempt to resolve society's contradictions through punishment, an attempt to **explain events** (such as a sudden **death** or social **disaster**) **that cannot be explained by the community's other cognitive tools. Witchcraft** beliefs can be used to understand the world, seeking causes for uncertain events, and can be used by political groups as a scapegoat to promote collective violence, functioning as a legal system, a **practical tool** for manipulation and control, a social philosophy and a conceptual framework for understanding the world.

Today, most 'witch hunts' take place in sub-Saharan Africa, with particularly high prevalence in the Democratic Republic of Congo, South Africa, Tanzania, Kenya, Ivory Coast and Nigeria, but also in Malawi, Ghana, Gambia, Benin and Angola. In addition, the practice is widespread on the Asian and American continents, especially in India, Nepal and Indonesia, and in Brazil and Colombia.

Although it is commonly assumed in the Western common imagination that belief in witchcraft is no longer part of current society, the social reality of various contexts shows us that these beliefs are not only still active in contemporary culture, but have been experiencing a moment of particular diffusion and extraordinary adaptation to modernity for several decades now.

Sub-Saharan Africa shows a high prevalence of witchcraft beliefs and a notable prevalence of accusatory witch-hunts, which often result in violence. However, it is worthwhile to consider that in most social groups that believe in the power of witchcraft, generally, even when

there are accusations, they do not result in violence, and may even be used by the community to obtain benefits from the accused person.

For example, in the Beng group of the Ivory Coast, the traditional position of king is occupied by a sorcerer. This man is not evil, far from it; rather, he is supposed to use his mystical powers to protect the group. It is said, in fact, that the Beng territory is constantly attacked by witches and that to protect it, a head of state is needed who is the most powerful witch of all, so as to combat the evil forces that constantly threaten the kingdom.

3. Embedding the individual practice in the broader cultural system.

Witch-hunting must be placed in the context of witchcraft-related beliefs. To understand the meaning and social functions that witchcraft can assume in the various contexts where it is practised, it is important to clarify the concept of **symbolism**.

Human thought, in fact, is organised according to the available symbolic structures, structures that vary from one culture to another or from one socio-cultural group to another, and that respond to a shared symbolic system. When we speak of symbolism, we are therefore talking about a cognitive system that participates in the constitution of knowledge and the functioning of memory. In different social contexts, even within the same culture or the same community, symbolic structures produce a fragmented and differentiated multiplicity of representations, which take the form of different practices: magical, discursive, political, medical, economic practices, etc.; witchcraft-related practices are one of these, and are a tool for approaching and interpreting the context, a bridge between individuals, or societies, and nature.

Witchcraft practices, therefore, are part of **symbolic systems; they are cognitive apparati and knowledge systems that provide different ways of approaching the world and of constructing and constituting the 'real'**, as well as of intervening in the world. These practices, and the different symbolic universes from which they are interpreted, observed and thought about, generate different images of 'other' events and entities, and enable their recognition and characterisation. Witchcraft practices are therefore a complex language, a complete symbolic system with an internal logic of operation, which is governed by its own rules, its own 'grammar' and according to its own mechanisms, and acts where other knowledge (such as rationality) is ineffective.

4. Is the practice essential (to the survival of the group), compulsory or optional?

It depends. It is inevitable that witchcraft accusations are an instrument of social control, and that the prosecution of witches as a crime is a form of reordering subjugated sectors of society (minorities, segregated, exploited or subjugated groups). Through criminalisation, the aim is to impose order and control certain practices, individuals, groups or cultural types, which is why some persecution campaigns are implemented out of the political necessity to have a certain cultural homogeneity that allows a certain idea of government to function.

Persecution therefore often aims at a certain cultural homogenisation of the subaltern strata of society, just as it did in premodern Europe, when efforts to Christianise priests aimed at homogenisation towards Christianity, yet often resulted in an amalgamation of beliefs and practices of different origins, which still today form part of the heterogeneous cultural heritage of various contexts.

At the same time, however, as the work of the Dutch anthropologist Peter Geschiere shows us, in some contexts the accusations of witchcraft can be reciprocal, and if villagers in some communities see witchcraft as a tool used by the elites to achieve their own ends, at the same time for the elites witchcraft is a weapon of the weak against the state, demonstrating how talking about witchcraft means talking about power relations.

Witchcraft seems to be characterised by a pervasiveness and ambivalence of its expressions and uses, and appears as a dynamic interplay of notions that reflects and reinterprets new circumstances. It creates a kind of economy and occult politics that has a dual character: on the one hand, it commends new means to achieve otherwise unattainable goals (such as improving life in situations of extreme social exclusion); on the other hand, it serves to give voice to the desire for retribution, to eliminate those towards whom one feels envy, as well as to annul inequalities and social differences.

5. Is the practice shared by the group or is it contested?

Witchcraft accusations usually conceal socially punishable behaviour and serve as a vehicle to restore social order. Often, behind a witchcraft accusation there may be an unexplained death or an attempted murder; therefore, witch hunts are often accompanied by

popular consent.

6. How would the average person from that culture (or religion) behave?

As indicated above, in situations of condemnation of a witch's actions and a subsequent witch hunt, the average person conforms to the group's will to condemn.

7. Is the subject sincere?

As is the case with the practice of voodoo rites (see item Voodoo rituals in this Guidebook), the **subject of jurisdictional disputes** is not the witchcraft system as a whole, nor even the existence of witchcraft understood in an objective sense, but **those cases in which it assumes a function of subjugation and persecution**, representing itself in the eyes of the victims, hunted as witches or affected by a 'witchcraft' act, as a real source of danger, justifying flight from their community of origin and the request for international protection.

Also in this case, the ascertainment of the subject's sincerity is guided by specific criteria of law and concerns the credibility of the facts narrated by the applicant and the injurious potential of the rite. For the purposes of a more complete understanding of the practice and its damaging scope in the case concretely presented to the judge, one could focus the cognitive investigation on certain elements (in part similar to those highlighted in the Voodoo rituals file, in part more specific and peculiar):

- the **spatial location of the practice**, which, as we have seen, is more widespread in some geographical areas than in others;
- the **verification of the historical presence of** the phenomenon in the place of origin;
- the **position of the state of origin** with respect to witchcraft: in some states, witchcraft practices are criminally prohibited (Cameroon, Côte d'Ivoire); in others, both witchcraft acts and witch hunts are prohibited (Nigeria). Attempts to institutionalise the phenomenon or the opposite attempts not to deal with it in any case determine whether the phenomenon operates in the shadows or clandestinely;

- the **possible existence of positions on the phenomenon by local traditional leaders** (as happened in Nigeria, in 2018 by the traditional leader Ewuare II, in Edo State, South-East Nigeria, who, on the subject of human trafficking and juju rituals, defused the spell of the rites – see the entry for Voodoo rituals in this Guidebook).
- **any motives/events or physical characteristics of the individual** that in the eyes of the community justify the accusation of witchcraft or the witchcraft act that is assumed.

T is important to emphasise that the existence of a punitive attitude of **the State of origin under criminal law is not necessarily a symptom of full protection**; on the contrary, in most cases, the phenomena, precisely because of their institutionalisation, are placed outside the areas controlled by the law or, in other cases, are not prosecuted in order not to contradict the will of the people and to pander to private vigilantist phenomena.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

The cultural equivalent is, first and foremost, historical. Western Europe experienced the phenomenon of witch-hunting, over a vast period from the late 15th to the 18th century, with the connotations of violence that history has vividly preserved. In the places where the practice is widespread today, one can find many characteristics similar to European witchcraft, although sometimes that same level of institutionalisation is absent, which makes the phenomenon more occult, apparently reducing its real scope and spread. It is possible to find many elements in common between historical and contemporary witch hunts: the attribution of witchcraft powers for particular physical characteristics, character, social roles or uncomfortable ideas that differ from the community patterns professed by the accused witch; the political use of the phenomenon to curry favour with the populations and find a scapegoat for economic and social crises, epidemics and other misfortunes.

Secondly, cultural equivalents more in keeping with contemporary times can be found in the majority culture, in those common practices of labelling certain individuals as people who 'bring bad luck' and in the consequent process of social exclusion. Although these phenomena have different consequences - because they arise in cultural contexts in

which the supernatural assumes a less pregnant role, where the vigilance of civil society and the state avoids the extreme phenomena that follow the identification of the 'witch' - it is nevertheless true that even in the majority culture the repercussions that such accusations can have on the psyche of the individual have been highlighted many times: including social isolation, depressive phenomena, attempted or consummated suicides, in the most serious hypotheses.

With regard to the fear of having been subjected to a witchcraft act and perceiving its evil significance in one's own or one's loved ones' physical ailments, there is a similar cultural equivalent in that this fear may also be present in the majority culture. One thinks, for example, of those cases, made known in the news, in which individuals, although perfectly integrated into society, found themselves squandering their means in an attempt to stem the 'risk' of pathologies and nefarious events on their loved ones, asking for protection from sorceresses and healers who offered deliverances from evils for a fee.

Finally, one must recall the strong faith that part of the majority culture continues to have in traditional forms of medicine, consisting of secret formulas and mechanisms practised only by a few individuals who have had the honour of acquiring them from the elders, and the strong belief, widespread among many, that ills and maladies can have an origin in the supernatural or in negative energies transmitted even involuntarily by other individuals.

If such beliefs retain a potential for influencing the lives of people in a secularised majority culture, even though they are no longer anchored to a structured religious and cultural substratum on the subject of the supernatural, think of the impact such practices can have in contexts where spiritualism has a permeating power in daily life and society is unable to curb the damaging consequences on victims.

9. Does the practice cause harm?

Being labelled as a 'witch' in the above-mentioned cultural contexts can lead to very serious consequences for the person, ranging from being totally excluded from the community (prevention of access to basic necessities, water or food, abandonment of the child/children to themselves because they are considered to be witches/witch-like), to being subjected to violence, torture imprisonment without safeguards and control, to being subjected to tests with the ingestion of toxic and

potentially lethal concoctions, up to death, which may occur either as a consequence of such poisoning or in other atrocious ways (as highlighted in the UNHCR report, which shows some varied cases of the killing of individuals accused of witchcraft).

The dangers cannot always be stemmed by seeking protection from the state. In some states, in fact, the very acts of witchcraft are punished, and with them the suspected perpetrators, while in others, attempts are made to stem the phenomenon of witch-hunting by punishing the acts of violence perpetrated in it. Often, however, this leads to accusations of witchcraft acting in the shadows anyway, especially in communities far from the eye of the state. Sometimes governments remain complacent about such witch-hunting practices, the so-called vigilantism phenomena, in order to please the population.

The fear of witchcraft has similar effects to those mentioned in the entry on voodoo rites (see **Voodoo** rituals in this Guidebook). Subjects fear for their own health and that of their loved ones, attribute their ailments to such evil spells, experience depressive syndromes and change their lifestyle habits, even to the point of fleeing their country of origin.

10. What impact does the minority practice have on the culture, constitutional values, and rights of the (Italian) majority?

In the host culture, 'witch hunts' are more likely to be understood as harmful because the labelling of a person as a 'witch' or sorcerer is linked to persecution in the majority view. However, there is also a tendency to regard it as a mere superstitious belief, an erroneous and exaggerated perception of the claimant, a tale too far-fetched for contemporary Italian society.

With regard to the fear of having suffered a witchcraft act (see also **Voodoo** rituals in this Guidebook) and of therefore being the victim of a 'witch's' spell, the impression on the Italian majority is that the subject is the victim of naive beliefs based on superstition, due to limited social, economic and educational conditions, or that the tale is invented and stereotyped, used for pure opportunism and to receive acceptance in the host country.

When viewed from a 'persecutory' perspective, witch-hunting has a strong impact on the constitutional values of the freedom of the individual and his dignity, becoming an instrument capable of violating the most fundamental good of all, that of human life. Such an instrument goes against the value of solidarity between individuals and

calls into question the duty of states to protect their citizens. When these fail, it should generate the activation of the value of welcoming the persecuted foreigner forced to leave his homeland for survival, enshrined in **Article 10 of the Constitution**.

On the subject of international protection, there is a widespread idea in the majority culture that the reception of foreigners, whether justified or not, undermines the value of security and public order. Reception is perceived as an emergency procedure, in response to an extemporaneous and pathological phenomenon; a mechanism to be implemented with caution and only in cases of extreme gravity, to be kept under strict control for fear of lack of resources. Requests for protection due to the risk of incurring a real 'witch hunt' are shared by the majority; conversely, the values of security and public order prevail in cases of witchcraft, in which the subject complains of the consequences of a witchcraft act suffered on his or her body.

Being accused of being a witch or a sorcerer exposes one's life to particularly serious dangers and calls into question the enjoyment of fundamental rights, which are largely exercisable in the majority society: personal freedom, physical integrity, the right to equality,
(when discriminated against in relation to the rest of the community or when directed at women or children), as well as the right to adequate judicial protection of rights.

11. Does the practice perpetuate patriarchy?

The practice of witch hunts perpetuates patriarchy because in many cases the victims of witchcraft accusations are women and very often minors. However, unlike historically in Europe, witchcraft accusations are now also made against men in some areas. The **gender factor must be an important element that** the judge refers to, but it must also be considered that, unlike some other practices, witchcraft **can affect both sexes**. In the case of those who feel themselves to be the victims of evil spells, one cannot speak of patriarchy as it is common for the act of witchcraft to be directed at both sexes.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

As has already been pointed out, in contexts where individuals require protection from specific cultural practices that they do not share and consider harmful, the good reasons for carrying out the practice by

those individuals in the community who do share it should be highlighted in order to better understand its diffusion in the places of origin, its pervasiveness and thus the inevitable risk to which those who shun it are subjected (see the Voodoo (rituals) and Female Genital Mutilation tabs in this Guidebook).

The 'accusers' find in witchcraft the reason for certain evils, specifically not the 'how' but the 'why' they occurred. Accusations of witchcraft often spread at times of crisis in communities, and respond to a need, typical of human beings, to seek the cause of their evils in specific individuals. In these communities, there are no alternative life choices, in which the supernatural is devoid of all value, because it is, as highlighted above, a system that permeates society, albeit at different levels. The conditions of social economic hardship and the use that political power often makes of these beliefs facilitate vigilantism and keep alive a kind of social-political alliance, which is already severely undermined.

Moreover, these beliefs are deeply rooted in African culture, which attaches great importance to the supernatural. This justifies both the fear of being a victim of evil, of having a witch or a sorcerer in the community, but even more so the demand for protection of the accused, due to the common absence of any effective solution that guarantees the protection of the life of the accused.

Proposed balancing act: in view of the impact on the person, it is suggested that the judge should consider the role of witchcraft as relevant and therefore recognise that it creates dangerous situations that may justify requests for international protection, especially if such situations may result in a witch hunt.

Legal Insights

1. Witchcraft in international asylum law. The points of contact between the practice of witchcraft and the Italian legal system mostly emerge in the field of international protection (e.g. asylum and other milder forms of protection). The majority of case law on the subject is mainly related to two types of events, which are able to determine potential dangers to the individual's safety: that of "witch hunts", in which applicants seek protection because they are accused of exercising witchcraft powers by the community of origin and are therefore

persecuted or marginalised;[12] and that concerning the fear of having already suffered past or the possibility to suffer future acts of witchcraft, which may lead to both physical and psychological illness. In the latter case, acts can often be traced back to the context of private disputes over family or inheritance issues.[13] These are cases in which, therefore, the subject requests from the host legal system, which is different from the legal system of origin, a form of 'protection' from cultural aspects characteristic of the context of origin.

On the phenomenon of contemporary 'witch-hunting', it should be pointed out that it does not only affect women or the elderly, but is also widespread against men and even minors. In some pronouncements on the subject, there has been talk of a veritable 'witch-hunt', potentially generating severe limitations on human rights, resulting in particular in situations of marginalisation or the danger of being subjected to torture and ordeal in the event of imprisonment. For this reason, the choice of protection tools to be used has expanded to include, depending on the case, not only the use of the more tenuous humanitarian-special protection, but also that of subsidiary protection governed by Article 14 lett. c) of Legislative Decree 251/2007, granted for situations of serious and individual threat to life or person resulting from indiscriminate violence in situations of internal or international armed conflict. Consequently, in some judgments concerning witchcraft, one can find a stricter interpretation of the obligation for investigative cooperation, established in case law, according to which the same is determinative even in the face of hypotheses of unreliability of the story, as it is aimed at ascertaining an objective and generalised situation of violence.[14]

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[12] The rulings concern also the persecution that can be suffered by the family members of a "witch": Ordinary Court of Turin, judgment of 3 February 2020, no. 741 (witch persecution of minors); in this case the accused of witchcraft is an Ivorian minor and the mother, who is in Italy, requests protection for fear of being persecuted upon returning to her homeland as the mother of a "witch"); Cass. Civil section work - 01/28/2022, n. 2717 (persecution suffered by family members of a "witch").

[13] Fear of having undergone or being liable to undergo witchcraft acts: Cass. Civ. sez. lav. - 16/02/2022, no. 5146; Cass. Civ. sec. lav. 13/04/2022, no. 12040; Cass. Civ. sec. III - 20/04/2022, no. 12644.

[14] Already cited. Cassazione Civ. sez. III - 20/04/2022, no. 12644 citing C.G.U.E. 30 January 2014, in case C-285/12, Diakite'. In this regard, it should be noted that in the aforementioned ruling of the Ordinary Court of Turin, sentence of 3 February 2020, n. 741, from an investigative point of view, there is an accurate in-depth analysis of the phenomenon of witch hunt: this undoubtedly contributes to

The issue of witchcraft is also quite deep-rooted at the international level. A 2009 study by the UNHCR clearly shows the extent of the witch-hunting phenomenon, highlighting how it can be considered a form of persecution for belonging to a particular social or religious group. The phenomenon of witchcraft is still particularly widespread because it corresponds to a mode of management and representation of reality: some African states have found themselves having to deal with the problem by means of witchcraft-related regulations, even at the penal level, although this has not helped to guarantee full protection for the victims.[15] The constant spread of the phenomenon and its danger stems mainly from two reasons: its political valence and its link to the structures of pre-colonial customary law. In relation to its political significance, it must be pointed out that, since it is a belief deeply rooted in common feeling, it has very often been used as a political tool to seek consensus among the masses: some political movements have sometimes supported the phenomena of private vigilantism that have mutated into veritable witch-hunting campaigns, carried out by private citizens within communities, often in response to the need to find forms of scapegoats for calamities, poverty, social malaise or epidemics. According to the 2009 UNHCR Study,[16] dedicated to the topic of witchcraft and its interference with human rights, this happened in Zambia, Malawi and Benin. In South Africa, for another example, during the struggles against apartheid, even the party of the revolution, the ANC, was forced to come to terms with the strong support that some of its supporters, among the population, showed for the practice of witch-hunting. The UNHCR study reports that in the northern provinces alone, at least 389 witchcraft killings were estimated between 1985 and 1995. In 2007, in the province of Mpumalanga, a bill, called the *Witchcraft Suppression Bill,* was drafted to outlaw the practice of witchcraft, witchcraft accusations and regulate the role of traditional healers. The proposed legislation was strongly opposed by two movements, the

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the judge's decision to attribute refugee status to the applicant, i.e. the highest form of protection, giving rise to a different procedural outcome compared to that of the existing jurisprudence on the matter, more oriented instead towards less decisive forms of protection.

[15] As was the case in Cameroon (Section 251 of the Penal Code) and Nigeria (Section 210 of the Penal Code) - see the entry on *Witchcraft* in this Guidebook - in some states, in fact, only witchcraft acts are punished, but not witch hunts.

[16] *UNHCR* study, *2009, Witchcraft allegations, refugee protection and human rights: a review of the evidence,* pg. 32 ff.

South African Pagan Rights Alliance and the Traditional Healers Organisation. The former, an association composed of individuals identifying themselves as 'witch doctors', complained of a real violation of religious freedom. The second represented the association of traditional healers. The influence of these two movements was so great that the South African Law Commission was asked to assess the constitutionality of the proposal. Following this, the Commission initiated a study project on the revision of all witchcraft legislation.

With regard to the second point, however, it is important to consider that witchcraft has always been an important part of the customary law system, regulating the life of communities in pre-colonial times, and was therefore influenced by the phenomenon of colonisation and decolonisation. The belief in witchcraft in the original pre-colonial communities responded, like other human facts, to a regulated system of dispute resolution. Individuals who were accused of performing witchcraft and evil acts towards other individuals were tried before the community leaders. The process of ascertaining responsibility for the witchcraft act was regulated by a system of guarantees that prevented the phenomenon from degenerating. A climate of witch-hunting involving the entire community would in fact have seriously endangered the subsistence of the community itself, so the phenomenon was treated and curbed in function of the prosperous and peaceful survival of the community, as was the case for other disputes.[17] Colonial legislation and jurisdiction, superimposed on these original community structures, often refused to deal with disputes involving accusations of witchcraft, because they were totally incompatible with the cultural principles of law and regulation of existence known in the West. These kinds of disputes have therefore been relegated over time to the shadows, in the absence of any kind of regulation other than that of simple human impulse. It is likely that this

[17] Maakor Quarmyne (2011), for the historical and political evolutions of witchcraft and its links to the customary law system; Cavina M. (2020), describes the relations between witchcraft cases and the colonial administration and in particular reports some episodes in which the phenomenon of witch-hunting and violent mobs, in the early 1900s, had led to a problem of public order for the colonial administration of French Balantacounda: conspicuous masses of individuals belonging to certain villages had begun to undergo mob trials to prove to their community that they were not witchdoctors. These trials required the ingestion of poisons, herbs and other toxic substances, resulting in a public health hazard due to multiple intoxications, infections and deaths.

has allowed witchcraft to become increasingly entrenched in populations, especially rural populations, and to reach the present day strengthened in the post-colonial era by claims of cultural belonging and the consequent political connotations.

2. From a superstition to a practice which impacts fundamental rights. From this perspective, the phenomenon described takes on a value that is anything but a mere superstition. It has its roots in a cultural and legal system that is profoundly different from the legal systems common to the majority, but with features that can be delineated. In assessing the damaging significance of phenomena of this kind, an understanding of the context and the perception of those involved is of fundamental importance. For this reason, these are issues that are well suited to be studied in depth through the consultation of experts (provided for, for example, under Article 8(3 bis) of Legislative Decree No. 25 of 2008).

The actual witchcraft capacity of acts or individuals is not relevant. What is relevant instead is the perception that victims and persecutors have of them. It is, in fact, on the basis of this perception (as highlighted by the judges of legitimacy on the basis of the "*current psycho-physical situation",* the "*cultural and social context of reference",* the *"subjective belief of the applicant to be a victim"* with consequences on his individual and community existence[18]) that the danger or serious harm is likely to materialise. In this sense, the rights involved in the balancing act, which are set against the requirements of security and public order to which the protection system must adhere, are broad and can be found in the constitutional framework of Article 2.

Anthropological insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

The 'new' witchcraft

1. Approaches to witchcraft and 'new witchcraft' in anthropological studies

[18] Cass. Civ. sec. I - 15.05.19, no. 13088.

In this in-depth study, an attempt will be made to analyse the main anthropological arguments put forward regarding witchcraft in the present day. An attempt will be made to reflect on its capacity to adapt to various contexts and on the social importance it assumes, so that useful elements may emerge from a legal point of view that is also complete from an anthropological point of view. In doing so, studies on the subject will be followed, with particular reference to those works that take into consideration the link between witchcraft and its economic aspects, i.e. those studies that refer to the more remote contexts in which globalisation has made available (more or less illusorily) the goods produced by capitalism. Many of these works are part of that current of studies defined as postcolonial studies, i.e. works produced in a period that saw the imposition of the supremacy of the capitalist system internationally, at the turn of the 1970s and 1990s. Among these studies, it is important to point out that the work of the Comaroffs, *Modernity and its Malcontents*,[19] and that of Geschiere, *The Modernity of Witchcraft*,[20] will largely guide us in this reflection.

Studies on 'witchcraft' have long envisioned two dominant typologies: one formed by the works of anthropologists, folklorists and historians of religions, who sought to advance general considerations on the explanation of the phenomenon of witchcraft, mainly by focusing their attention on its social function. The other type of study, on the other hand, was represented by historiographical investigations, which kept away from general considerations to focus on studies of local cases.[21] In the 1970s, however, witchcraft seemed to be only an 'anthropological affair', a phenomenon that had disappeared in the West and was therefore destined to vanish, due to the assertions then in vogue about a supposed continuity between the processes of decolonisation and modernisation.

From then on, however, the issue of witchcraft was destined to resurface, and so it did in the 1980s and, even more so, in the 1990s, which saw the publication of the aforementioned Geschiere text (1997),

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[19] Comaroff, J. and J. L., 1993, *Modernity and its Malcontent. Ritual and Power in Postcolonial Africa*, Chicago, The University of Chicago Press.

[20] Geschiere, P., 1997, *The Modernity of Witchcraft: Politics and the occult in postcolonial Africa*, Charlottesville, University Press of Virginia.

[21] Simonicca, A., 2019, 'The Return of Witchcraft', in P. Clemente, C. Grottanelli, eds., *Comparatively*, Florence, SEID, 189-222.

the title of which is a tangle of terms (especially the occult and modernity) that would hardly have been accepted side by side in previous decades. Today, it can be argued that the areas of interest concerning the subject of witchcraft in recent decades have become numerous, and vary according to the researcher's interests.[22] Witchcraft, that 'social event and/or phenomenon that was thought to have ethnographically disappeared, at least after the 1940s, and certainly after the Second World War',[23] has become a 'fashionable' topic again, but above all a topic whose analysis can be extremely useful in understanding the complexity of 'modernity'.

2. The new witchcraft as resistance to the inequalities of capitalism

Mr and Mrs Comaroff's work on 'Modernity and its Discontents' (1993), is one of the most important and relevant works on witchcraft in the 1990s. The two scholars focus their attention on the problematic relationship between culture and globalisation, blaming the resurgence of witchcraft on the international processes of the economy. According to the Comaroffs, witchcraft presents itself as a kind of 'resistance' to the great suffering and unequal distribution of goods to which the globalisation of capitalism has led, and is capable of translating the incomprehensible and irrational laws of the market into the comprehensible idiom of occult forces, thus finding and carving out a piece of the world to oppose the economic imbalances of capitalism. The Comaroffs argue, in short, that the fact that the economic mechanisms for the distribution of goods do not appear clear to certain populations produces contradictory and unbearable effects, and the response to these inequalities is one of jealousy and envy in which the subjects of certain contexts, feeling impoverished by the market, attribute the causes of social inequality to witches. 'Modernity' here becomes a vehicle for the ideas of witchcraft, a source of powerful new forms of nightmares of the imagination, in which economic processes constitute the material on which they feed.

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[22] Other very interesting and important studies that we could point out include, for instance, that of the French anthropologist Jeanne Favret-Saada (1980; 1989), who emphasises the discursive constitution on which witchcraft would be constituted.

[23] Simonicca, Alessandro, *op. cit.*, p. 194.

Peter Geschiere, in his 1997 work, also analysed the relationship between modernity and witchcraft, albeit with a different perspective from that of the Comaroffs. The main themes discussed by the author, apparently quite contradictory, concern the idea that people accumulate power and wealth through witchcraft, and that the fear of witchcraft cancels (or at least this is his intention) the inequalities between people and induces them to share their resources. Geschiere points out that the villagers in the south-west of Cameroon, in which he studied, regard witchcraft as a tool used by the elites to achieve their own ends, while for the elites it is a weapon of the weak against the state; thus, while witchcraft strengthens power, it also weakens it.

According to Geschiere, there is a profound conceptual continuity between the discourse of the past and the sentiment of the present; that is, the author believes that witchcraft is an expression of older notions and images that reflects and reinterprets new circumstances. It is a way of redistributing both wealth and bad fortune, and would create a kind of occult economy that has a dual character: on the one hand it commiserates new means to achieve otherwise unattainable goals (such as improving life in situations of extreme social exclusion), while on the other hand it gives voice to the desire for punishment and serves to eliminate those towards whom one feels envy, i.e. to annul inequalities.

Picking up on the Comaroff thesis, it too considers the economic component in relation to witchcraft to be important, but from a different perspective than Geschiere. The Comaroff theory emphasises the strong change that occurred in the second half of the 20th century and the contrast with the transition from industrial capitalism to post-capitalism. The Comaroffs attribute the 'rebirth' of witchcraft to processes of international economics; for them, the witchcraft dynamic belongs to the register of responses, typical of the Third World, to the tendencies of globalism, which indeed generalises the commodity, but at the same time drastically increases economic and social differences. Witchcraft is therefore a form of resistance that occurs through a reshaping of the local within the grids of the global.

Looking at Geschere's and Comaroff's works, it becomes clear that the most stimulating attempts to renew the study of witchcraft and to understand its extraordinary modernity come from authors who, by not reducing the discourse of witchcraft to an opposition between good and evil and by distancing themselves from the moralising discourse, have best succeeded in understanding the ambiguity of representations of witchcraft and their persistence in contexts characterised by new

relations of production and power. These authors attempt to show how the discourse on occult forces intervenes in the uncertainties of modernity through resistance. Thus, witchcraft, which may seemingly be fleeting and intangible, destined to have no location as witches are everywhere, fly, and never take root, is actually a tangible support tool for many social groups that use it as resistance to manage uncertainty.

This apparent 'intangibility and invisibility' of witchcraft, in the eyes of a careful scholar and its proper analysis, can therefore be a valuable tool for understanding numerous aspects, and can make us observe how witchcraft can be indicative of characteristics of our modernity that we would otherwise find difficult to grasp.

With all its ritual and magical practices of the occult, witchcraft presents itself as a revealing spy, as a storehouse that encloses within itself all those economic-cultural contrasts and 'resistances' that are not made explicit, but which manifest themselves in the symbolic systems of occult practices. It also allows us to reflect on the social actors' interpretation of reality, on the understanding of situations at the micro-social level and, as the Comaroffs have shown, also at the macro-social level.

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Comaroff and Geschiere's readings are indispensable for understanding witchcraft in the contemporary age. Their decades of experience in ethnographic study provide a heterogeneous and clear perspective of the phenomenon in the present day, i.e. to understand the ability of witchcraft to adapt to changing times and contexts.

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2. Male circumcision

Cases: minors, aged between 8 days and puberty, whose foreskin is partially or totally removed

Cultural test

1. Can the category 'culture' (or religion) be used? The categories of culture and religion can be used because the practice, to which specific meanings are attributed, takes place within certain religious and ethnic groups.
2. Description of the cultural (or religious) practice and group. The practice of male circumcision, i.e. the partial or total removal of the foreskin of the penis, has been documented since around 3000 BC. There are two types of circumcision: so-called cultural circumcision and religious circumcision. This is a widespread practice in different ethnic/religious groups, with a very wide geographical spread, so much so that it is estimated that more than 30%, if not almost 40%, of the global male population is circumcised. The age of children undergoing circumcision can vary widely: neonatal circumcision is common in the Jewish religion (in which it is practised by the eighth day after birth), in the United States, Canada, Australia and New Zealand, and in many of the countries of the Middle East, Central Asia and West Africa, while in other countries the practice is performed in childhood to late adolescence. With regard to **religious circumcision**, the practice is usually aimed at preparing the child for life in its religious community and is practised in the Muslim religion, in the Jewish religion, among Coptic Christians and Ethiopian Orthodox Christians. In the Jewish religion, this ritual derives from a covenant made between Abraham and God, whereby circumcision becomes the physical sign of belonging to the chosen Jewish people. In the Muslim religion, there is no specific mention in the Koran: however, Muslims practice circumcision as a confirmation of their relationship with God (it is the largest religious group that practices circumcision for religious reasons). Finally, we find religious circumcision among Coptic Christians and Ethiopian Orthodox Christians, two of the oldest forms of Christianity, of which circumcision remains one of the characteristics. As far as so-called **cultural circumcision** is concerned, i.e. practised not for religious reasons, this is also an extremely widespread practice. The main reasons behind it are related to emphasising gender

differences and thus emphasising the separation of the male and female worlds - thus with a *gendering* function, aimed at culturally and symbolically determining the child's gender identity - by affirming membership of a particular group. Male circumcision aims at the social effect it produces, rather than the physical modification per se. It is often a means to access certain gender-related social prerogatives and consecrates and establishes the difference between men and women. Other meanings are related to the 'improvement' of the child's body or status through the ritual.

We find forms of cultural circumcision in most African countries, in Korea, in the Philippines, among Australian aborigines. It is also widespread in the United States (with about 80% of men being circumcised), Canada and New Zealand. In these countries, the practice initially spread in Puritan contexts, which introduced infant circumcision in the 19th century to prevent or compensate for 'immoral behaviour', such as masturbation. The practice then took root, partly due to the belief that it constituted a good hygienic and disease-preventing norm.

3. Embedding the individual practice in the broader cultural system.

Ritual male circumcision, understood in a cultural sense, is closely linked to a **group cultural continuity**, a high value associated with masculinity and a clear differentiation between the male and female genders, as well as a sense of belonging and group identity. It is also linked to a high value attached to the status of the individual and to adulthood, clearly distinguished from childhood. It assumes an important role within a context of negotiating social relations between and within different genders and generations.

From a religious point of view, circumcision is part of a broader context that attaches great importance to religious rites, membership of the religion itself, and the relationship with God and the professed faith.

4. Is the practice essential (to the survival of the group), compulsory or optional?

It depends on the context in which it is practised. As far as **cultural circumcision** is concerned, in some groups it is considered obligatory from both a personal and communal point of view. **Not being circumcised could lead to social exclusion and loss of a certain status**. In other cases, the practice is optional and open to personal choice: the frequency with which one chooses to practice it shows that

it is an automatism, a conforming to the majority. In the United States, it is optional, but there is a strong social habitus that leads to its practice.

In the case of **religious circumcision**, the practice is considered obligatory as far as Judaism is concerned, as it is an essential part of belonging to the religion itself, and for Coptic Christians. For the Islamic religion, it is compulsory only among one of the six Islamic schools, the shafi'ita, while in the others it remains a strongly encouraged traditional practice, as it is essential to be able to make the pilgrimage to Mecca, one of the pillars of the Muslim religion.

5. Is the practice shared by the group or is it contested?

It can be said that the practice of circumcision is **generally shared by the group to which it belongs** although among Jews, Muslims, and secular Americans alike, activist movements for ending of the practice are increasing on the argument that it is a violation of children's rights. Particularly **in the United States,** where **about 80% of men are circumcised**, the practice of circumcision has been and is the subject of controversy and debate and is sometimes challenged on ethical or medical grounds. On medical grounds, it is disputed on the harm/benefit ratio (benefits attainable through regular hygiene and prophylaxis), the potential effects on sexuality (since the foreskin is part of the highly innervated skin system of the penis, its removal **would reduce sexual pleasure**), and the possible occurrence of complications, mainly due to the manner in which circumcision is performed (place where it is done, instruments used, age of the child, and professionalism of the circumciser). From an ethical point of view, the practice is sometimes challenged on the grounds that it leads to an anatomical alteration that is possibly harmful to a minor, whose consent is given by the parents, and to the **permanent and irreversible modification** of the genital organ.

6. How would the average person from that culture (or religion) behave?

Parents belonging to the groups in which the practice is performed would have the child circumcised.

7. Is the subject sincere?

In this case, the sincerity of the subject is to be ascertained on two levels: the existence of certain cultural and/or religious convictions and the non-existence of a detrimental intention towards minors or unjustified forms of violence. An investigation on both aspects would be

useful to ascertain:

- the **value of circumcision** in the subject's cultural or religious system;
- the **manner in which the** operation was carried out and, if applicable, the reasons that led to the operation being carried out in unsafe conditions: the social and economic conditions of the persons involved; whether or not, in the place where the event takes place, there is a cost-sharing system, including regional cost-sharing, for carrying out the operation in suitable facilities;
- the **good faith of the parent** and his or her belief that he or she has relied on a person with expertise in the matter, even if not a doctor, because he or she may be recognised as such within the community.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

The practice of male circumcision is not particularly widespread in Italy, outside the religious communities where it is prescribed. It is true, however, that parallels can be found, exclusively on the symbolic level of body *gendering*, with the custom of piercing girls' ears shortly after birth. This practice, as male circumcision is often understood, is a process aimed at preparing the girl to fully assume her female gender. While comparable on a symbolic level, it is true that the implications on a physical and ethical (and potentially also psychological) level are extremely different, since in the case of circumcision it is an operation on a genital organ.

A further counterpart can be found in cosmetic surgery on minors (e.g. breast augmentation surgery). While it is true that in the case of cosmetic surgery there is an expression of consent on the part of the minor in question, it is possible that, given their minor age, they may not be fully aware of the physical/psychological implications possibly arising from the surgery they undergo.

9. Does the practice cause harm?

Male circumcision constitutes an **alteration to the minor's physical integrity** and is considered by most of the scientific community to be a 'medical act', which determines an anatomically functional modification of the male genital organ and which must therefore be performed according to certain surgical practices, under optimal conditions of asepsis and hygiene and by persons with professional competence.

According to the prevailing opinion, it does not **lead to an**

appreciable and permanent diminution of the functions of the organ concerned and is not harmful in terms of its effects on the physical and mental state of the child or the individual who suffers it.

In Italy (National Bioethics Committee, 1998), it is considered **compatible with the civil law regulation of acts of disposition of one's own body** precisely because of its inability to cause a permanent diminution of the physical integrity of the penis. The main argument of the Italian Bioethics Committee is that circumcision does not lead to an appreciable and permanent diminution of the functions of the organ concerned (**performing the sexual act**) and is therefore not harmful in terms of its effects on the physical and mental state of the child or the individual who suffers it.

To sum up, in the Italian legal system, it is not the practice itself that causes harm, but its performance by persons of dubious competence and/or in unsuitable contexts, such as in the home. It is in these cases that consequences such as permanent injury and in the most serious, though particularly rare, cases, death can result from the practice.

Some medical studies have claimed an effectiveness of the practice as an additional measure to prevent the development of certain infections of a bacterial or viral nature, the transmission of HIV or other sexually transmitted diseases. However, according to the scientific community, neither the prophylactic efficacy of circumcision nor its permanent impairment of the functions of the male genital organ can be stated with certainty to date.

The World Health Organisation, in fact, although not indicating it as a recommended practice, defines it as almost totally harmless and low risk, especially when practised in infancy.

Against those arguments, some medical studies observed that the forseskin removal **reduces sexual pleasure**, and that "the foreskin is a sexual organ in its own right, which is ablated forever by the act of circumcision" (Ball 2006: 177). As the function of the penis is not only to perform a sexual act but also to obtain pleasure from it, the practice should be considered harmful, as diminishing sexual pleasure.

10. What impact does the minority practice have on the culture, constitutional values, and rights of the (Italian) majority?

The practice of male circumcision is perceived by the host group with a general diffidence. Unlike, for example, in the United States or the United Kingdom, it is not particularly widespread in the European population except among certain minorities.

This mistrust is slightly smoothed out when the practice is embedded

in minority religious contexts which find a more or less established recognition in society, such as the Jewish or Muslim ones: in this case, there is a tendency to accept the fact that **the practice determines membership of that religious group**, and therefore is carried out for strictly religious reasons.

Such distrust is instead accentuated when the practice is embedded in cultural and religious contexts different from those referred to, as for example among migrant populations from Africa, sometimes even belonging to Christian cults. In this case, circumcision appears as a treatment imposed on minors, in deference to traditions that are retrograde and scarcely respectful of the well-being of the youngest of the population, and even as potentially dangerous.

The practice not only relates to values inherent in the sphere of the child's physical integrity and health, but also intersects religious freedom and cultural identity, of the child as well as the parent, going so far as to touch upon the issue of the transmission between parents and children of a system of cultural and religious values and its possible limits.

From a legal point of view, male circumcision falls under the discipline of acts of disposition of one's own body under Article 5 of the Civil Code and is considered compatible with the limits set therein (permanent impairment of physical integrity, morality and public order) if performed *lege artis* by competent medical personnel (with the exception of Jewish circumcision, which is performed by the '**mohel**', a specially trained and authorised minister of religion for whom **registration in a register** has recently been introduced) and in appropriate facilities.

Circumcision carried out for religious reasons (Islam, Judaism) is considered to be an expression of the right to religious freedom, as set out in Article 19 of the Italian Constitution, and, when practised on one's own children by the express will of the parents, an implementation of the latter's right and duty to educate their offspring also from a moral and religious point of view, protected by Article 30 of the Constitution and 147 of the Civil Code.

Circumcision carried out for 'ethnic-cultural' reasons is not considered to be an expression of religious freedom, but it could be brought under the parental rights referred to above and in any case, given the jurisprudential development on the subject of cultural rights as an expression of the latter, which are also considered constitutionally protected (Article 2 of the Constitution and others).

In terms of criminal law, the objectively harmful conduct engaged in

by the circumciser and the child's parents for religious reasons is held to be excused by the exercise of the right to freedom of religion and the discipline of consent.

Ethnic-cultural circumcision is **not deemed to be exempted**: the performance of the operation by non-medical personnel and outside health facilities entails the offence of abusive exercise of a profession, pursuant to Article 348 of the criminal code, which can also be extended to the parent who authorised the act, in addition to other possible offences concerning physical integrity in the event of damage resulting from the operation (injuries, death).

The act is always punishable in cases of negligence, inexperience and imprudence and where serious and permanent consequences for the child result**.**

11. Does the practice perpetuate patriarchy?

On the basis of the meanings described above, the practice would not seem to perpetuate patriarchy mainly because it is a practice intended for the male gender and in this sense does not act on the sphere of women's rights. However, there is no shortage of positions that sees patriarchal elements in it.

A **first position** is internal to Jewish feminism and argues that **the practice would result in a privileged position of male individuals** over women, precisely by virtue of the particular ceremony of covenanting and entry into the religious community, intended for the former and not the latter. According to this view, the practice, perhaps more than any other, would highlight the intensely gendered quality of traditional rabbinic Judaism by focusing on the penis.

A **second position** argues that circumcision perpetuates **a form of patriarchy that takes the form of fathers' control over their sons,** who cannot decide for themselves and find their bodies perpetually scarred because of the parental decision.

Within this position, it was revealed that tolerance of male circumcision gives rise to **reverse discrimination in** that it results in a lower level of protection of physical integrity for male individuals than for female individuals protected by the prohibition of female genital mutilation. According to this position, both practices are patriarchal and should be prohibited. Within **Jewish feminism,** for example, a proposal has been made to equalise the position of boys and girls by stipulating that the current naming ceremony (a minor, female-only celebration by which girls receive their names and are welcomed into the Jewish community) be extended to male infants as well, thus

equalising the positions. This would eliminate the patriarchal double implication of circumcision: the exaltation of the male child alone as the protagonist of the covenant with God and the permanent mark on the body decided by the parents without the son's consent.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

The good reasons the minority presents for continuing the practice can be summarised as follows.

Firstly, in adherence to what has been defined above, performing the practice becomes for minorities a necessity of belonging to that cultural and/or religious group: it marks the entry into a religious community, sometimes sealing a form of alliance with one's god (think of the Jewish and Islamic cases); it determines the entry into a cultural community (as in the case of some minorities of African origin), access to an entire system of values; it defines and orients the individual towards the role he or she assumes within his or her community (*gendering* function). Secondly, when carried out on minors through parental consent, it constitutes the fulfilment of that right and duty of parents to educate their offspring according to a given cultural, religious and value system, without which the transmission of a sense of belonging to a given community, and potentially the community itself, would fail.

In a legal system where the exercise of such rights is made stronger by the Supreme Court's recognition of cultural rights as inviolable (Criminal sect. III, 29 January 2018, no. 29613), the choice to perform the practice arises as an equally valid alternative: since circumcision is internationally recognised as a practice that, although invasive, does not result in permanent diminution of the minor's physical integrity, it falls within the limit sanctioned for the exercise of cultural rights.

Proposed balancing act: As male circumcision causes a permanent change in the sexual organ, and is performed without the child's consent, the child's rights to physical integrity, sexual freedom and consent to medical acts ideally should prevail in the balancing act against the freedom of religion and education vested in the child's parents. Nevertheless, the criminalization of parents that perform male circumcision is not a solution, as the child would then be saddled with yet another violation to his/her rights (e.g. right to a family) should the parents be jailed. The judicial status quo that generally acquits parents who perform male circumcision (in safe conditions) can be preserved,

even while making clear through judicial opinions that the practice infringes on children's rights.

Legal Insights

Despite widespread regulatory non-interventionism[24] on the subject of male circumcision, it is possible to identify a homogeneous attitude of tolerance on the part of the various European and Western legal systems: the performance of the practice is seen on the one hand as an expression of freedom, especially religious freedom, and on the other hand as the exercise of one of the powers inherent in parental responsibility, that of the right and duty of parents to transmit their cultural and religious values to their offspring.

Male circumcision is usually considered a 'medical act' by which, even to a minimal and tolerated extent, the physical integrity of the individual or minor is undermined. Therefore, its lawfulness is often subject to the application of certain precautions and usually assisted by the rules governing medical treatment.

In general, there is therefore a balancing act between the value of the physical integrity of the individual and the child involved, as well as his or her right to health, and that of his or her or their parents' religious and/or cultural freedom. The latter are guaranteed, provided that, through certain precautions (e.g. respect for certain accredited practices in the medical-surgical sphere, the regulation of parents' consent, etc.) suitable for reducing the risks inherent in the practice, a minimum protection of the child's rights at stake is also ensured.

In Italy too, male circumcision is considered compatible with the discipline of Article 5 of the Civil Code concerning acts of disposition of

[24] In Europe only Germany and Sweden have adopted legislation on ritual male circumcision. In Germany, circumcision for cultural reasons is regulated in Section 1631 BGB. If carried out in the first six months of life, the practice may be performed not only by physicians, but also by persons commissioned by the religious community and competent to do so. The issue is brought under civil law by the German discipline, among the powers included in the exercise of parental responsibility and specifically, in the right and duty of care and protection of parents towards minors. In Sweden, male circumcision is regulated by Act No. 499 of 2001 and prescribes that it may be performed for ritual purposes on minors up to two months old, by a doctor or other person authorised by the Minister of Health, in the presence of a doctor or an anaesthetist. Outside this hypothesis, it must always be performed by a doctor. (Garetti, 2017).

one's own body.[25] However, in terms of criminal law, as emerges from a well-known ruling on the subject,[26] the balance seems to be differentiated according to whether one is referring to a 'religious' or 'ethnic-cultural' circumcision.

Religious circumcision, which, moreover, is identified in the pronouncement mostly with Jewish circumcision, is afforded absolute protection by Article 19 of the Constitution on freedom of worship and by the Law of Agreement between the State and the Jewish Community (Law 101/1989). In this case, the predominantly religious nature of the act is affirmed and the medical reservation does not apply.[27]

In relation to ethno-cultural circumcision, performed apparently for reasons of ethnicity, the ruling in question excludes the configurability of a cultural exemption, finding no basis in the legal system, although in the case at hand it recognises non-punishability due to excusable ignorance of the criminal law.[28] Cultural rights have very little place in this issue.

When compared to other cultural practices that are prohibited on the basis only of their potential risk,[29] it is actually surprising that the

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[25] National Bioethics Committee, 1998.

[26] Cass. Pen. sez. VI - 22/06/2011, no. 43646.

[27] Jewish circumcision is not carried out by doctors but by special ministers of the cult, the Mohalim, who have professional skills ascertained by accredited bodies in the Jewish community and for whom a special register is established. The conduct exercised by the Mohel, as well as that of the parents requesting the execution of the operation on the minor, could never integrate, according to the case law under examination, the crime of abusive exercise of the profession under Article 348 of the Criminal Code and would be justified, as is the case for the objectively harmful act, by the exercise of a right of religious freedom (Article 51. Criminal Code) and the discipline on consent (Article 50 of the Criminal Code).

[28] The case concerned a Nigerian mother who had subjected her infant son to a circumcision operation, turning to a person with no medical-professional competence and agreeing to have the operation performed in a domestic setting. The child then suffered haemorrhages following the operation, which led the mother to turn to the appropriate medical facilities to limit the damage of the post-operative consequences. The Court of legitimacy recognised, unlike the courts of merit, the non-punishability for *ignorantia legis, pursuant to* Article 5 of the Criminal Code, recognising the excusability of the lack of knowledge of criminal law due to the Nigerian mother's ethnic origin and non-integration in Italy.

[29] In Italy the kirpan, the Sikh ritual knife, has been prohibited as is considered violating security although no one Sikh never used the kirpan to strike anybody (see kirpan in this Guidebook). Kissing one's child genitals for cultural reason is considered impairing the sexual freedom of the child, although no harm is proved

Italian legal system allows religious male circumcision while never questioning the permanent change caused to the physical integrity of the minor, and his lack of consent: probably the familiarity with the practice brought to Italy centuries ago by the Jewish community, and the political consequences of prohibiting a practice which is already so widespread contribute to the status quo. The question of harm focuses, in Italy, on the ways in which male circumcision is performed. In the prevailing discourses within Italy, as well as in Europe and the West, it is not the practice itself that causes harm, but its performance by persons of dubious competence and/or in unsuitable contexts, such as in the home. It is in these cases that consequences such as permanent injury (e.g. the penis is cut more than needed by the ordinary circumcision) and in the most serious, though particularly rare, cases, death (e.g. by hemorrhage) can result from the practice.

The Italian balancing scheme produces, in our opinion, some inconsistencies.

Firstly, the distinction between religious circumcision and ethno-cultural circumcision omits the fact that both are performed without child consent and both produce a permanent alteration of the child's genitals, therefore permanently affecting his physical integrity even if the circumcision is well performed. Judgements that reflect more on the rights of the child could help to put questions of the legitimacy of the practice back into the intercultural debate.

Secondly, the distinction between religious and cultural circumcision is not sustainable anymore, in the light of the inviolability of not only religious but also 'cultural' rights, recognised in 2018 by the Supreme Court of Cassation.[30] After such recognition, an abstract 'cultural', as well as religious, exemption could apply.

Even staying within the judicial discourse that maintains the distinction between religious and cultural circumcision, a greater use of anthropological data would be desirable in order to assess whether the circumcision in question is perhaps religious in nature, although not conducted in the context of the Islamic or Jewish religions.[31]

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when the practice is performed as a gesture of affection without pedhopylic intents (see the entry Displays of affection concerning children's genitals in this Guidebook).

[30] Cass. Pen. III Sec. of 29/01/2018 No. 29613.

[31] This is what emerges on the basis of the anthropological data collected in the file on the practice of some Christian groups from sub-Saharan Africa.

Another inconsistency seems to be the different treatment between Islamic and Jewish circumcisions, even if both are religious. Islamic circumcision, being of religious nature, would be fully covered by the protection of Article 19 of the Constitution, but it is always theoretically prosecutable for abusive exercise of the medical profession under Article 348 of the criminal code if not performed in healthcare facilities as there are no certified circumcisers in Islam.[32]

The 'reservation of profession' (the requirement that circumcision is performed by a doctor) as a derivative of the 'medical' conception of the act of circumcision is required in order to guarantee standards of safety and protection of the psycho-physical well-being of the child. Those standards, in the case of the Jewish religion, are met, according to the judges, by objective factors such as the fact that the practice is performed only by **specially trained ministers of religion**, that it is performed only on newborn babies and is therefore less dangerous, that it must be officially certified and therefore the use of clandestine practices is excluded.

Nevertheless this requirement (the fact that the circumcision is performed by a doctor or similar accredited religious figure) has not solved the problem of 'clandestine' operations, which are ascertained to account for around 35% of those performed in Italy.[33] Clandestine male circumcision are sometimes a consequence of the fact that the family does not have the money to perform the **operation in private health facilities** and the majority of the Italian hospitals do not cover the costs of the practice.[34]

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[32] In the Islamic community, circumcision procedures are not assisted by an organisational and census system of the circumcisers as is the case in the Jewish system. Germany and Sweden try to solve this problem thus: although they provide for forms of control over circumcisers, allow the practice to be carried out also outside health facilities and by ministers of religion provided that they are competent and that the intervention is carried out in the first months of life.

[33] Parliamentary Committee on Childhood and Adolescence, Report on the problems related to the practice of ritual circumcision of minors, adopted in the afternoon session of 7 July 2021, Rapporteur: Paola Boldrini.

[34] The Italian Parliamentary Committee on Childhood and Adolescence, Report on the problems related to the practice of ritual circumcision of minors, adopted in the afternoon session of 7 July 2021, Rapporteur: Paola Boldrini does not condemn male circumcision per se, but is rather concerned to promote safe circuncision under medical supervision. The report highlighted that in Italy only in Tuscany and the Marches are the costs for circumcision fully covered by the SSR (Health public service). In Calabria, Campania, Apulia, Basilicata, Sardinia, Molise, Abruzzo,

The criminal rule providing for the professional exception (if performed by a doctor or religious professional) does not address the issue at the root of male circumcision (the infringement of children rights), which actually is a problem to be addressed by the legislature through a dialogue with the groups that perform it and/or policies aimed to discourage the practice, and through attempts to make parents aware of the child's rights (e.g. consent, sexual freedom/pleasure, the right to an intact body etc.).

Interventions on the matter, already urged by the Italian Parliamentary Commission for the Protection of Childhood and Adolescence in a special report,[35] focus on safety in performing the practice, not on its abolition. Similarly, the Parliamentary Assembly of the Council of Europe,[36] in its request that states adopt specific protection tools in relation to those practices that involve interference with the physical integrity of minors, including male circumcision, does not clearly declare if by 'physical integrity' it refers to the right to intact genitals or the fact that the practice should be performed with a safe procedure. In fact, on one hand, it condemns male circumcision as a violation of children rights (sec. 2), while on the other hand it urges states to allow it in public health facilities to avoid risk to the health of the children (sec. 7.5). Probably, the need to prevent risks for the health of the children subjected to circumcision by non-professionals is so urgent that it postpones the debate on the abandonment of the practice *per se*.

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

Liguria, Lombardy, Trentino and Valle d'Aosta it is not possible to perform circumcision in public facilities (except in some cases with the contrivance of phimosis, in this regard see *Cass. Pen. sez. V - 18/06/2015, no. 35026*). In Piedmont, Veneto, Friuli Venezia Giulia, Emilia-Romagna, Latium, Umbria and Sicily it is possible to perform ritual circumcision by means of a hospital stay and if covered by insurance.

[35] Ibid, footnote 36.

[36] Resolution 1952(2013), adopted by the Parliamentary Assembly of the Council of Europe, on 1.10.2013, entitled *Children's Rights to Physical Integrity.*

1. Main groups where the practice is widespread

Male circumcision, or the partial or total removal of the foreskin of the penis, is one of the oldest and most widespread surgical procedures in the world and is practised for many reasons: religious, cultural, social and medical.

Although the procedure is sometimes medically indicated (as in the case of phimosis or foreskin shrinkage), the practice is usually performed for non-therapeutic reasons, which include cultural and religious reasons. In addition to religious or ethnically-based motivations, these include the perception that circumcision improves hygiene and reduces the risk of infection, conforming to common imagination, a supposed improvement in sexual performance, and aesthetic preferences (Coene, 2018).

While traditionally circumcision was understood as a sign of cultural identity or religious importance, with the progress of surgery in the 19th century and the increase in migration in the 20th century, the procedure was introduced in some cultures that previously did not practice circumcision for both health and social reasons (e.g. the United States).

Jewish Religion: The rationale behind the circumcision prescribed by the Jewish religion is found in the Jewish holy book, the Torah, which records the stipulation of a covenant between Abraham and God, the outward sign of which is circumcision for all Jewish males: "This is my covenant that you must observe, a covenant between me and you and your descendants after you: let every male among you be circumcised. You shall let the flesh of your foreskin be circumcised, and this shall be the sign of the covenant between me and you" (Genesis 17:10).

Male circumcision continues to this day to be practised almost universally among Jews as a physical sign of belonging to the chosen Jewish people. In fact, almost all Jewish male infants in Israel, about 99% of Jews in Great Britain and 98% of Jewish men in the United States of America are circumcised (WHO, 2007).

Traditionally, Jewish babies are circumcised by a *Mohel,* i.e. a specially trained traditional circumciser, during a ceremony called *Bris Milah*. The surgical training of a *Mohel* may include anatomy, surgical technique, minimising complications and everything related to pre- and post-operative care (WHO, 2007).

Muslim religion: Muslims are the largest religious group practising male circumcision. As part of their faith, Muslims practice circumcision

(*khitan*) as a confirmation of their relationship with God; the practice is also known as *tahera*, meaning 'purification'.

With the global spread of Islam from the 7th century A.D. onwards, male circumcision was widely adopted by peoples who previously did not have circumcision. In some areas, male circumcision was already a cultural tradition before the arrival of Islam (e.g. some areas of West Africa and South-East Asia). In other regions, however, Islam became a determining factor for circumcision.

Unlike Jewish traditions, for which circumcision is clearly recommended on the eighth day after birth, Islamic traditions do not provide specific recommendations on the timing of the ritual; consequently, the age of circumcision among Muslims varies widely. This may depend on family traditions, region, or country of origin.

In the Muslim religion, the methods used for ritual circumcision vary widely and we can find the practice performed in infancy, as well as at a later age, resulting in greater risks.

In Pakistan, for example, babies are generally circumcised in hospital a few days before discharge after birth, while those born outside the hospital are circumcised between the ages of 3 and 7. Similarly, in Turkey, Muslim boys are circumcised between the eighth day after birth and puberty, while in Indonesia, they are generally circumcised between the ages of 5 and 18 (WHO, 2007).

United States, Canada, United Kingdom, Australia: Some English-speaking countries - the United States, Canada, the United Kingdom, and Australia - introduced childhood circumcision in the 19th century, often recommended to prevent or compensate for 'immoral behaviour' such as masturbation, nocturnal incontinence, and venereal diseases, particularly syphilis (Carpenter, 2010; Darby, 2003; Friedman, 2001). While incidence declined in the UK, Canada and Australia around the turn of the 20th century, the prevalence of circumcision has remained incredibly high in the United States, where to this day approximately 80 per cent of men and boys are circumcised (Morris et al., 2016), for reasons of medical prophylaxis and social desirability, thus conforming to the majority.

Philippines: Although it is unclear how it evolved into a generalised custom, circumcision is still an integral part of childhood for Filipino men, so much so that over 90% of men are circumcised. Compared to previous generations, for whom circumcision was limited to the traditional procedure, the current generation is routinely circumcised

by traditional or medical means and the age of the child/boy may vary between infancy and adolescence. In the case of traditionally performed circumcision, it is often performed without anaesthesia by laymen, using common tools such as a knife or household razor. The medical procedure, on the other hand, is performed by medical professionals in specialised medical facilities and clinics, with equipment and anaesthesia, in the backyards of homes, or in premises such as municipal halls and town halls. It is not known how many Filipino males have been traditionally or medically circumcised; in any case, circumcision in the country is essentially understood as a ritual, symbolising a rite of passage from childhood to adulthood, linked to an imagery of masculinity (Lee, 2006).

Korea: South Korea has a high circumcision rate, with about 60% of men circumcised. Interestingly, however, the practice of circumcision was introduced fairly recently, starting in 1945, despite the fact that circumcision is directly contrary to the long and strong Korean tradition of preserving the body as it was given by the parents. Most circumcisions are performed in local clinics by practising physicians, usually on boys as young as 12 years of age (in any case between the ages of 9 and 14), based on alleged hygienic reasons and prevention of disease transmission (Pang, Kim, 2008).

2. Criticism of the practice

Although there is widespread legal tolerance of religious/cultural male circumcision, it is nevertheless true that in recent decades the practice has been challenged to some extent, within several groups and disciplines, on ethical, medical or personal grounds, especially in Western countries.

The arguments used to support a position against the circumcision of boys are very similar to those used for decades to raise awareness about the circumcision of girls in anti-FGM campaigns: the focus on harm, medical risks and long-term medical consequences, and the claim that circumcision violates children's rights.

Today, we find one of the strongest movements opposing the circumcision of boys and children in the United States, a country where approximately 80% of men are circumcised. From the first isolated voices in the 1970s opposing the circumcision of boys in hospitals, it grew into a more entrenched movement that formed and consolidated in the 1980s and 1990s. While some groups called for a ban on the practice, others questioned its routine application, leaving room to

continue performing it on religious and cultural grounds (Johnsdotter, 2018). There are also some tensions between the European context, where the incidence of male circumcision remains rather low, and that of the United States. The American Academy of Pediatrics - the largest professional association of paediatricians in the USA - issued a statement in favour of male circumcision in 2012, claiming that the health benefits (such as prevention of urinary tract infections, HIV contraction, transmission of certain sexually transmitted diseases and penile cancer) outweigh the possible risks of the procedure. In response, 38 physicians from 16 European countries wrote an article entitled 'Cultural bias in the AAP's 2012 Technical Report and Policy Statement on male circumcision', published in the journal *Pediatrics*, of the Academic Pediatric Association (APA), highlighting the cultural bias (prejudice) behind the justification and normalisation of non-therapeutic circumcision in the United States (Johnsdotter, 2018). Indeed, it is argued that there is a clear cultural bias in the evaluation of the available evidence on possible benefits and harms (Coene, 2018). Even if one were to agree that the health benefits outweigh the possible risks in this case, these benefits would only occur at a later stage in the individual's life and thus not legitimise the practice being performed on non-consenting children. Furthermore, it is argued that many of the health benefits can also be achieved by other less invasive means, such as better hygiene and the use of condoms (Bronselaer et al., 2013). With the increasing contestation of the benefits of circumcision for non-medical purposes on newborns, at least in the Western context, the human rights discourse, in particular the children's rights perspective, thus emerges as the main ideological resource employed.

"There is a growing consensus among physicians, including those in the United States, that doctors should discourage parents from circumcising their healthy children, because non-therapeutic circumcision of minor children in Western societies has no health benefits, causes post-operative pain, can have serious long-term consequences, is a violation of the United Nations Declaration of the Rights of the Child, and conflicts with the Hippocratic oath: primum non nocere: First, do no harm" (Frisch et al, 2013, p. 799).

It is in fact a procedure that intentionally alters the male genital organ of children who do not give their consent, without a specific medical indication. The removal of tissue from a healthy organ of infants or

children therefore raises important ethical questions regarding consent, autonomy and bodily integrity, as does female circumcision.

In several Western countries, including in Europe (Sweden, the Netherlands, Denmark, etc.), the public discourse is in fact increasingly characterised by a conceptual juxtaposition between male and female circumcision. While once both practices were not considered problematic, with a subsequent development of currents strongly critical of female circumcision, today we find many actors arguing that both practices are highly questionable and should be abolished, based on similar ethical grounds (Johnsdotter, 2018).

3. Male and female circumcision: two different approaches

It has been suggested that in many societies female circumcision has been introduced as an imitation of the male circumcision ritual (Cohen, 1997), assuming the same symbolic character, i.e. preparing the child for the religious life of one's community, accentuating gender differences, or perfecting gendered bodies. In some cases, even the terminology used is the same. In Egypt, for example, the Arabic word *khitan* is used for both male and female circumcision, and the same applies to the Swahili word *kutairi* in Kenya (Johnsdotter, 2018).

Although there are valid reasons to differentiate between the discourses (primarily because of the wide variety of procedures in the female context, ranging from the least to the most invasive, as opposed to the practice of male circumcision, which can be identified as a single type of procedure), there is, however, a common factor to consider: both male and female circumcision are procedures that intentionally alter the genital organs, for non-medical reasons, of children who do not give consent. In both cases, tissue (in the female case, other types of modifications are also included) is removed from the vulva or healthy penis and, when performed on infants or children, raises ethical challenges regarding consent, autonomy and notions of bodily integrity.

For global health organisations such as the WHO, male circumcision is fundamentally different from female genital practices and similar positions on the incomparability of the two practices have been expressed in the past by feminist and women's rights activists. In these discourses, female genital practices have predominantly been framed as harmful cultural practices that negatively impact the health of women and girls and support gender inequality, discrimination and violence against women in society. In contrast, male genital practices have been interpreted as beneficial to health and not harmful in any other way.

Until recently, in fact, research on male circumcision assumed and focused primarily on the health benefits of circumcision (Bell, 2015), in stark contrast to FGM/C, for which instead studies have focused exclusively on the possible harms and risks.

It is evident, however, that while female genital modification has become the subject of extensive public and political debate leading to its criminalisation, the same has not been the case with male circumcision, which is now accepted in Western legal systems.

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3. Parenting

Cases: judgments of inadequacy of parenting skills (family law) for various behaviours that are different from majority practices: e.g. parents entrusting their children to the care of older siblings or other extended family members (child neglect); care activities perceived as lax or, on the contrary, excessive.

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes, the category culture can be used: the way of parenting, both in terms of behaviour and of emotions/feelings associated with the role, is learnt within the socialisation group, where it is transmitted intergenerationally. However, it is important to bear in mind that it is not possible to specifically identify a fixed and unequivocal relationship between certain parenting methods and a certain culture, as other complementary and variable factors come into play, such as the socio-economic conditions of the family in question, possible personal situations/fragilities, traumatic events related to a possible migration pathway (e.g. exploitation in trafficking; loss of family members in the course of migration), and the fact that the family is not the only one to have a specific relationship with the culture; exploitation in trafficking; loss of family members in the migration route; losses inherent in migration itself: loss of family, friends and community support; loss of ease of communication in one's mother tongue; compulsory changes in eating habits and customs; loss of multiple connections with one's social network) that influence these patterns.

Particularly with regard to the idea of parenthood, it is crucial to take into account that the cultural element is indeed a component to be considered in the assessment of the subject in question, but also a starting point/an implicit observation lens for the assessor himself/herself (judges, social workers, psychologists, etc.). The latter too are, in fact, embedded in a specific cultural context that proposes a specific model of parenting and family, which, however, does not constitute a universal standard model.

2. Description of the cultural (or religious) practice and group.

Parenthood is treated in this Guidebook as an articulated and composite cultural practice, encompassing all those behaviours, attitudes and feelings that a person engages in when raising a child. The

intention is not to propose a single definition of parenthood, but rather to describe certain legally relevant behaviours linked to this concept. Parenthood, in short, is understood here as a cluster (bundle of behaviours) whose selection prism is mostly derived from case-law and social casuistry.

From this case history and the numerous testimonies from the social work sector, which is directly involved in the management of migrant families, it is possible to draw an illustrative, though not exhaustive, breakdown of parenting-related and culturally influenced behaviour and practices:

1) Parenting practices implemented because they are deeply rooted in the culture of origin; they are seen by the parent as the best way of exercising their parental function and transmitting the heritage of their values, especially in a context of being far from their homeland; they are sometimes seen as an expression of bad parenting or pathologised by the majority culture.

One thinks of fostering practices within an extended family or where the child is perceived as more autonomous than Italian children. For example, the presence and importance of the role of parental figures are not the same in all societies, leaving room for other figures involved in the growth and upbringing of offspring. In a Tanzanian population, for example, after weaning there is a detachment of the son/daughter from the family of origin. The son/daughter is taken into the care of the maternal grandmother, creating a lasting union (until 6-7 for boys, until marriage for girls). The grandmother performs educational and training functions, which we usually associate with parental figures. In a post-migration context, the mother who entrusts the child entirely to the grandmother could be seen as failing in her parental duties.

In some groups it is common for older children to be entrusted with younger children because the child is deemed fully capable of caring for younger siblings. The majority culture might see such behaviour as child abandonment.

Not only in non-Western contexts, but also within the neighbouring and familiar European landscape there are care behaviours very different from those in Italy. For example, in Sweden and Denmark, children are let out in the snow or rain despite cold temperatures, or it often happens that babies are left in prams outdoors to take their 'naps' (unattended), while the family stays warm at home, as it is thought to

temper and be good for the child's health and wellbeing. Similarly, given the high social trust in these societies, it is common that if parents go to a restaurant or bar, the child's pushchair is left outside unattended.

This group of practices seen as problematic by the Italian majority culture could also include: forms of cuddling of children such as kissing and caressing on the genitals with no sexual intent, given for the purpose of greeting, celebration of virility, total and unconditional acceptance of the child (see the entries Displays of affection concerning the children' genitals and Homage to child's penis in this Guidebook); the typical practice of some mothers from Africa of "braiding" their daughters' hair, a laborious and often tiring practice for the child, not to be identified as an unjustified obsession, but as a real way of teaching care for one's own body; the different ways of showing affection (behaviour considered too affectionate or behaviour considered too avoidant); the emotional expressiveness (e.g. the tone of voice that always appears angry, but which belongs to a mode of expression that the child does not perceive as aggressive because it is a cultural trait that the child is perfectly capable of contextualising); a strong reliance on traditional medicine or religion; the different organisation of roles in child-rearing based on gender; the involvement of children in their parents' work (which could conflict with child labour regulations); ways of weaning children off with foods that we consider 'too' spicy. Each society, including our own, therefore develops parenting models that it deems fit for purpose, with gender and/or parental role models and practices that cannot be universally defined.

2) Practices that are not strictly cultural, but mostly constitute a response to certain difficulties in parenting arising mainly from the fact that it is experienced in a different cultural context and from a distance from one's own community, with a strong influence of biographical and economic variables, and elements related to the lived experience of migration. These variables are sometimes culturalised by legal and social workers.

This second group could include the particular attachment relationship between mother and child, sometimes considered 'possessive'; aggressive or closed attitudes towards social workers with respect to attempts at assistance or, on the contrary, attitudes of total delegation of one's parental functions to care facilities; temporary entrusting of one's children to neighbours or others with whom a

relationship of trust has been established; intolerance towards parenting education courses or towards the restrictive way in which meetings are restricted (often very brief, carried out under the strict control of operators and not necessarily in the parents' language of origin); mistrust of state social and health institutions, especially in relation to maternity or to pathological treatment of one's own children or of the parent; excessive trust in spiritual and religious systems; other and various behaviours indicative of simple inexperience with motherhood/parenting (bath temperature, accidental falls of children, etc.).

3. Embedding the individual practice in the broader cultural system.

The different models and approaches to parenting are part of a broader cultural context that guides and defines the very idea of the family and the way children are raised and educated. These contexts are obviously different depending on the country/culture under consideration, but also vary on the basis of further, more personal and individual factors (e.g. social class, level of education, etc.).

Family, and kinship more generally, cannot be regarded as institutions based simply on 'nature', as rules and different family forms are historically and culturally variable.

Relationships and kinship ties are culturally constructed and therefore susceptible to change both in their foundations, from biology to social and history, and in the specific rights, duties and obligations that constitute the relationships.

The idea of family is a socio-cultural construct and the one used in Western countries cannot account for the intricate web of relationships that exists between parenting practices, relationships between spouses and siblings, vertical and horizontal relationships between relatives, marital ties, marriage contracts and domestic arrangements in other nations. It is important to bear in mind, for instance, that many people do not necessarily aspire to a nuclear family model. If within the vast set comprising different family types we find a multiplicity of different and heterogeneous solutions, its boundaries therefore appear blurred.

Alongside the 'Italian' model, which is also constantly evolving and changing, and itself characterised by considerable pluralism, we find today very different family models and relationships, such as the extended family, kafala (see the entry kafala in this Guidebook), polygamy (i.e. families with many spouses), parental care and family relationships that show how the single-nuclear family model is a drop

in the ocean of the 'family' institution.

The diversity of human experience shapes human relationships in many different ways, and cultural background is therefore a powerful basis for conceiving parental norms differently and for implementing different practices in child-rearing.

In addition to other institutions, such as the family and kinship systems, parenting practices must be included in the broader system of 'personal culture', i.e. the way the individual incorporates his or her cultural system into his or her biography.

In the area of parenting, therefore, rather than attempting to frame individual educational behaviour within a rigid and stereotypical cultural categorisation system, it is surely more useful to enrich the scheme of enquiry through an additional lens that captures the multiple nuances of the cultural variable and its influences on both educational practice and the observer's judgement.

Maintaining a critical and non-rigid gaze can thus make it possible to grasp the complexity and fluidity of family relationships, shedding light on behaviour that is sometimes difficult to understand. According to this perspective, for example, what is often referred to as the 'possessive' relationship between mother and child, aggressive or closed attitudes towards social workers, as well as intolerance towards parenting education courses or restrictive meeting arrangements, could be traced back to parents' fear of losing those children, on whom they have placed the expectation of a better life, or of leaving them to the upbringing of strangers. In some countries, for instance, the vision of parenthood/maternity care is not necessarily represented by the state or by strangers, but much more by the family (mother-in-law, mother, grandmothers, elderly women in the community, etc.). Moreover, for some Nigerian trafficked women, it sometimes emerged that motherhood is associated with a meaning of completion and/or redemption, experienced as a way to "erase" the past of prostitution.

4. Is the practice essential (to the survival of the group), compulsory or optional?

Since parenting does not consist of a one-size-fits-all practice, it depends on which practice one considers. There are cases in which the parent feels that he or she is a bad parent if he or she does not adopt certain behaviours that should, therefore, be considered obligatory: for example, punishing the child who misbehaves; transmitting a religious belief, sending the child to attend religious schools; not separating from the child or entrusting the child only to trusted family members until he

or she reaches a certain age (e.g. Roma groups); not sending the child to day care as it is seen as a practice of neglect and abandonment towards the child (e.g. Roma groups). It should, in any case, be borne in mind that even when adherence to a particular model of caring for and bringing up one's children is something that is based on an optional decision, parents generally consider such a model to be the best and most appropriate for that purpose, going so far as to consider other parenting approaches as wrong, problematic or negative.

5. Is the practice shared by the group or is it contested?

The various practices that constitute parenting are generally shared by the group to which they belong, subject to endocultural divergences and the plurality of educational methods within the same culture (e.g. more permissive and stricter parents). It should, however, be borne in mind that there is no one-size-fits-all model, so that even within the same group we can often find different parenting/family approaches.

6. How would the average person from that culture (or religion) behave?

The average parent would follow the dictates of the culture from which he or she learned how to parent, particularly if convinced that this corresponds to the child's best interests. Adaptations to the new context of insertion are possible either for strategic reasons (e.g. avoiding leaving the child alone at home with older siblings to avoid losing parental authority) or out of a conviction that the behaviour of the majority is equally beneficial to the child (e.g. African mothers abandoning the practice of carrying the child in their arms in favour of the pram, which other women regard as a tool that separates the mother from the child and prevents the child from seeing the world, which is instead possible from the mother's arms).

7. Is the subject sincere?

For the purpose of a better assessment of parenting skills, especially when related to foreign parents, it would be worth investigating:

- the actual existence of the particular vision of parenting and that behaviour in the culture of origin;
- the individual's migration experience (what motivated the individual to migrate, whether it was an intentional migration or one that they would have preferred to avoid, the social networks that were left behind in the land of origin, the role of these

networks in supporting parenthood, any losses during the migration journey, any incidents of trafficking and exploitation, violence suffered and other traumatic experiences);

- the context of family-environment relations (existence or non-existence of reference points in the same community of origin; analysis of links with educational and other institutions);
- spirituality (strong links to religion or certain forms of belief in traditional medicine are part of the mother's cultural inheritance, not mere 'mystical delusions', rather they are a way for subjects to accept, process and cope with otherwise uncontrollable circumstances);
- the differences perceived by the parent between experiencing parenthood here or in their community of origin;
- the different modes of communication between parents and children, which may be different by culture or even by context (a foreign parent might be more authoritarian in a context different from his or her home context because he or she does not perceive it as 'safe' for his or her children, lacking, from his or her own perspective, a set of social support networks).

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Within the Italian context itself, it is not possible to identify a single parenting model that is universally normative and found in all families.

Differences between family models, communication modes and expressions of emotion between different parts of Europe and Italy, as well as between different urban centres (city - countryside) are still very evident today. It is certainly necessary to highlight how some practices criticised today because they were carried out by foreigners, were also particularly widespread in the majority culture: it was common to bring one's own children to workplaces, especially if they were private or family businesses (restaurants, accommodation facilities, etc.). Often this involvement in small, mostly symbolic operations was a great source of pride for children who felt part of a whole and felt they had a role. This practice has now disappeared in urban Italy, partly as a result of the criminalisation of child labour, but it persists in Greece, for example, where the tourism industry sees, especially in the summer, the whole family mobilised to run the typical tavern, including minors under 16. The practice of temporarily entrusting minors to relatives and neighbours was also widespread in Italy.

From an intercultural point of view, aimed at bringing majority and minority into dialogue around child-rearing practices, conversely, some Italian parenting practices that are widespread and accepted today could be discussed on the level of the violation of values and rights of the child by minorities: often for work reasons, Italian parents leave their children for many hours in educational institutions, in other hosting contexts (oratories, playgrounds, summer camps), or they tend to spend all day at work, reducing the time spent at home to a minimum. These, too, are forms of delegation of parenting skills, sometimes due to necessity, but also partly due to a precise educational choice that wants minors always engaged in potentially productive activities in line with the values of capitalist neo-liberalism and of a competitive society that looks at the child for what he/she will be able to do and produce when he/she grows up and is concerned about making him/her function socially.

9. Does the practice cause harm?

The requirement of harm could be fairly used in a balancing test as long as it is not taken to extremes. Forcing one's daughter to have her hair braided may correspond, for example, for a mother from a given African country to a form of body care education. It certainly generates temporary damage on the child that may result in opposition, crying, screaming, expressions of pain. However, it is very common for other practices involving elementary rules of hygiene to give rise to identical reactions (most young children detest 'washing' or in particular washing their hair). Nevertheless, nobody thinks in Italy to denounce parents who impose daily showers to their children for being obsessed with hygiene or for causing psychological and physical trauma to the child.

In other practices, on the other hand, the harm may be entirely absent (temporary fostering by trusted persons, symbolic participation in the work activities of one's parents); on the contrary, they may lead to the growth of relations between the child, the parent and the new host community.

Some practices (e.g. *ius corrigendi* through beatings) produce harm and should be discouraged.

In determining the harm caused to the child by a parenting practice, this should, however, always be compared with the harm the child would suffer as a result of being removed from the family. It should, in fact, be taken into account that a high level of harm in parenting is presented by cases of estrangement, especially when justified by an

equivocal interpretation of certain parenting practices or by forms of parenting that are questionable, but temporary and resolvable through structured help that takes culture into account. Expulsion from parents severs the family bond and, especially in the case of foreign minors, introduces the minor into another cultural context, often making him or her unable to absorb certain features of his or her culture of origin, generating forms of incomprehension and hindering any communion, even in the brief moments of encounter they may be afforded, with their family of origin.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The parenting expectations of a given society are strongly influenced by the cultural context of reference and the attachment models proposed and accepted in that context.

The majority culture perceives its own conception of family and parenthood as the best existing, replicable in every context, and vice versa the others as retrograde, cruel or the result of psychological problems (personality disorders above all), often untreatable, and strongly influencing the ability to transmit educational models appropriate to society. It is not conceived that the most widespread educational and parenting models derive from precise historical and social events, as well as from the socio-economic structuring of society, and not from a natural evolution 'in the right direction'.

Some migrants' parenting practices impact above all on the majority society's vision of childhood, which is totally child-centred, centred on play and carefreeness, but are also considered detrimental to the values of dignity, freedom, self-determination and psycho-physical integrity.

In the legal sphere, they are often given weight in the evaluation of parental competence, in proceedings concerning the declaration of the state of abandonment and/or adoptability, leading to the child's removal from his or her parents, temporary or definitive, or to a structuring of the parental relationship reduced to a minimum through meetings in protected facilities. **Law No. 184 of 1983** and the jurisprudential interpretation of its rules on adoption and the state of abandonment, however, establishes that the child's overriding interest is to grow up in his or her family of origin, unless dire sources of harm are identified.

According to these principles, the assessment of parental adequacy

should not include comparisons between the economic conditions of foster families and their original families, nor should it stigmatise hypotheses of 'weak parenting' that needs to be supported by the social welfare system. On the subject of fostering, adoption and the state of abandonment, it has been repeatedly stated that the persistence of the state of abandonment must be assessed on the concrete and current conduct of the parents rather than on past facts. Just as certain practices in their equivocal interpretation are deemed to affect the child's rights to psycho-physical integrity, health and education, removal from the family unit potentially in turn causes damage to the child's psycho-physical integrity, cultural (**art. 2 Const.**), religious and spiritual identity - often impossible to cultivate when the child is entrusted to Italian families at a tender age and destined to meet the biological parents only for short periods of time - as well as to the right to private and family life (**art. 8 ECHR**).

11. Does the practice perpetuate patriarchy?

In some cases, there may be educational/parenting models that have a different determination of gender roles in the family of origin compared to the host society model: for example, giving more allowance to the male child and less to the female child; dividing domestic tasks unequally by having only the female children do the cleaning and tidying up of the house and relieving the male children; feeding the male children more than the female children. Apart from cases in which discrimination results in situations of humiliation and suffering for girls, it should be borne in mind that diversified parenting practices in the care and upbringing of male and female children do not always correspond to patriarchal logics: in fact, they may serve to prepare young people for their future gender roles, reproductive functions and to make them familiar with certain activities (e.g. differentiated games between boys and girls).

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

The different parenting behaviours practised by minorities are perceived by them as the most appropriate in order to raise and educate their offspring, leading them to consider different practices as incorrect or detrimental. Furthermore, the family, and thus different parenting models, are fundamental in transmitting the shared values of the group to which they belong to an intergenerational level. Often, in migratory contexts, the upbringing of sons/daughters according to the model proposed by one's own community is perceived as fundamental

in order to maintain a strong bond with one's own cultural experience.

Proposed balancing act: the child's right to remain in his or her family of origin and to be respected for his or her private and family life is to be considered overriding, and in the case of foreign minors it interfaces with the child's possibility of acquiring the heritage and cultural identity of his or her group. The Constitution also requires the State to support the care and assistance of minors in their own families; therefore, unless there is serious and irreparable harm, which cannot be overcome through support projects, the minor should be protected within his own family group.

Legal Insights

1. Parenting and multicultural society

Parenthood, understood as that set of practices in which the educational and affective relationship between parents and children takes shape, is certainly one of the forms of expression of the individual in social formations, including that of the family (Article 2 of the Constitution). It is also connected to that particular duty and right of parents to the maintenance and education of their offspring (art. 30 Const.), through which the process of transmitting certain identity values between generations is implemented; and finally, it is also inevitably connected to a parallel duty of the State to support the care of minors and childhood (art. 31 Const.).

Because of these numerous implications, parenting often becomes the object of assessment and/or observation by social and judicial workers: when there are suspicions about the existence of criminally relevant abusive conducts, perpetrated by parents on their children; when it is necessary to investigate the possible state of abandonment of a child, to assess its consequent extra-familial fostering or adoptability or to support cases of 'weak parenthood' through educational relationship support interventions and/or other social and economic supports; in relation to the assessment of the requirements for family reunification.

This evaluation is a particularly challenging task for both evaluators and evaluated subjects. Parenting is, in fact, subject to constant change even within those groups that belong to an apparently unitary socio-cultural structure. The difficulty of elaborating reference models and

parameters of judgement is destined to grow in proportion to the multicultural evolution of society. In fact, more and more frequently, the object of investigation in these assessments are 'mixed' family nuclei, i.e. made up of parental figures from different cultural backgrounds, or entirely foreign families, which, depending on their immigration history, require assistance on different levels and additional caution when subjected to assessment. These nuclei are, in fact, often characterised by a clash between expectations and plans for better living conditions and the numerous difficulties linked to the migration path (linguistic, psychological and social, employment and economic difficulties). Often their members may have experienced traumatic experiences: having been victims of trafficking, slavery; having suffered the loss of loved ones along the migration route. Not infrequently, migrant parents experience the frustration of not being able to transmit their values to their offspring, due to the new cultural context in which they find themselves, and experience parenting in "exile" (Crivellaro, 2021), far from the support of friendly community networks.

2. Some cultural misunderstandings in the assessment of parenting

A number of legal analyses, but also those by experts in psychiatry and psychotherapy, have highlighted limitations and critical issues in parenting assessment, especially when it interfaces with the 'cultural variable'. The main 'diagnostic errors' or 'cultural misunderstandings' (Long, 2015) can be observed in proceedings concerning the assessment of the child's state of abandonment by foreign parents and the possible initiation of fostering or adoption procedures. In these contexts, in fact, some forms of ‘weak parenting', mostly due to the difficulties of the migratory experience and/or to the consequent conditions of marginality suffered upon arrival in the host country, as well as some practices that are instead properly traceable to the educational patterns of the cultural context of origin, are often interpreted as pathological elements or in general as attitudes of disinterest towards one's role as a parent. Some examples of such equivocal 'bad parenting' may be: the temporary entrusting of one's child to neighbours, in order to carry out one's work and in the absence

of other assistance/social support network, often interpreted as lack of interest in the care of the child;[37] excessive attention with respect to the care of the body and the biological needs of the offspring;[38] manifestations of affection common in the culture of origin identified as hypothesis of sexual violence on minors (see in this Guidebook the entry Displays of affection concerning children's genitals and Homage to the child's penis). Other elements reported, especially by experts in psychiatry and psychotherapy as critical in the assessment of the foreign parent, include the focus on the observation of the parent in his/her relationship with the social workers rather than in the parental relationship;[39] the correspondence between the evaluating subject of parenting (worker who observes in first person and relates the facts) and the one providing the support service (worker who implements the service) resulting in a climate of mutual suspicion and a very uncertain outcome of the success of the intervention (Anostini et al., 2021); migrant parents' lack of knowledge of the internal institutional child protection systems and the lack of correct preventive information

[37] In the ruling of the *European Court of Human Rights Zhou v. Italy, sect. II, 21 January 2014* (case of a Chinese working mother, with a form of disability, who is removed from her child, considered in a state of abandonment and who is granted the right to damages against Italy for violation of art. 8 of the ECHR), we report the considerations of the technical consultant in the domestic proceedings, according to whom, the habit of leaving her child with her neighbours during working hours and in the absence of a care network is a delegation of her parental role and symptomatic of the fact that the woman did not have the time to take care of the child because of her work. A similar case is found in the *Court of Appeal of Naples, decree 9 November 1995*, in "Il diritto di famiglia e delle persone", 1997, p. 587, in which, despite the request for the return of the daughter made by her family of origin, of Ghanaian nationality, it was confirmed that she was entrusted to the Italian couple to whom the same parents had entrusted her from birth. The child was entrusted to the Italian couple not to abandon her but rather on the base of a relationship of trust, in the belief that they would guarantee her assistance during working hours and better domestic accommodation than the natural parents could provide.

[38] In this regard, Taliani (2012) reports how the practice of some mothers of African descent of braiding their hair is identified as a form of obsession rather than an element of education with respect to personal care.

[39] In Cass. Civ., sez. I - 6.02.2013, no. 2780, the state of adoptability of a Nigerian minor child of a woman victim of trafficking is confirmed, also in relation to the poorly collaborative attitude with the social services and her tendency to alienate herself. The poor cooperation between parent and social services is also recalled in the case dealt with by the ECHR in *Akinnibosun v. Italy*, IV sez., 16.07.2015.

about them, resulting in misunderstandings and misinterpretations (Voli et al., 2015), especially in cases where judicial intervention, assessment of parental capacities and placement in protective communities (often perceived as places of detention)[40] follow a request for help from the same parent (due to lack of means of subsistence or situations of domestic violence, perhaps); the structuring of encounters between foreign parents and their children in 'neutral spaces', which often provide, according to these scholars, a distorted image of the parental relationship and do not facilitate it (Beneduce, 2014) due, for example, to their limited timeframe and the prohibition against using their language of origin in communication (ignoring the importance of the common language as a moment of connection between parent and child); the pathologisation and medicalisation of difficulties linked to situations of marginalisation or other social and economic variables and not specifically to culture (Taliani, 2012); and the 'brutalisation' of the description of the behaviour of foreign parents.[41]

3. Some solutions

It is likely that, as already pointed out by many scholars in the legal and psychological/psychiatric fields, the scheme for resolving the cultural misunderstandings encountered should be enriched with interdisciplinary methodologies (anthropology, transcultural psychology and ethnopsychiatry),[42] break away from objectification and medicalisation at all costs (Beneduce, 2014), and move towards

[40] Attempts to flee with the child from the facilities, either to other European countries or to the child's own country of origin, often result from this misunderstanding and are interpreted by evaluators as risky attitudes towards the child, but for the parent this is a strategy to protect the child. On this subject, see Voli (2015).

[41] Some authors report excerpts of reports by social workers in which expressions such as "the lady moves like a beast" are used or, in an attempt to guarantee absolute objectivity of information, the statements of foreign parents are reported as they are pronounced, due to language difficulties, with the use of a mispronounced Italian (petit-nègret) capable of implicitly conveying the image of a parent who is always a child and in difficulty. In this regard, see Taliani (2012).

[42] In Italy, there are centres dedicated to the application and study of the disciplines of transcultural psychology and ethnopsychiatry. Of particular note are the Frantz Fanon Centre in Turin, the Ethnopsychiatric Consultation Centre operating at the Niguarda Hospital in Milan and the Cultural Consultation Service in Bologna.

investigative tools capable of bringing into dialogue parental practices, culture, migratory experience and possible conditions of marginalisation.

More cross-cultural perspectives on parenting can also be found in the domestic and European jurisprudential framework. In a number of judgments in which the Court of Cassation has ordered the re-examination of the state of abandonment and adoptability of some foreign minors, a number of essential points are reiterated, all oriented to the best interests of the child, respect for his or her private family life (art. 8 ECHR) and the permanence of the child with the family of origin (L. 184/1983 art. 1), among them: the need for a proactive role of the social services in supporting weak forms of parenting,[43] the urgency need for the ascertainment of the child's state of abandonment be based on the criteria of actuality and concreteness, traced back to a "persistence" of the same rather than to a "pre-existence", with the necessary evaluation of the manifestations of will of the parents with respect to the recovery of the relationship with the child, the impossibility of declaring the child abandoned on account of conditions of socio-economic marginalisation, force majeure or in any case not attributable to the parents, nor on the basis of the exclusive existence of certain pathological attitudes/behaviours;[44] the centrality of the time factor (e.g., a certain timeliness in arranging for the parent to be heard during the proceedings, in initiating interventions to support the parental relationship and in efficiently monitoring their progress), especially in cases where the removal of foreign minors and their parents is ordered during the proceedings and their relationship is structured only through meetings in neutral places.[45] Moreover, it is reiterated that the assessment of the state of abandonment/adoptability cannot be based on a comparison between the conditions of the foster family, perhaps of Italian nationality, and that of origin of the foreign child, but must rather be based on the prognosis of the child's future life in his or her own family, on possible

[43] Civil Cassation, Sec. I - 07/10/2014, no. 21110

[44] Civil Cassation, sec. I - 28/10/2022, no. 31976

[45] Civil Cassation, sect. I - 09/11/2021, no. 32661

interventions and support, going beyond the cultural parental model of the host country.[46]

Still on the subject of parenting and cultural variability, the case law of the ECtHR, precisely on the occasion of a number of sentences to pay damages imposed on Italy for the violation of the right to private and family life of foreign minors removed from their families, has established the need for reinforced protection of the parental relationship in such contexts (*Todorova v. Italy*, sec. II, 13 January 2009), targeted social assistance (*Zhou v. Italy,* sec. II, 21 January 2014), the need to clearly inform the foreign parent about his or her substantive and procedural rights (*Todorova v. Italy*, cit.), and inform about the types of subsidies available to him or her to overcome economic difficulties (*Akinnibosun v. Italy*, sect. IV, 16 July 2015), ruling that removal is ordered only in exceptional cases and that in the case of meetings in neutral space a certain degree of intimacy between parents and children is in any case guaranteed (Zhou, Todorova cit.).

The weight of the cultural variable in the assessment of parenting skills cannot be addressed through the construction of an *ethnic cookbook* (Beneduce, 2014) of parenting practices that categorises the behaviours of each culture, but rather through a cross-cultural analysis that takes into account the variables that are grafted onto the parenting journey.

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

1. Parental assessment

In health, judicial and social norms concerning parental assessments, parents are asked to adhere to an extremely specific and defined parenting profile, i.e. one that corresponds to 'our' expectations, where 'our' indicates the parenting model that is dominant in Italy and endorsed by the practitioners. If these expectations are not met, i.e. if these parents fail to adhere to the majority's educational models in a

[46] Civil Cassation, Sec. I - 22/11/2013, no. 26204

very short period of time, they are automatically considered inadequate and therefore incapable of taking care of their children's growth.

The migrant parent is forced to interface with the institution and thus to communicate with institutional workers. However, the different parental models and the relative meanings and values that these models convey often lead to real confusion when institutions investigate, going so far as to label certain behaviours and relational modes as disinterested, aggressive or within pathological categories. Sometimes there is a precise cultural practice that the parent puts in place, at other times the culture is expressed in his or her affective skills and ways of manifesting love towards the child: when these do not coincide with the majority ones, the parent is considered pathological (e.g. several Nigerian mothers are considered too severe because of the tone of voice, which is actually typical of that culture, and which the child does not perceive as aggressive). In addition, a certain 'other' culture is sometimes simplified and reified, e.g. an alleged 'African culture' is used with a certain superficiality of analysis to emphasise inadequacies on the part of parents. The pigeon-holing within predefined, rigid grids and the difficulty of communicating with the institution in its formal language, embedded as it is in a cultural and bureaucratic context distant from the one known to migrant parents, means that the experience of these people is reduced exclusively and 'objectively' to technical and minimal aspects that are in reality far removed from the much more complex reality.

Migration paths and experiences are in fact often complicated and not always easy to reconstruct accurately. This can lead social workers to a series of assessment errors and misunderstandings, causing the very issue of migration, which is fundamental to assessment, to remain in the background. Moreover, a further and fundamental fact to consider is that of the evaluation context, which is unfortunately often inappropriate. Evaluations by experts usually take place within the counsellor's office or within a so-called neutral place, managed by the counsellor as places of observation of the parent/child relationship.

2. Some concrete examples

The following is an extract from a text by Simona Taliani (2019) as well as examples from an article by Manuela Tartari (2015), both anthropologists. From the passages quoted, it can be understood how

the different ways of expressing feelings and affection are sometimes not taken into account and how the personal relationship between mother and child, their experiences and possible traumas are not considered. What also emerges is the difficulty of managing the complexity of the experiences of parents coming from different cultural backgrounds, with a migratory past behind them and therefore, often, suffering.

"Yetunde is a woman from the Edo State who arrived in Italy at the age of about 20, pregnant. [...] Following an attack with boiling water thrown at her by the woman who had brought her to Turin, Yetunde gave birth prematurely to her first-born daughter and asked the social services for assistance for both herself and her premature child. [...] The girl grew up for six years in Italy. Then Yetunde, worried about the prospect that social workers were proposing to her (to leave her daughter with an Italian foster family), took the girl to Nigeria where she is now in her twenties and still lives and studies. On her return from Nigeria, Yetunde will be under great pressure from the social welfare services, especially in connection with her subsequent pregnancies. The workers will go to great lengths, and by all means, to push her to separate from her last two children. Perceived, in fact, as an 'abandoning mother' for having left her first-born daughter in Nigeria with her paternal grandparents, she would be the subject of a negative assessment that will lead the court to deem both children 'adoptable' four years apart [...]. In 2011, a few months after the birth of the little girl, the child neuropsychiatrist in charge of following her would go on to say during a network meeting between social workers: "The next one she gives birth to will be taken as soon as it comes out of her belly" (Taliani 2019, p. 114)".
"A report drawn up by social workers of a Child Neuropsychiatry Service draws attention to the Court's "the lack of attention" towards the daughters of a Senegalese mother, housed in the communitỳ with them, evidenced by her way of talking in front of the girls "about any subject." It is thus written that the mother does not 'filter' her negative emotions and is therefore shown to be 'completely heedless of the little girls' emotions.' She manifests a 'meticulous and precise care of the exterior appearance, poorly supported by affectivitỳ.' The Court issued an Opening Decree of Adoptabilitỳ due to "a consistent difficulty of the woman to be emotionally and affectively close to the girls" (Tartari 2015, p.189)".

"Neutral observers report that the Nigerian mother insists, against their instructions, on breastfeeding her daughter (two months old), cradles her in a "restless" manner, keeps her too covered. In their report, the Child Neuropsychiatry Service staff take up these observations and conclude: 'if the child were to live in the nucleus of origin, this would expose her to a mode of care characterised by the unpredictabilitỳ of maternal behaviour and incongruous maternal responses to her needs, both concrete and emotional and affective.' In this case, giving the breast to the newborn becomes a neglectful gesture because the mother should take into account that her milk is not needed as the little one takes her bottle at other times and no one thinks of fostering the bond by modifying the timetable, just as no one questions the restless cradling of a daughter from whom one has been separated a few days after birth (Tartari 2015, p. 189)."

Anthropology's task is therefore to convey the importance of neither trivialising nor simplifying the other's culture through generic or abstract categories, as they would fail to be effective in rendering the complexity of those different cultures. Such 'reductive' descriptions would in fact say nothing about the different social and symbolic systems to which the parents in question belong, and consequently about their relationship with their children/children; nor would they be able to express the difficulties linked to the migration route or the socio-economic conditions within the new life context. This reflection is therefore intended to emphasise the importance of becoming aware that the parental model we propose is itself the result of cultural (as well as socio-economic, in general) conditioning, and must therefore prompt us to reflect on the way in which the evaluation of other parental models is carried out. In essence, it is the questions and answers themselves that should be asked differently, avoiding simplifying, trivialising or encapsulating hard-to-understand behaviour in pre-established boxes.

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4. Gua Sha/coining and cupping (East Asian traditional medicine)

Cases: minors with bruises and various swellings on the body; minors medically treated only with traditional medicine and not with Western medicine (criminal and family law)

Cultural test

1. Can the category 'culture' (or religion) be used?
Yes, as the practice is a type of traditional medicine within certain traditional medicines. No religious profiles are discernible.

2. Description of the cultural (or religious) practice and group.
Gua Sha: *Gua Sha* (stasis pressure, press-stroking or 'coining' in English) is a traditional medicine technique widely used in Asia, in Asian immigrant communities, and by acupuncturists and practitioners of East Asian traditional medicine worldwide. Specifically, it involves **repeated, unidirectional pressure applied with a smooth-surfaced instrument** (such as a Chinese soup spoon, an ordinary metal stopper with a smooth round lip, or slices of buffalo horn) on a skin area lubricated with oil or talcum powder until petechiae appear. The **appearance of petechiae is transient**. They immediately begin to fade into ecchymoses, disappearing completely in 2-4 days.

The practice of ***Gua Sha*** is generally considered effective within Chinese and/or East Asian cultures for treating acute or chronic pain and for conditions such as colds, flu, fever, heat stroke and respiratory problems such as asthma, bronchitis and emphysema. It is also used for functional problems of the internal organs and musculoskeletal problems (from fibromyalgia to severe strains, spasms or injuries), and is indicated in all cases of recurrent fixed pain. *Gua Sha* is a therapeutic intervention to treat pain and pathologies that manifest as stasis of Qi (i.e. the life force, an invisible force behind all events) and blood, occurring on the skin surface. The term *Gua Sha* is Chinese. The literal translation of *gua* is scraping or scratching. *Sha is* a polysemous term: it describes the stasis within the tissue and the petechiae that form as a result of *Gua sha* practice, indicating the release of this stasis; it can be translated as "sand shark skin" or a red, raised rash, and represents the sensation one feels on the skin after *Gua Sha*, as if there were sand on it. The practice can be performed on both minors and adults.

Cupping: Like *Gua Sha,* another traditional medicine technique used mainly in East Asia is 'cupping,' or *baguan*, which is also indicated for

'blood stasis', characterised by fixed or recurring pain in acute or chronic disorders (the Chinese term *ba* means to pull out or pull up, while the term *guan* refers to a jar or pot). *Cupping* involves the application of round cups suctioned onto the skin. *Cupping* is a traditional Chinese medicine (TCM) therapy that dates back at least 2,000 years. The actual cup can be made of materials such as bamboo, glass or terracotta. By creating a vacuum using a flame or mechanical suction, the tissue is stretched inside the cup. This causes petechiae and round ecchymoses to be created. Almost without exception, in all cases where cupping is performed there will be a slight reddening or a ring-like mark caused by the edge of the cup at the treatment site. The extent of the cupping mark depends very much on the duration of the treatment and the strength of the suction.

This procedure is used to counter painful conditions such as shingles and lower back pain. *Cupping* moves the Qi (energy, strength, vital breath) and blood and opens the pores of the skin, thus eliminating pathogens through the skin.

3. Embedding the individual practice in the broader cultural system.

The use of Gua Sha and cupping should be framed in the ideas of health/disease and medicine in East Asia, where there are philosophical concepts that look at the human body in correlation with the external environment and the forces that animate it (e.g. Qi) and not only in its individuality and separateness (see Anthropological insights *below*).

In East Asian medicine, all pain is defined as a form of stasis. Common myalgias, i.e. muscle pains that come and go, are thought to result from the stress of repeated daily activity, prolonged posture or exposure to changes in temperature. If the myalgic pain resolves on touch or movement, we speak of Qi (energy, strength, vital breath) stasis. If the pain persists or returns to a fixed point, we speak of Qi and blood stasis, which indicates the presence of *sha* (stasis within the tissues). The term 'blood stasis,' which is difficult to define, generally refers to a pathological alteration of blood flow, but differences in definition remain, apparently reflecting regionally developed differences.

The presence of *sha* is confirmed when pressing palpation causes a superficial reddening that slowly subsides. Over time, unresolved sha can be associated with and/or make the body more vulnerable to severe chronic pain, tension or disease. The stasis of *sha* can be released with sweating from a real fever or through treatment with *Gua Sha* or

cupping.

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice is optional. Just as Western patients today have their choice of medical treatment between either Western medicine or Chinese medicine or both, so too do patients who live within Chinese/East Asian cultures have their choice of medical treatments, between the various medical systems of diverse cultures. While there is a margin of personal choice in what remedy to choose, it must be noted that Chinese medicine is widespread in Asia, and it is a defining element of the group, and it coexists in equal dignity with Western medicine in China (see anthropological insights).

5. Is the practice shared by the group or is it contested?

The practice is shared by the group to which it belongs. Overall, in East Asian countries the medical system is plural, which means that Traditional Chinese medicine and Western allopathy coexist and both are institutionalized, although in different ways according to the country under consideration. In China, for example, the modalities within traditional medicine are explicitly acknowledged through legal classifications, medical training, and service provisions. Furthermore, these modalities are interconnected and unified under the supervision and comprehensive practice rights of traditional medicine doctors (as well as allopathic doctors), who have the authority to practice either form of medicine based on their professional judgment

6. How would the average person from that culture (or religion) behave?

In the presence of pain, the average person may turn to either official or traditional medicine or both.

When it comes to paths to health, it is important to bear in mind that these are individual and personal choices. A person may choose to turn to traditional medicine and Western biomedicine in parallel, actively seeking the best of both worlds to meet their own or their children's health needs, aware of the fundamental differences and complementary nature of these two medical models.

7. Is the subject sincere?

To verify the subject's sincerity is important to ascertain the non-detrimental nature of the practice, which indeed has a curative function. To this end, it is appropriate to investigate, through experts and through the same hearing of those involved (parents and minors):

- the link between these methodologies and the culture of origin; Gua Sha/coining/press-stroking and cupping/cupping are two traditional remedies typical of Chinese medicine, as highlighted above, but are also widespread in other Asian cultures such as the Vietnamese and Laotian;
- the function (curative reason) for which the practice was performed, i.e. what kind of ailments the subject underwent;
- the reasons that led to the use of the practice: use of the traditional remedy due to the lack of seriousness of the ailment; poor access to other health facilities and services (communication difficulties etc.); distrust of conventional Western medicine and professional medical personnel;
- the ability of the subjects to explain the practice and its functions (which can then be confirmed by an expert in both anthropological and medical-scientific fields);
- the degree to which the family is aware of the use of the practice, not as a total replacement for conventional Western medicine, but perhaps as an aid in cases of minor ailments. In some cases, these particular signs on the body are noticed by health service workers, during specialist or routine visits, at conventional Western health facilities, where the child is accompanied by the parents themselves, perhaps because the problem persists or in order to ascertain the most effective treatment.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Some techniques of traditional Oriental medicine are also particularly widespread in Italy. Cupping is often used in sports, to soothe pain and reduce muscle tension, as are acupuncture and other forms of massage to be performed according to special techniques. Moreover, it should be pointed out that 'traditional' forms of healing have also always been implemented in the majority culture, albeit in a less structured manner than in the East. Examples of this are the allopathic form of Western medicine practiced at clinics and private health facilities (e.g. homeopathy, reflexology) and what are often referred to in common parlance as 'folk remedies', as well as the dissemination among families of small pamphlets containing basic therapeutic indications, necessary for the initial treatment of minor ailments (now replaced by the practice of consulting the web when ailments or pains occur) containing indications of basic medical care. In Italy, those remedies are certainly not a substitute for specialised official medical treatment, but

they are widely used in cases of transitory, frequent and non-serious illnesses (colds, transitory febrile conditions, migraines, neuralgia, etc.). These particular curative methods are framed in the majority culture under the category of 'home remedies' and are partly comparable to the curative practices mentioned above, even though they lack the same historical and philosophical structure that characterises Oriental remedies. It should also be pointed out that today, in contemporary Western society, most of these remedies have evolved into a 'pharmacological' perspective. 'Home' remedies for mild and transient ailments often consist of over-the-counter medicines, sold without the need for a prescription, to be kept at home for emergencies or to be taken with one's person during travel and journeys. The administration of such drugs is left to the conscience and self-control of individuals. Unlike cupping and Gua-sha, however, these are pharmacological, and therefore chemical, substances that can cause harm to adults and minors in the event of incorrect use, even if not as immediately obvious as the marks left by the Oriental practices under consideration.

Another example of a cultural equivalent in the broadest sense can be found in massages that are widely practised in the majority culture among sportsmen or as physiotherapy treatments. Vigorous massages can, in fact, leave marks and are also a cultural equivalent to the possible sensation of pain that these treatments may cause when performed.

9. Does the practice cause harm?

The practice does no harm if performed correctly, according to the modalities that are required for the curative result to be achieved. Usually these modalities are spelled out in actual Chinese medicine manuals or transmitted orally. They are practices that are always performed to cure an ailment, and without any other objective. The signs resulting from these treatments can be interpreted as symptoms of abuse, beatings, or mistreatment, but they are nothing more than the residue of the execution of the practice and indeed often highlight its correct practice. These signs are quite similar to those following vigorous forms of massage, which are also often widespread in the majority culture. However, in the event that the practice is not performed by a professional, it may prove to be quite painful and may leave marks on the body such as actual bruises or even cause a slight discharge of blood (see images in the anthropological insights).

The threshold of pain experienced while performing the practice is influenced by the perception of the subject undergoing it, by the more or less pathological state he or she is in. For example, from the

perspective of children, even health treatments that adults consider to be more banal and painless - such as taking a syrup, undergoing an injection, swallowing a pill, dressing a wound with disinfectant - cause suffering and have traumatising effects. Pain is thus not an element that alone can be indicative of actual physical harm, being an element that at least transiently characterises the multiplicity of healthcare treatments, not only from an objective point of view, but also from a psychological one.

10. What impact does the minority practice have on the culture, constitutional values, and rights of the (Italian) majority?

On the majority culture, the practices of Gua sha and cupping have an apparently strong impact, including a visual one: the marks left by these treatments could be interpreted as child abuse by health or school workers. Even when the 'healing' nature of the intention emerges, they appear as treatments that generate suffering that should not be performed on minors in particular.

The marks left by the aforementioned practices could be mistakenly placed in the category of beatings (Article 581 of the criminal code), in that of injuries (582 of the criminal code), or even in the more serious forms of ill-treatment in the family (572 of the criminal code). The lack of knowledge of the function and meaning of these practices makes them difficult to accept by the majority culture, despite their curative value. It is assumed that they cause unjustified pain and suffering and no benefit. Both in criminal and civil law, therefore, the practices could potentially be relevant in proceedings involving the delicate context of the family and the assessment of the adequacy of parents in exercising parental responsibility and caring for children. For this reason, an in-depth knowledge or willingness to investigate such practices would be essential to protect the interest of the child who risks being removed from perfectly functional and protective family realities. In fact, Article 8 of the ECHR requires the preservation of the family and private life of minors. The latter in the absence of abuse and harm has no reason to be disturbed. The child's right to physical integrity is only apparently involved, since it is only materially violated if the practice is not carried out properly. In addition to cultural rights, those inherent in the parents' right and duty to educate their children according to their own system of values (art. 30 of the Italian Constitution) come into play, including: the will to make their children know and understand the function of traditional remedies, typical of their own culture, to teach them when to use them or not to use them, to choose them in place of

others (analgesics and over-the-counter drugs); to exercise consent on certain medical treatments rather than others. The only limitation is always represented by the child's right to health, which is usually not questioned since these forms of traditional medicine are not considered as substitutes for conventional Western medicine.

In some jurisdictions, these practices are mentioned in child abuse prevention manuals for social service personnel and legal practitioners so that they are not misinterpreted as forms of parental abuse. This is the case in Colorado and Kansas. The reference is not only to coining and cupping, but also to the so-called 'blue spots' (due to melanin accumulation) that appear on the skin of some children of Oriental or African ethnicity from birth and disappear as they grow up, and which have no pathogenic significance.

11. Does the practice perpetuate patriarchy?

The practice does not perpetuate patriarchy. It is performed indifferently by and on individuals of both sexes. It could, if associated with pain and suffering, be linked by the majority culture to a form of patriarchy, understood as authoritarianism, subjection and control by adults over minors or as a form of imposition, but since it does not generate greater suffering or pain than other widely practised and accepted treatments, this interpretation must be considered without merit, especially when compared to the typical functions of the practices, which are precisely to heal and relieve pain.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

In the Chinese philosophical system, diseases arise from a stasis of Qi, vital energy, which Gua sha and cupping serve to rebalance.

Proposed balancing act: A correct hermeneutics of the fact (e.g. ascertaining that the bruises are a consequence of traditional medicine) leads to the conclusion that the objective element of the offences of beating, injury or abuse does not exist and to the consequent acquittal of the accused or, if in a family law case, to a judgement of appropriateness of the parent. When Gua sha and cupping are expertly performed, they do not cause any harm to the health of minors or adults, and those who perform and receive them are within the exercise of their cultural rights.

In the case in which parents chose to recur only to this kind of medical practices, given the fact that traditional medicine is strongly legitimate in the East Asian context, where it has an equal status to Western medicine, we suggest a decision that acquit the parents, if appropriate once all the circumstances have been ascertained.

Legal Insights

Cupping and Gua-sha/coining do not seem to have been prominent in Italian or European jurisprudence to date. There are, however, references in the literature (Morton, 2002; William Y. Chin, 2005; Renteln, 2010) to court cases that took place in the United States between the 1980s and 2000s, in which these practices were often equivocally interpreted as actual child abuse. With regard to coining and Gua-sha, a case from 1994 is cited, in which a Vietnamese mother is accused of abusive conduct toward her child, only to have the charges withdrawn after the testimony of a Vietnamese social worker who recognised the traditional care practice of coining in the signs (Morton, 2002). Also in the USA, in 2002, four Hmong children were preventively removed from their parents on the basis of the same suspicions, but then again the charges were dropped when the coining treatment was medically ascertained (Morton, 2002); the same happened in the case of two other Chinese parents who had practised Gua sha on their child and who were later cleared of abuse charges thanks to the intervention in of some experts in the practice at the trial stage (Corwin, 2000).

Regarding the practice of cupping, we report a case from 1983, also in the **United States**, in which two parents from the Central African Republic were prosecuted for performing this practice on their daughter. The judge, while finding cupping to be an unaccepted healing practice in America, ruled on the child's return to the family after temporary removal, recognising the conduct as not abusive (*In re Jertrude O.*, Maryland Court of Special Appeals, 1983).

It is highly probable that in today's multicultural society, social workers (teachers, educators, social workers) and legal practitioners (especially those working in the first degrees of jurisdiction) have had or may in the future have contact with these practices. This could take place in proceedings involving the assessment of parenting skills and in those examining immigrant families, or even in more serious contexts of suspected child abuse by family members. In fact, these traditional medicine practices leave obvious marks on the body and therefore lend themselves to being mistaken, at first, as forms of abuse, especially in

those cases where there is no knowledge of the practice, its purposes or effects.

In these hypotheses, a conflict could arise between the principle of the child's physical and psychological integrity and certain parental rights such as the right to pass on their culture to their offspring, which include traditional care practices, or the right to decide on health treatments to be carried out on their children, even in the area of 'self-medication'.

Unless we are dealing with dysfunctional contexts tainted by dynamics of violence, however, this could be an illusory conflict, easily overcome. The practices in question, in fact, if performed properly as prescribed by the cultures which keep them,[47] do not cause permanent injury to the physical integrity of minors, being compatible with the provisions of Article 5 of the Civil Code: they, in fact, only leave marks, very similar to bruises, destined to disappear in a few days after the final effect of the treatment. Coining and cupping, as traditional medicine practices, are an integral part of the cultural luggage of some minorities, a form of manifestation of the individual not only in his own community but also in his reality, and therefore susceptible to find protection in Article 2 of the Italian Constitution. Finally, such practices recall the right of parents to pass on their cultural heritage to their offspring, a heritage that would remain incomplete if deprived of their knowledge and experimentation since minors would not be able to understand the practice's meaning or learn how to perform it.

The right to health under Article 32 of the Italian Constitution could be used as a parameter for assessing the compatibility of these practices with the interests of the child. In fact, these are curative modalities that in most cases are not considered substitutes for conventional health treatments, but are used to treat temporary ailments such as colds or transitory febrile conditions. Such practices do not, therefore, imply a specific ban on access to other types of pharmacological or hospital treatment, as is the case with some religious groups who, because of their beliefs, refuse to receive particular health treatments such as transfusions. The physical harm, identifiable in the marks left by the treatment or in the pain that may be felt by the minor during the

[47] The Chinese medicine manual in relation to Gua-sha, for example, prescribes the performer to be cautious when performing this practice and observe the patient's expressions while performing it (*A Barefoot Doctor's Manual: The American Translation of the Official Chinese Paramedical Manual 80* (1977).

execution of Gua sha or cupping, is strictly personal and dependent on the perception of the individual, but in any case cannot be used to stigmatise the practice, since it is composed of two elements - the momentary pain during the treatment and the marks left by it afterwards - that are in fact typical of most health treatments that are imposed on minors, especially if these are performed at a young age, from the most invasive ones to those performed in the context of family self-medication (swallowing pills, drops or syrups, undergoing injections, applying disinfectant to wounds, etc.).

It could be argued that in the case of Gua sha and cupping, the pain inflicted cannot be justified by the efficacy of the treatment, but this would also invalidate the recognition of any value, even spiritual, of many family and traditional remedies, which are widespread in all cultures, even the majority culture; and it would also ignore the profound value hidden behind traditional healing gestures, handed down from generation to generation, and would fail to recognise that the strengthening of the healing relationship between parents and children also passes through these gestures. It should also be emphasised that Gua sha and cupping are treatments that do not involve the use of pharmacological elements and in this sense are much less invasive than some self-medication practices widespread in today's society, which now have a pharmacological guise, often administered without any medical consultation because they can be purchased without a prescription.

The condemnation of these treatments on the grounds that they leave marks on the body, even if they can be healed in a few days, would respond to a monocultural paradigm (Renteln, 2010) heedless of the real consistency of the practices or their cultural value, and one that also fails to respect the minor's interest, especially when the suspicions give rise to his removal from the family nucleus, thus generating indelible traumas, even if only temporary, when such removals are subject to protection under the right to private family life pursuant to Article 8 of the ECHR.

The other case law that those practices could potentially implicate is that of parents who chose to cure their children only with traditional remedies, without resorting to Western medicine, resulting in harm caused to the health of the child. Such cases, to date, have not approached Italian courts. Leaving to the judge the evaluation of all the facts (e.g. did the family had a consciousness that the child was at risk? could the parents have in their mind the option of taking the child to a Western hospital?), in general when the minority sincerely believed

that the traditional medicine was a proper solution, this should be taken into account in the judgment. Given the level of recognition of traditional East Asian medicine (see below for anthropological insights), it is often seen as an equally valid choice to treat one's child exclusively with traditional medicine, as it is to treat one's child exclusively with Western medicine.

In Italy Western medicine is the official system, and the only one recognized as scientifically proven. Although the medical system allows other types of treatments (e.g. homeopathy, reflexology, acupuncture, folk remedies etc.), Italy has actually a mono-medical paradigm in which the only scientifically proven medicine is standard. Therefore in cases when the health of the child is compromised, the judge often takes for granted that the diligent parent is one who takes their child to an "official" doctor and no other. While, from a legal point of view, only the legislature can change this *status quo*, from a philosophical point of view, aimed to enhance intercultural reasoning, it is important to explore this provocative question: given the value widely recognized in East Asian traditional medicine, might it not be a sign of negligence from certain parents to eschew traditional Chinese medicine, and instead seek only Western medicine as a resort?

This provocative question arises also when considering the side effects, complications and wrongful deaths which are present in the Western medical system itself. Thousands of patients die by Western medicine every year, whether through simple negligence, lack of proper sanitation, or even by the action of the treatment working exactly the way it was intended to (as Western medicine, like all treatment courses, is not infallible). In cases of negligence, the doctor or hospital can be sued, but never has it ever happened that a Western parent was prosecuted because they, in good faith, took their child to a Western hospital. Is there a double standard in the way in which Italy and the West in general is approaching the issue of what cures are duly available to parents? Perhaps on an abstract level, yes: one could believe that in a global world which offers numerous certified medical remedies, all officially recognized treatments should be attempted and therefore also the East Asian ones, but it is also true that in court the average diligence of parents is measured on the basis of the standards that they know in their own cultural sphere, and of basic scientific knowledge accepted in the system of origin. Therefore the Italian parents that limit their choice to a Western hospital are not guilty. This same reasoning could also help the judge to better evaluate the behavior of parents belonging to different cultures.

In perspective, once another medicine system has proven to be scientifically valid, as is the case of East Asian medicine, it would be important to enhance the opportunities for both children and adults to be treated within a plural medical system.

Anthropological insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

In Western biomedical discourse, the focus is on an individualistic approach and on organ systems and body components. Typically, disease is seen as an alteration in the functioning of a single component or in the relationship between the components that make up the individual. In contrast, traditional East Asian medicine, specifically Chinese medicine, is based on philosophical concepts that look at the human body in correlation with the external environment and not only in its individuality. The meaning of health is synonymous with functional interactions between entities within the body in response to the natural forces of the environment. This concept is based on an understanding of unity, of the harmonious relationship between the microcosm of human beings and the macrocosm of the universe. What must be achieved to restore health is the overall dynamic balance, thus not treating any one entity in isolation. Indeed, diagnoses based on East Asian traditional medicine tend to consider the whole patient, rather than focusing on a particular symptom, taking into account many different symptoms and signs to decide on or identify the 'pattern' of diagnosis (Leung 2010). Those who use such traditional medicine focus particularly on the whole person, the close correspondence between the individual and nature, and the fundamental principles of balance and harmony that contribute to health and well-being.

It is a traditional medicine that therefore refers to a broader philosophy, according to which all things are composed of *yin* and *yang. Yin* and *yang* are perceived as the principles and origins of all things and underlie the functioning of the phenomenon of life in relation to the environment. All changes in natural phenomena operate in the incessant movement and complementarity of *yin* and *yang*. When yin and yang are not in balance, disease is inevitable. *Qi*, the life energy, is produced when the two forces combine. Therefore, due to the duality and dynamism of *yin* and *yang,* which do not exist in a state of

equilibrium in the environment or in the body, but rather oppose each other, *Qi* is formed (Leung 2007).

The main effect of illness is the blockage of *Qi*, the life force that permeates our bodies and the universe. *Qi* is an internal energy of human beings and is vital for health. *Qi* refers to the intangible energy within the human body and constitutes the essence of life. *Qi* is contained in the 12 meridians that are connected in sequence in a great circle that branches out through different parts of the body. Symptomatically, *Qi* deficiency is recognisable by fatigue, malaise, shortness of breath, low voice, pale complexion, pale tongue and spindly pulse. When the level of *Qi is* normal, but its flow is slow, a stagnation syndrome occurs, in which internal organs may swell or pain develops at points where *Qi* cannot flow through the meridians. In such cases, *Gua Sha is* necessary. *Qi* is used to understand the world in general, as all elements of the universe are made up of *Qi* (Leung 2007).

Gua Sha is a therapeutic intervention to treat pain and pathologies that manifest themselves as stasis and stagnation of *Qi* (i.e. the life force, an invisible force behind all events) and blood occurring on the skin surface. The area to be treated is first lubricated with a simple oil (usually peanut oil in China) or a medicated oil or balm (Nielsen, 2007).

As an essential technique of traditional East Asian medicine, practised in both domestic and clinical settings, the instruments used can range from a simple Chinese soup spoon, a smooth coin or a slice of ginger, to tools made from cow bone, water buffalo horn, jade or stone. The important characteristic of any Gua sha instrument is that the edge is smooth, not so sharp that it breaks the skin, but also not completely blunt so as to stimulate the skin (Nielsen, 2007).

The petechiae of the *sha* appear slowly, increasing with each stroke. The rubbing stops when all the *sha is* expressed as petechiae on the treated area, before producing a bruise.

In Vietnamese, *Gua Sha* is called *Cao gio* (pronounced cow yo, meaning 'scraping away the wind'), in Indonesian it is called *Kerik* (ka-drik or ka-drok), in Khmer Cambodian it is called *Kos khyal* (kos kee-yaul) and in Laotian it is known as *Khoud lam* (cooed-lum). The most frequent translations refer to scraping and spooning.

As with *Gua Sha,* cupping is practised in both domestic and clinical settings and the instruments used can vary, from the more traditional horn, ceramic, bamboo or glass cups to more modern methods using plastic cups with a valve and a hand pump for suction.

The practice itself can vary slightly, depending on the purpose and motivation behind the therapy: it can be performed more or less intensively, as can cupping 'in motion', or combined with acupuncture and/or the use of herbs.

For what concerns the “official” use of Gua Sha and cupping, contrary to Italy where the “official” medicine is only one (mono-medical system) and other medical practices are allowed but not considered as scientifically proved, in East Asia the medical systems are plural, in the sense that two different types of medicines cohabit: the Western and the traditional. For instance, in 1929, the Republican government nearly eradicated Chinese medicine from legal recognition. Seventy years later, traditional Chinese medicine (TCM) has become a fully institutionalized and government-supported component of the Chinese healthcare system, holding equivalent legal status to Western biomedicine. TCM now provides nearly 40% of all healthcare services in modern China. Similar to Western medicine, TCM in China is primarily hospital-based. In addition to approximately 3000 specialized hospitals, over 95% of Western medical facilities also incorporate fully-equipped TCM facilities.

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5. Kafala

Cases: family reunions of minors who join from abroad in Italy the person to whom they were entrusted in kafala; entrusting of minors to relatives in kafala and consequent exit from the biological family unit with possible accusation of child neglect or parental inadequacy for non-exercise of parental duties (family law)

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes. Both the culture and religion categories are usable. The Islamic kafala, **besides being considered a religious 'good practice', is a legally institutionalised formal child protection system** in which a person (kafil) agrees to care, educate and guide a child (makfoul) on a voluntary basis, without establishing a filial bond. In fact, unlike Western adoption, in kafala the child does not renounce his or her family of origin and does not acquire a kinship bond with his or her guardian.

2. Description of the cultural (or religious) practice and group.

The kafala is a child protection institution that exists in Islamic countries and traditionally responds to two different situations:

1. the protection of orphaned, abandoned or neglected children through the judicial assignment of guardianship to a **Muslim family** meeting certain requirements, and
2. family care by assigning guardianship of a child to a **member of the extended family**.

The term kafala had several meanings in classical Arabic including: guardianship (daman) and care (from the verb root ka-fa-la). The concept of guardianship is divided into: guardianship that focuses on the provision of goods (money and property) and educational guardianship (morality and spirituality). The education of Islamic values is emphasised in the kafala and, for this reason, kafils must be good Muslims, as only in this way can the education of the makfoul be entrusted to them.

The kafala is divided into two types: notarial kafala and judicial kafala. Notarial kafala is established when the child has not been abandoned, nor is there a court ruling declaring the child as such; here, parents who cannot afford to take care of the child hand over their child to a kafil by means of a deed. A judicial kafala is established by a judge because the child has been declared abandoned or orphaned.

In Islamic culture, there is a ban on adoption, which finds its origins in the Q'uran (verses 4 and 5 of Sura XXXIII) and this is linked to the social construction of the family in the Muslim religion. The kafala is therefore a response to the Qur'an's ban on adoption, and has become the most important legal institution for the protection of abandoned or troubled children. It has several differences from Italian adoption mainly in that the child retains ties with the biological family and the institution is not permanent.

According to the dictates of the religion, kinship is transmitted to men through blood and to women through marriage, and for every Muslim there is an obligation to preserve this continuity. This explains why a Makfoul child is not allowed to acquire the surnames of the new family: a change of surname would symbolise a fictitious link and a break with the biological family, with the past and with consanguinity. The influence of the religious factor is also reflected in the requirements for obtaining the kafala, as the kafil is required to profess Islam and to undertake to diligently educate the child in Islam.

It should be noted that the duration of the kafala is not permanent, as it ceases when the makful reaches the age of majority, although this provision does not apply in the case of an unmarried daughter or a son who is unable to provide for his own needs, nor in cases of the death of the makful, the death or incapacity of the kafil, or the joint incapacity of the two spouses responsible for the kafala.

3. Embedding the individual practice in the broader cultural system.

The origin of the prohibition of kafala is found in the Qur'an, and has to do with aspects of the Prophet Muhammad's life, who was an orphan and had an adopted son, Zayd. The law, in fact, was changed and adoption was forbidden on the inspiration of a verse in the Qur'an in which it says that the Prophet adopted Zayd, giving him his surname, and Zayd married Zaynab; but the Prophet fell in love with Zaynab, and Zayd decided to leave his wife out of gratitude to Muhammad, who later married Zaynab. This led to a moral conflict over incest, and explains

why adoption is forbidden in Islam: if adoption had been recognised, Muhammad could never have married Zaynab, as he would have married his son's wife.

Despite the fact that adoption is not recognised, the Qur'an emphasises the importance of maintaining orphanages as a primary social responsibility, which must be respected and which concerns all members of the community. The holy text of Islam, therefore, regulates the care and protection of the material and moral rights of destitute youngsters in the figure of the kafala as a social, religious and legal institution of permanent protection and assistance.

It is important to note that although Muslim legal systems are based on spiritual law, most Muslim countries do not directly apply Islamic law, as they have their own codes of law that, although inspired by Islamic law, vary from country to country. This means that the formal requirements and functioning of the kafala also vary from country to country. For example, Pakistan allows international kafala, as does the Kingdom of Morocco, whereas Mauritania, Iran and Egypt do not allow international kafala. Moreover, other countries with an Islamic tradition, such as Indonesia and Tunisia, allow not only kafala but also other traditional adoptions.

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice **can be of great help to children in difficulty** and, while not binding, is considered a religious 'good practice' in order to be a 'good Muslim'.

Orphaned children living in Islamic countries, as they are not legally adoptable, are orphans 'forever'; however, the existence of a protective figure such as the Islamic kafala means that many of these children are integrated into families, and find a life path of protection within a new family unit, thus proving kafala to be a valuable tool to help children in need.

5. Is the practice shared by the group or is it contested?

The practice of kafala is widely shared in the Muslim world. It is used both in Islamic countries and, in recent years, by European families as an alternative to international adoption and by Muslim families immigrating to Europe as a migration strategy based on inter-family

solidarity.

6. How would the average person from that culture (or religion) behave?

Kafala is a widespread and accepted practice, so it is common to see its application in many Islamic family groups.

7. Is the subject sincere?

In this case, the ascertainment of the subject's sincerity would be aimed at preventing those charged with the care and assistance of the child from using the institution to circumvent the necessary criteria for the adoption of children or other norms envisaged for their protection in the international panorama, by transferring children from one country of origin to another in the absence of any desire for care and assistance but perhaps with abusive, exploitative or trafficking intentions.

With regard to this assessment, it must be reiterated that, when it comes to judicial kafala, the assessment of the child's state of need, the child's family of origin's willingness to foster him, as well as the kafil's willingness to provide care and assistance, are first ascertained by a territorially competent judicial authority that issues a proper court order.

The problem would also be more present in cases of negotiated kafala, where the approval of the 'custody' by an authority is only optional and in any case has a declaratory function. In this case, as partly indicated by case law, it would be appropriate to investigate whether the best interests of the child exist in the concrete case:

- regarding the nature and purpose of the institution invoked by the parties (negotiated or judicial kafala);
- regarding the correspondence of the same with the rules of domestic law of the State of origin;
- regarding the identification of the actual, pragmatic, legal reason for the kafala (state of abandonment and destitution in judicial kafala; desire to offer the child better care and assistance in negotiated kafala);
- whether there is an implicit or explicit agreement between the parties (the family of the child and the kafil);
- regarding any pre-existing link between the child's family of origin and the kafil.

Other evaluations may be aimed, in doubtful cases, at ascertaining the

institution through monitoring by the social services with respect to the relationship between the child and the kafil, the possible maintenance of relations with the family of origin, and generally the non-existence of abusive situations.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

The kafala presents elements similar to those of temporary foster care. In the kafala, in fact, as in the foster family, the full participation of the child in the life of the family must be guaranteed and the obligation to look after him/her, keep him/her company, feed him/her, educate him/her and provide him/her with an integral education must be fulfilled. Also in temporary foster care there is no filial relationship and relations with the family of origin are maintained. From this point of view, therefore, there is a clear similarity between this child fostering measures and the kafala, which is also a formal protection institution, whereby the child is placed in a family with the aim that the foster parents take care of, nurture, educate and protect him/her in the absence of his/her parents, without, however, implying any filial bond between the child and the kafili. To some extent, the institution could also be likened to that particular figure of adoption, defined by jurisprudence as mild adoption, with the difference that in this case the relationship is not temporary, and a filial relationship is generated but at the same time, there is constant maintenance of relations with the child's family of origin.

It should be pointed out that forms of co-parenting and family solidarity linked to cultural traditions have always been present in Italy, especially before the interventions of the family law reform (1975) and introduction of today's child protection institutions such as adoption and temporary foster care (Law 184/1983). In Sardinia, for example, the reference is to that form of shared parenting that led the child to be entrusted to another family unit within his or her own kinship or, in any case, within his or her own community, maintaining relations with his or her family of origin but at the same time benefiting from the material and moral assistance of the host family who treat them as 'spiritual kin' and often also heirs. Such practices, traces of which can be found all over Italy, responded to forms of reciprocal family solidarity: the 'host' family was often a childless family, and was therefore alleviated in the suffering of missing offspring or loneliness, in times when a lack of children was seen as a form of social misfortune; the donative family

had the possibility of alleviating its own efforts but at the same time guaranteeing decent if not even better living conditions for some of their children.

9. Does the practice cause harm?

No. Unless it is a tool used to facilitate the trafficking of minors to Western countries or is characterised by cases of maltreatment or exploitation of the same, it does not cause any harm because it is an instrument for the protection of minors, as also recognised by certain international conventions on the protection of children. The substantive assessment of the regularity of the institution is ascertained, in the case of judicial kafala by the jurisdictional authority of the places of origin of the minors and approved by public authorities, in some cases, even when it is a matter of negotiated kafala. In any case, dysfunctional relationships can be easily detected through monitoring by the judicial authority and social services. As for the danger of circumventing the rules on international adoptions, sometimes feared in the past by jurisprudence and doctrine, kafala does not create any filial relationship and is not an adoption.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The practice does not have a negative impact on the majority culture. In fact, it takes the form of a kind of family solidarity very similar to those that have always been implemented in communities and social networks; moreover, it has a similar value to the institutions of temporary foster care, guardianship and curatorship. In some cases it enjoys the recognition of an authority competent for the child's place of origin and is therefore easily recognisable as an officialised institution.

The kafala is consistent with constitutional values protecting children. In fact, it is an institution that guarantees, in Islamic law, the protection, care and assistance of minors in conditions of abandonment or destitution, which enhances forms of family solidarity built on the basis of voluntariness and the possibility of pre-existing social networks between the kafil and the families of origin of the minors. It therefore makes it possible to favour better living conditions for the minor, facilitating his or her settlement in countries that guarantee greater freedom and prospects than those of origin, for example in the case of reunification; it protects family unity by guaranteeing the maintenance

of the relationship with the family of origin and at the same time enhances de facto affective relations even when there is no consanguinity.

On the basis of the evolution of jurisprudence and of the norms of international law, the kafala is an institution for the protection of children which is now considered compatible with the Italian legal system, because in the abstract it is aimed at realising the best interests of the child, not in contrast with the adoption and foster care norms established in Law no. 184/1983 and moreover recognised as such by both the New York Convention on the Rights of the Child of 1989 (ratification law no. 176/1991) and by the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children of 19.10.1996 (Ratification Act No. 101/2015).

11. Does the practice perpetuate patriarchy?

No.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

This is the only child protection institution for abandoned or parentless children provided for under Islamic law. For this reason, the minority sees the kafala as the only vehicle from which to benefit from the child protection system and to be able to apply what is considered a religious 'good practice'.

Its non-recognition as an instrument to care for minors or even for the purpose of family reunification would penalise, in particular, minors from Arab countries and of the Islamic religion (orphans, in a state of abandonment or simply from indigent families) for whom the kafala is the only institution of protection provided for, since there is no adoption. In addition, the fact that the bond is ascertained by the foreign authority's order provides greater guarantees as to the child's actual fostering needs and the suitability of the kafil to take care of the child.

Proposed balancing act: the kafala may be the only child-supporting instrument for some Muslim minors and, moreover, it is absolutely comparable to some child-care models other than adoption that are widely used in legal systems; therefore, the link resulting from it should generally be acknowledged, as its distorted use may be discerned through judicial evaluation and observation in the concrete case.

Therefore parents accused of abandoning their children for entrusting them in kafala should be acquitted and family reunification allowed between children and adults even if they are not their biological parents.

Legal Insights

The institution of the kafala is an example of a cultural practice that has found great accommodation in the jurisprudence of states outside the Islamic system of law, to the extent that its inclusion among the instruments of international protection of minors and its recognition in most legal systems is now commonplace.

Italian jurisprudence has recognised the institution gradually. At first it legitimised it in its 'judicial' form, being the subject of a foreign court order, as a prerequisite for family reunification between the *kafil* and the minor entrusted to it. At that time, this recognition concerned only subjects who did not have Italian citizenship,[48] but after the Court of Cassation's decision in Civ. SS.UU. no. 21108/2013[49] the possibility of taking advantage of reunification was extended to Italian citizens as well, with the specification that there was no violation of the principle of international public order or circumvention of the rules on international adoptions precisely because the kafala did not have the same effects as the latter, as it could not determine any filial relationship. Other particularly significant pronouncements concern the equivalence in recognition between 'judicial' kafala and 'negotiated' kafala, in which the fostering agreement takes place between private parties and is then approved by a competent judicial or notarial authority.[50] Finally, other pronouncements have since dealt with the institution in a broader sense, dwelling on the identification of its effects in the legal system. As of today, even in the trial courts, the effectiveness in the Italian legal system of the institution and of the measure establishing the care relationship between kafil and the minor is affirmed, through the rules concerning the enforcement of the measures of foreign authorities in the Italian State, though not disregarding an assessment of the concrete case carried out always

[48] Cass. Civ. sez. I - 20/03/2008, no. 7472.

[49] Cass. Civ. Sec. Un. - 16/09/2013, no. 21108.

[50] Cass. Civ. sez. I - 2/02/2015, no. 1843.

with a view to protecting the minor's interest;[51] this excludes the need to open guardianship proceedings against the child entrusted in this way, as well as the possible appointment of a guardian other than the person identified as kafil, the latter already having legal guardianship as a foster parent appointed by the court/judicial authority of competent venue;[52] it recognises the kafala bond as a prerequisite for the right to parental leave, pursuant to art. 26(6) of legislative decree 151/2001 (consolidated text of the legislative provisions on the protection and support of maternity and paternity).[53] The importance of the institution has led the Court of Cassation to ask the trial courts to re-evaluate the possibility of the configuration of the crime of aiding and abetting illegal immigration for the person who brings with him the child entrusted to him in kafala, thus introducing him into the country.[54]

The European Court of Justice has also helped to enhance the value of the institution in its ruling of 26/03/2019, no. 129 (Grand Chamber), stating that the child entrusted in kafala, even if he/she cannot be identified as the "direct descendant" of the foster parents, who are EU citizens, is to be considered at least as "another family member" of the same, pursuant to Article 3(2)(1)(d) of Directive 2004/38 and therefore has the right to an entry visa in one of the EU Member States.

It is true that this path of accommodation of the practice in the legal systems other than those of origin was facilitated by the presence of certain norms in important international conventions that provided for this institution as an instrument of child protection. Indeed, the kafala is recognised not only by the New York Convention on the Rights of the Child of 1989 (Art. 20; ratified by Italy with Law No. 176/1991), but also by the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children of 1996 (Art. 3(e) and Art. 33; ratified by Italy with Law No. 101/2015). Such laws facilitate the recognition of its strongly institutional character, and that in both its forms, negotiated or judicial, it is the subject of a measure of

[51] Arts. 65 and 66 of Law 218/1995, inherent in the Italian system of private international law; in this sense see Court of Appeal section II - Salerno, 26/07/2022, no. 23.

[52] Court sez. I - Mantua of 10/05/2018.

[53] Tribunal sez. lav. - Venice of 24/09/2021, no. 542.

[54] Cass. Pen. sez. I - 14/04/2021, no. 22734.

local authority and therefore also speaks with respect to the suitability of the persons involved in the custody and care of the child.

This was, however, a path that was not without its difficulties and that is still evolving today, given the occurrence of numerous interventions on the subject, specifically in the courts, always aimed at reforming its limits from time to time (such as the reported judgments of merit). The institution is confronted with important instances of the domestic legal system such as, for example, the need to control the entry of foreigners into Italy and migratory flows, in the case of reunifications in particular, but also with the interest of minors in family unity, even though it may constitute a form of revocable removal from the family of origin.

In this path, mostly jurisprudential, the evolution of the concept of 'public order' has certainly played a fundamental role, as it is more attentive, in relations between domestic and international law, to enhancing shared principles with respect to the international community with a view to greater protection of fundamental rights, rather than creating an exclusionary barrier with respect to the domestic institution, as was the case in the past.[55] Moreover, to date the same legal systems have generally shown the need to resort themselves to 'spurious' forms of adoption (Garaci, 2020), different and much more modular than the classic legitimising adoption scheme, capable of adapting more closely to the concrete case and better balancing the importance of maintaining relations with the child's family of origin with the child's interest in access to more efficient conditions of care, in a manner similar to what happens in the relationship resulting from the kafala.[56]

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[55] This development is discussed by Iovane (2022), making an analysis of this concept precisely with reference to the parameter of the best interests of the child.

[56] Garaci (2020) cites some examples of this kind, including: the parental delegation provided for by the French system, which envisages a form of sharing parental responsibility through parental delegation; the *open adoption* in use in the USA, which allows the adopted child to maintain ties with the family of origin; in relation to the Italian system, the mild adoption model, derived from the jurisprudential interpretation of Art. 44, lett. d., of Law No. 184 of 1983 (so-called adoption in special cases), which also provides for the maintenance of the relationship between the child and his or her blood family. In this regard, it is worth mentioning, for instance, the Supreme Court's order of referral to the Constitutional Court, no. 230 of 5.01.2023, in which it asked to verify the constitutional legitimacy of the adoption law provision that provides as a general rule for severing the relationship between the adoptee and the family of origin. The Court of Cassation's doubt concerns, in fact, whether the severing of these ties

The careful use of the 'best interests of the child' parameter has thus played a primary role. In fact, it is evident how this concept has been used in kafala according to an optimal scheme, which could also serve as an example for other cultural practices where it is necessary to balance the different interests of the child, including that of his or her cultural identity.

The best[57] interest of the child is an extremely multifaceted concept and over time it has undergone and continues to undergo mutations in its use. Some scholars point out that it is by nature a parameter with blurred contours, that it cannot be packaged into a series of provisions (Iovane, 2022) to be adopted for the protection of the child in every eventuality, but rather into a set of several elements, a multifaceted parameter oriented towards the combined evaluation of interests in the immediacy of the child's life but also in a future perspective, that does not sanction automatisms with respect to the superiority of these interests over others, just as it is not channelled into inflexible dispositive elements that do not allow the adjudicating bodies a broad assessment of the concrete case (Lamarque, 2023). It emerges from the reported decisions on the subject of kafala that this parameter has been used in its most reasonable form, with an assessment that does not disregard the concrete fact and strikes a balance between the cultural identity of the child and his or her physical and psychological well-being.

Anthropological Insights

corresponds to the best interests of the children in the case of orphans of femicide, in relation to their relationship with grandparents and paternal uncles. The Constitutional Court addressed this issue in its judgment No 183 of 28/09/2023, pointing out how a constitutionally oriented interpretation of the contested rule (art. 27; Law No 184/1983) excludes the absoluteness of the prohibition to maintain particular socio-affective relations between the minor and his family of origin, all the more so if in this maintenance the judge sees the realisation of the minor's interest, a way to protect the continuity of his affective ties and his identity.

[57] Some authors point out that in translating the concept of Best *Interest of the child,* the term "best" is preferable to the term "superior", as the former would better emphasise the need to balance these interests against the others involved, without giving the idea that these are always and in any case prevalent. See Iovane (2022) and Lamarque (2023).

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

In the Islamic world, several modalities can be observed in the constitution of the kafala, among which are:

- intra-family kafala (consisting of relatives from the same family as the child),
- kafala of third parties (outside the family but resident in the same country) and
- international kafala (where the kafil is foreign).

In turn, to simplify understanding, these can be classified as **judicial kafala** and **notarial kafala**.

In the first case, that of the **judicial kafala**, the holder of the kafala is entrusted with the fulfilment of obligations relating to the care, maintenance, education and protection of the minor. These obligations extend up to the age of 18 in the case of boys and up to marriage in the case of girls, with the possibility of extending this obligation if the minor is unable to be autonomous. Furthermore, in order to constitute such a kafala, it is necessary for the child to be under the age of 18 and to be declared in a state of abandonment, which occurs when his or her filiation is unknown, he or she is an orphan or is the child of defaulting parents.

This mode is usually accompanied by substitute guardianship, whereby the kafil is granted legal representation of the child in court. Finally, it should be noted that only Muslim spouses or Muslim women can apply for this institution, whereas the establishment of an international kafala (where the kafil is a foreigner) is possible on condition that he or she converts to Islam.

In the second kind, the **notarised kafala,** it amounts to a delegation of parental responsibility by the biological parents. This notarial kafala is privately established between the parties involved, so that the child does not need to be declared abandoned, as it is the parents themselves who voluntarily hand over their child; moreover, according to this procedure, the child's interests and rights are not adequately protected and guaranteed by the respective competent public authorities. Therefore, the latter is not subject to the controls provided by law, and it may also happen that such an institution is established in the absence of the relevant administrative action.

Despite its charitable origin, the kafala is sometimes used as a **form of child exploitation**, especially of women, since in exchange for a payment to the child's biological parents, the latter hand over through a notarial kafala the child, who is often used as cheap or free labour, e.g. for domestic work or, in the worst cases, as sex slaves.

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Anthropological bibliography (recommended reading)

Bargach, J. (2002). *Orphans of Islam: Family Abandonment and Secret Adoption in Morocco*. Lanham: Rowman & Littlefield Publisher.

This interesting ethnographic work addresses the case of orphaned and abandoned children in contemporary Morocco, through a careful analysis of the concept of kafala and adoption in current times and its social significance.

With her fieldwork, the author succeeds in describing both the point of view of the children and the point of view of the adopting families;

what can be understood from Bargach's work is that there is a complex nexus of kinship ideologies, textual traditions, state institutions and (inter)national actors that condition and construct the conditions in which abandonment and adoption develop.

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6. Kirpan (Sikh ritual knife)

Cases: Sikh men charged with illegal carrying of weapons for wearing the ritual knife known as a kirpan in public.

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes, both the religion and culture categories can be used. **The Kirpan is a ceremonial knife that Sikhs are required to carry according to the precepts of their religion (Sikhism),** in keeping with the principle of fighting against oppression and injustice. It is part of the Sikh dress code along with other items (see below 2).

2. Description of the cultural (or religious) practice and group.

The word Kirpan in Punjabi has two roots: *kirpa*, meaning mercy, grace, compassion, and *aanaa*, meaning honour, dignity. Its area of origin is the Punjab region of India, where its use has taken root among Sikhs. For the Sikhs, the Kirpan is a symbol of wisdom and defence of the forces of light, peace and justice; it is the emblem of the word of God; it is a symbol of their spirituality and constant striving for goodness, and it is a destroyer of ignorance.

The Kirpan is a symbolic dagger-like weapon carried by orthodox Sikhs since 1699, when Guru Gobind Singh Ji, the top political, military and spiritual leader of the Sikhs, declared that it should always be carried as a symbol of the struggle against oppression and injustice. The Kirpan is placed on a cloth belt called the Gatra and can vary in length; generally Kirpans are curved and have a single sharp edge and are made of steel or iron.

Any Sikh who has undergone the initiation ceremony may wear more than one, as the Kirpan represents one of the five principles of Sikhism to be observed, which are:

- **Kesh**, long hair, often covered by a turban;
- **Khanga**, a wooden comb for maintaining the hair;
- **Kara**, a steel bracelet that reminds the believer of his connection to the guru;
- **Kacha**, cotton underwear;
- **Kirpan**.

To wear the Kirpan is to embody the qualities of a Sant Sipahi (holy soldier) who, according to the precepts of the religion, has among his characteristics the courage to fight for the underdog, as well as to show no fear on the battlefield and to treat defeated enemies with humanity. Although not all those who identify themselves as Sikhs wear the **Kirpan,** it **is one of the five articles of faith that baptised Sikhs see as an element of identity** and therefore feel they must wear.

Originally a ceremonial sword, the kirpan today is nothing more than a small dagger symbolising power and freedom of spirit, self-respect, the constant struggle for goodness and morality against injustice, and should never be drawn to attack or in moments of anger.

As much as the Kirpan sometimes raises questions or doubts among people unfamiliar with Sikhism, the Kirpan is nothing more than a religious symbol, similar to the cross in Christianity. It is not a physical object with a practical utility, but a symbolic and metaphorical element framed within the religion of Sikhism.

Just as Christians wear a cross, baptised Sikhs (almost exclusively men, but in recent years, as evidenced by some testimonies, also women), according to the commandments of the faith, wear a Kirpan at all times of their days, along with other articles of faith.

3. Embedding the individual practice in the broader cultural system.

Sikhs are a **monotheistic religious group of Indian origin, whose best known and most visible characteristic is the use of the turban**, **as well as the kirpan**. Sikhism was founded in the 15th century in the Punjab region of northern India, a culturally vibrant region ruled by the Mughal Empire. At the time of the founder of the Sikh faith and its first guru, Guru Nanak, Sikhism flourished as a counterweight to the predominant teachings of Hindus and Muslims; during this period the Mughal emperor Akbar focused on religious tolerance, and his relations with the Sikh gurus were cordial.

Relations between the Sikhs and Akbar's successors, however, were not friendly, and it is in this context that the use of the Kirpan among the Sikhs originated. In the following period, in fact, the Mughal rulers restored Islamic traditions, and with them a tax for non-Muslims. Guru Arjan Dev, the fifth Sikh guru, refused to follow the precepts of Islam and was therefore summoned by the Mughal rulers and executed.

This incident is considered a turning point in Sikh history, and led to the first instance of militarisation of the religious group, which occurred under the command of Guru Arjun's son, Guru Hargobind; it

was he who first conceived the idea of the Kirpan through the notion of Sant Sipahi (holy soldiers).

Beginning with the tenth and last guru, Gobind Singh, the Kirpan was formally incorporated as a compulsory article of faith for all baptised Sikhs, making it a duty for Sikhs to defend the needy and repressed, to uphold righteousness and freedom of speech.

The origins of the use of the Kirpan by the Sikhs are therefore rooted in the early period of origin of the religion, from a necessity of the first worshippers. Today, the dagger symbolises the religious duty to defend the innocent, and can only be used in self-defence and never as an offensive weapon.

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice is essential as a religious and identity issue, and a Sikh without his Kirpan to protect him from harm feels vulnerable, as a potential victim of external attacks.

The number of Sikhs in the Western world is numerous, and a constant among the members of this religion is the fact that parents make their children follow the Sikh commandments with great conviction, passing on the need to wear the Kirpan in every context of life. The Kirpan, besides being one of the five commandments of Sikhism to be followed, is also a very important identity symbol, especially in migratory contexts.

5. Is the practice shared by the group or is it contested?

The practice is shared by the group, and the kirpan is seen by practitioners exclusively as a religious symbol and not as a weapon.

Although it is quite clear that it is a religious symbol, the possession of the Kirpan has been the subject of public debate for many Sikhs living in Western contexts, as some public places prohibit the carrying of weapons: such as aeroplanes, courthouses and government offices. Despite this debate, Sikhs have not, by and large, stopped following the practice, and some countries grant Sikhs an exemption to carry these items.

6. How would the average person from that culture (or religion) behave?

The kirpan is worn daily by Sikhs, especially by the middle class. Although it has lost some of the symbolism that delegated to its owner the commitment to defend the weakest, it remains an unmistakable message of belonging to one's religious community, just like the turban.

7. Is the subject sincere?

In order to assess whether the subject's adherence to the practice of kirpan wearing is sincere and thus devoid of any offensive intentions, it might be useful to inquire about:

- his membership in a particular Sikh community;
- the possible use of other sacred objects typical of the Sikh faith;
- the nature of the dagger worn (the kirpan in fact possesses certain material characteristics that distinguish it from other cutting instruments);
- the **type of kirpan**; in fact, there is a prototype of this instrument recently approved by the National Proof House in Italy, which has been certified as being incapable of being used as an offensive weapon - so if it were this model, punishing the subject for unlawful carrying of weapons would contravene the series of provisions that have defined that particular model as not classifiable as a weapon;
- the possible **involvement of** the subject in past episodes of **violence** in which he/she used the instrument, even if only as a brandishment;
- other characteristics of the offender such as his or her participation in the life of the religious community, his or her lack of dangerous behaviour, his or her commitment to the society of which he or she is a part (character of the offender; the offender's criminal and judicial record and, in general, his or her conduct and life prior to the offence, the individual, family and social conditions of life of the offender).

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

The Kirpan is a religious and identity symbol, comparable to the cross in Christianity.

For people unfamiliar with Christianity, the cross worn by many Christians is an instrument of torture and death (the Romans used the cross to torture and execute prisoners). Therefore, one might come to think that people who wear a **cross** around their neck are **advocates of applying martyrdom**, suffering or torment.

In reality, the cross **symbolises salvation,** the way to resurrection, the human side and the divine side of Christ; it is the tree of redemption and therefore, for Christians, the cross is a sacred symbol.

The same happens with the kirpan: people unfamiliar with Sikhism might come to think that Sikhs carry an instrument of attack or assault and are always ready to pull it out if the occasion calls for it, whereas for Sikhs the kirpan is a symbol of wisdom and defence of the forces of light, the destroyer of ignorance, peace and justice, the spiritual struggle; it is the symbol of the word of God and also of spiritual purification.

9. Does the practice cause harm?

There do not appear to be any cases in the chronicle or in case law where the kirpan has been used offensively and thus caused harm. With the exception of the prototype referred to above and officially certified as harmless, the non-offensiveness of the kirpan cannot be ruled out entirely. One could sometimes exclude its ability to perpetrate cutting wounds, because it is perhaps not sharp or particularly small, but not its general ability to cause harm, especially if larger in size. If one focuses on the practice of carrying the kirpan, and thus on adherence to the meanings of peacekeeping and obedience that it symbolises, one can say that the practice does not cause any harm. It certainly generates fear in members of the majority culture who do not know its meaning because it is associated with the idea of the dagger but also, with the dagger being carried by a 'foreigner' and this evokes a feeling of danger because it is equated with the phenomenon of a potential terrorist attack. If one were, therefore, to identify a form of harm, this would have to do with the feeling of security of some people, especially those who are unfamiliar with the practice or who have a prejudice of dangerousness towards foreigners. But if one goes beyond this prejudice, traces the practice back to its real meaning and data, which do not show the use of that weapon in an offensive sense, the harm does not exist.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The majority culture perceives the practice of wearing the kirpan in public places as a security risk. This perception is fueled by a distorted conception of the foreigner as dangerous, dedicated to begging and delinquency because they lack economic and welfare means, or as a potential extremist and terrorist. While it is undeniable that some migrants find themselves in conditions of housing, economic and welfare deprivation and are therefore often inclined to commit crimes (as are Italian citizens who find themselves in the same conditions), it is

also true that these situations do not concern the majority of foreigners in the country, who live peacefully and work stably in Italy for several generations and who would better represent the profile of the 'foreigner'. However, prejudice about foreigners has a preponderant weight on the feeling of public safety. In fact, the citizen does not feel threatened to the same extent in other cases that are an integral part of everyday life, but which conceal, at least in the abstract, the same risks: one thinks of the use of picnic knives that are carried by their legitimate owners on walks and outings; of certain civil and formal ceremonies in which, in front of crowds of people gathered for the occasion, several individuals display and brandish swords (coronation of kings and queens, wedding ceremonies in which members of the armed forces choose to adopt special protocols and in which the exit of the bride and groom is often accompanied by the so-called 'bridge of sabres', a real bridge of swords made by military colleagues above the bride and groom and endowed with special auspicious meanings for the couple), to occasions of military parades, as well as medieval parades and historical re-enactments with swords, crossbows, bows and arrows.

The constitutional value that is considered most harmed by the practice of wearing the kirpan is the common sense of public safety. However, other values also come into play: that of secularism, which in an extreme view would like to limit the expression of individuals' religious orientations in public (as well as crucifixes, Islamic veil), to guarantee the idea of a formal equality not conditioned by expressions concerning one's beliefs; versus that of religious freedom, which would instead like to guarantee the free use of symbols.

In terms of rights, the practice would seem to impact on the protection of public order and safety. The reference, however, to the specific practice of wearing and carrying the kirpan in public places does not generate a real infringement of this right, as long as it is not used with malicious intent. Even the punishability of the conduct is in fact mostly linked to offences of danger, which therefore affect certain conduct that the legal system deems highly likely to generate dangerous situations, hence the reference to public order and safety as rights. However, from the point of view of the 'feeling of danger', the use of the kirpan has a slight impact on the sphere of individual rights compared to the limitations that the absolute prohibition of this practice would determine on the right to freedom of worship and on the principle of the 'positive' secularity of the State, called upon to facilitate and protect the spiritual and religious expressions of individuals.

11. Does the practice perpetuate patriarchy? No.
12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice. The kirpan symbolises power and freedom of spirit and is nothing more than a religious symbol, similar to the cross in Christianity. This is why it is worn **naturally according to the commandments of faith**, along with other articles of faith, and there is no reason to break this custom.

Proposed balancing act: Since the right to religious freedom and the principle of 'positive' secularism - according to which freedom of worship and religious expression must be protected and guaranteed to individuals - are of fundamental importance in the legal system, they should not be sacrificed to public order and security, .This is true especially in the absence of evidence of offensiveness in concrete terms of the practice. In fact, in relation to the specific wearing of the kirpan and the Sikh group, there have been not cases of violence or inappropriate use that would justify its prohibition.

Legal Insights

The kirpan, understood by the Sikhs as a symbol of wisdom and defence of the forces of light, peace and justice, has repeatedly been the protagonist of the Italian legal debate because, being materially configured as a knife, albeit a symbolic and ritual one, it has often come into conflict with the regulations governing the carrying of weapons and offensive objects in public in Italy.

Initially, a certain openness developed, similar to that which occurred in other Western states,[58] mostly by a part of the jurisprudence of merit[59] that recognised the inoffensiveness of the ritual dagger and its unsuitability to be used as an assault weapon, precisely because of its

[58] In *Multani v. Commission scolaire Marguerite-Bourgeoys,* [2006] 1 S.C.R. 256, 2006 SCC 6, the Supreme Court of Canada dealt with the possibility of taking the kirpan to school and admitted it.

[59] Court of Cremona, 19/02/2009, no. 15; Court of Piacenza, 24/11/2014.

beneficial value in the religion of origin. For these reasons, the existence of justified motive, referred to in the same legislation on the carrying of offensive objects, was found to exist, and thanks to this, it was considered lawful to wear it in public places, as it is a fundamental element of the Sikh religion.

Subsequently, however, these positions were not upheld by the jurisprudence of legitimacy, which instead ruled quite the opposite and punished the wearing of the kirpan in public.

In these pronouncements, the Sikhs are always challenged on the grounds of the incompatibility of carrying the ritual dagger in public places, in contrast to Article 4, Section II of Law No. 110 of 1975.[60] The religious motive put forward by the Sikhs, who were suppressed in the proceedings, is not considered by the Court of Cassation as a justified motive. The characteristics of the ritual dagger in any case make it an improper weapon and as such incapable of responding to those "particular needs that lead one to carry the weapon outside the home," which, according to the Court of Cassation, should have corresponded to behavioural rules that were in any case lawful, in relation to the nature of the object, the manner in which the fact occurred, the subjective conditions of the bearer, the places of the event, and the normal function of the object (Cass. Pen, sec. I - 24/02/2016, no. 25163, Cass. Pen., sec. I - 01/03/2016, no. 24739). All these elements were not assumed to be supplemented by the mere religious justification.

The discourse on kirpan was then settled in a 2017 ruling (Cass. Pen. sez. I - 31/03/2017, no. 24084), discussed in detail in the opinion.[61] This decision, in addition to not recognising the religious motive as

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[60] Law No. 110/1975; Article 4. '*Carrying of weapons or objects likely to cause offence*'. *Paragraph II*: 'Without a justified reason, you may not carry, outside your home or its belongings, sticks with a sharp point, pointed or cutting instruments capable of giving offence, clubs, pipes, chains, slings, bolts, metal balls, as well as any other instrument not expressly considered as a pointed or cutting weapon, clearly usable, due to the circumstances of time and place, to offend the person.'

[61] As reiterated also in the constitutional pronouncement that the Court of Cassation in this specific case recalls to corroborate the pre-eminent force of the values of public order and security, no. 63/2016, concerning religious building issues. In this pronouncement, it is stated that freedom of worship may be restricted on the grounds of public order and security, but through the state legislative instrument and not the regional one.

justifying the violation of the rule referred to, deepens the discourse on the level of values, only mentioned by the previous pronouncements, and reiterating the contrast in the case at hand between religious freedom and the protection of public safety and peaceful coexistence, as well as the consequent prevalence of the latter over the former and the need for foreign subjects to conform to the values of the host culture.

The case of the kirpan actually raises more complex issues: in the balancing act, together with religious freedom, the principle of the secularity of the state is also involved (Constitutional Court 203/1989), which would presuppose state intervention capable of recomposing the diatribe between cultural practice and legal norms, together with the protection of pluralism and identity rights guaranteed by Article 2 of the Constitution; public order, security or peaceful coexistence are not protected in the Constitution as primary or 'tyrannical' values, they have a very discretionary connotation that constitutional jurisprudence has often sought to anchor to the legislative instrument.[62] The principle of the proportionality of the limits that may be imposed on religious freedom would also play a role in the case, due to the fact that it succumbs under the axe of a contravention, which provides for particularly serious punishments[63] and generically refers to the concept of justified motive, thus offering a wide discretion to the interpreter. The discretion is such that the same criteria that case law uses in all these pronouncements to affirm that there is no special need to carry the weapon outside the home could be used to admit the carrying of the kirpan instead, especially if assessed from a more anthropological perspective.[64]

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[62] Morelli, 2017; Nico, 2017; Introvigne, 2017.

[63] With Legislative Decree No. 204 of 26 October 2010, the punishment originally provided for the violation of Article 4(2), corresponding to imprisonment from one month to one year and a fine from EUR 51 to EUR 206, was aggravated to an arrest from six months to two years and a fine from EUR 1,000 to EUR 10,000.

[64] For example: 'lawful rules of conduct' could be understood as the same freedom of worship, admitted in the constitution by Art. 8; 19; by Art. 2 itself.; the nature and function of the object would be identified in the symbolic meaning of taking the side of the weakest and of justice, not in a sense of armed struggle, but more ethically, as a promise of faith; the manner of occurrence of the fact as well as the circumstances of the place, as evinced by the rulings dealt with, never concern episodes of confrontation or threat but Sikhs carrying out their daily activities; the subjective

In this debate, a point of favour is certainly to be assigned to the Italian Sikh community, which rather than exacerbating the conflict has recently tried to adapt its traditions to Italian legal culture by proposing to its faithful the use of a kirpan model that complies with Italian legislation on the carrying of offensive objects. This adaptation can be seen in an opinion of the Council of State (Consiglio di Stato sez. I - 29/10/2021, no. 1685) on the recognition of legal personality of a Sikh association, in which a specific model of ritual dagger, approved as non-offensive by the National Proof House[65] (act prot. no. 525 of 16 December 2016) and also in the articles of association of the Unione Sikh Italia, which, in its preamble, identifies the 'Kirpan' as the 'inoffensive replica and consistent with Italian provisions of a ritual object, simulacrum of a dagger and symbol of respect and moral integrity, with dimensions that make it not suitable for causing offence to the person.'

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

It is difficult to understand Sikhs and the interpretations of their objects of worship without considering issues related to the process of their identity construction in history.

On the one hand, Sikhs define themselves as a global religious community and, indeed, in order to define Sikhs it is necessary to consider their membership of a particular religion (Sikhism), but they also define themselves by reference to a common origin or ancestry (Punjab) and a shared language (Punjabi). For these reasons, Sikhs are

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conditions of the bearer could refer not only to religious affiliation, but also to the subject's level of inclusion in the host community.

[65] An institute that assesses the characteristics and compliance of arms and ammunition with technical and legal standards and can be considered the 'registry office' of all arms produced in Italy and a large part of those imported. Source: https://www.bancoprova.it/it/banco_nazionale_di_prova-armi_da_fuoco-portatili-munizioni_commerciali/

bound by a sense of brotherhood on a transnational and global level; it is worth noting, in fact, that more than 1.5 million Sikhs are settled abroad, which would correspond to the highest percentage of any religious community in India. This significant settlement outside the homeland would respond to an important tradition of Punjabi emigration, which goes back further than the Sikh religion itself.

In any case, religion is the fundamental element in defining the identity of Sikhs, both as individuals and as members of the community, so much so that their practices and beliefs influence the way they live and work. Indeed, there is a code of conduct, the Rehat Maryada, that regulates and organises many aspects and practices of their daily lives. This is why being a Sikh goes beyond the mere definition of an individual based on belief; a Sikh is defined by a certain ethical philosophy and way of life that characterises them, where brotherhood, community and family are at the heart of Sikhism, and thus they regard other Sikhs as brothers and sisters.

Against a backdrop such as this, it is easy to understand how for Sikhs the Kirpan is a symbol of their spirituality and constant struggle for goodness and morality against the forces of evil and injustice, not only in the individual sphere but also and especially in the social sphere. The wearing of the Kirpan in this religious context is clearly stated in the sacred Sikh scriptures (Sri Guru Granth Sahib Ji) and for the wearer it is a reminder or inspiration of/for the daily struggle to defend the community and injustice.

Guru Hargobind introduced the concept of the Saint-Sipahi (holy soldier), that is, a person who takes part in his social, family and community responsibilities, following the path of law, order and morality. Later, Guru Gobind Singh Ji, the tenth and last Sikh prophet, formally instituted the obligation for all baptised Sikhs to always wear the Kirpan in order to be a good holy soldier. He instituted the current Sikh baptism ceremony in 1699, known as 'sword baptism' (pahul khanda); during this ceremony, sugar crystals and water are mixed in a steel vessel with a Kirpan, in front of the initiate who has to drink the mixture. In this ceremony, the initiate is also instructed on the duties and obligations of becoming a good Sikh.

The new member of the Sikh community is expected to live up to high moral standards at all times, which include such codes as refraining from smoking, drinking or consuming other substances, performing daily prayers and always maintaining the distinctive physical symbols of Sikhism in his or her person which include, among the most important, those of maintaining uncut hair and wearing the kirpan.

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In this interesting interdisciplinary work, Eleanor Nesbitt highlights and contextualises key points in the history of Sikhism, so that the historical reasons behind the most characteristic Sikh customs can be understood. His study is geared towards understanding Sikhs in the present day, especially in contexts of migration; for this reason, reading his work is highly recommended.

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7. Mourning, Burial, Ancestor Worship

Cases: judgments of inadequacy by parents or grandparents for grieving for too long, in a way considered too dramatic, or for making minors follow certain rules connected with mourning (e.g. dressing in a certain way, prohibition of attending parties during the mourning period); refusal of autopsies on bodies for reasons connected with the fate of the soul after death; requests to carry out certain rituals (e.g. lighting fires, incense, vigils, dances, funeral banquets, celebrations of the dead) in cemeteries, other public spaces or in the domestic sphere; dismantling of native/indigenous burial sites for the construction of residential and/or commercial areas; appropriation by cultural bodies and private individuals of human remains and grave goods belonging to indigenous tribes for scientific and/or tourism-commercial purposes.

Cultural test

1. Can the category 'culture' (or religion) be used?
Yes, the category culture can be used. Although death is a biological process, it nevertheless has social and cultural implications. Mourning and burial, in fact, can be seen as cultural (or religious) interventions that are enacted following the death of a person and on the corpse itself, as well as social responses to the end of a life. The cult of the dead continues throughout life after the events of mourning and burial.

2. Description of the cultural (or religious) practice and group.
Mourning. The term mourning refers to all the psychic processes and social practices following the death of a person. Generally, the state of mourning can be interpreted as **accompanying the transition of the deceased** by enacting specific rituals, behaviours and practices.

Burial. The term burial is understood here, in a broad sense, to mean all those **interventions carried out on the body of the deceased to manage the process of decomposition**. A related word, "sepulchre" (cognate with *sepoltura* in modern Italian, meaning burial) does not exactly coincide with the term inhumation or interment, but, as the etymon reveals, derives from the Indo-European root *sap-* render honour (bury, http://www.etimo.it/). Thus, in this Guidebook, we use the etymological meaning of the term and use it in extensive variations.

What makes death tangible and therefore persuades the social group

of the absence of one of its members is the physical alteration of the corpse. The belief systems concerning death in each society are reflected in the different ways in which corpses are treated.

The task of the social group is to manage the process of putrefaction of the body of the deceased, which, apart from a few rare cases ('The initiation rites of some African Pygmies involved living in close contact with a corpse for six days', Fables 2003, p. 35), is generally handled in the following ways:

- **Avoidance of decomposition**: cremation or funeral cannibalism;
- **Acceleration of decomposition**: ritual exposure or abandonment for the bodies to be eaten by animals;
- **Dissimulation of decomposition**: inhumation (in the ground with or without an container such as a shroud or coffin), burial (in a loculus, sarcophagus, urn, etc.) but also inhumation in caves or other natural places, such as among the roots of large trees, or immersion in water;
- **Slowing down decomposition**: temporary embalming, Thanatopraxis (mortuary aesthetics involving the treatment of the corpse's internal cavities with antiseptic liquids to delay the effects of putrefaction);
- **Stopping decomposition**: mummification, cryogenisation (i.e. a progressive hibernation and preservation of the corpse, particularly popular in the USA).

What the different ways of handling corpses have in common is the guarantee of specific care for a body that is still perceived as 'human', i.e. as part of the social group in question.

The different forms of burial do not have a homogeneous geographical distribution. Within the same social group, more than one form of burial may also co-exist (in Australia, for example, almost all forms of burial in the world co-exist).

Within the same Italian context we find both burial in the ground (inhumation) or loculus (burial), cremation, and mummification treatments, reserved for certain particularly important bodies.

Although there are similar types of burial recurring among different populations, the complex web of symbols and meanings that each culture associates with funeral rites means that it is not possible to provide a single explanation and interpretation. In fact, the meanings

and motivations behind a similar burial choice may even be opposite in different societies or eras.

Ancestor worship

The expression cult of the dead refers to those practices implemented, after the mourning process and the completion of the burial, throughout life to pay homage or keep alive the memory of the deceased. They may take place in the domestic sphere (e.g. altars dedicated to ancestors, tables with photographs, preservation of ashes) or in the public sphere (e.g. *Dia de los muertos in* Mexico involving vigils, dances and banquets in cemeteries; *Gule Wamkulu*, or ritual singing and dancing to renew traditions entrusted to ancestors in some areas of Malawi, Zambia and Mozambique).

3. Embedding the individual practice in the broader cultural system.

Mourning, burial, and the cult of the dead fit into the broader approach a group has towards death, emotion and religion, particularly beliefs about life after death.

Death is certainly a crisis element in the relationship between individuals in society. However, the body of a deceased person is hardly ever perceived as a mere biological body, but rather retains 'human' characteristics. The deceased is the object of specific care, sometimes purifying, sometimes purely aesthetic. Such care is not limited to cleaning operations, but symbolically brings the body back into the world of the living, of society, as well as being an expression of affection. Preparations for funeral rites reactivate social networks and reconstitute the group to which they belong: what emerges as fundamental is therefore the importance of the complex networks of exchange that are created around the deceased, creating a real social life of and with the dead. The cult of the dead carried out throughout life at periodic intervals (e.g. annually) renews this bond.

Mourning can be conditioned by the way a group perceives emotion: in groups where it is legitimate or even a duty to outwardly manifest the most violent emotions, mourning is accompanied by uninhibited shouting and crying, by the obligation to dress in a certain colour, and not to go to certain events even for a long period after the death of one's loved one; conversely, in groups where it is considered improper to abandon oneself to grief, mourning manifests itself silently

and is not externalised through the obligation to wear a certain clothing or to abstain from certain behaviours (e.g. attending parties).

One element of the cultural system that can affect bereavement and have legal implications is the exposure of the child to the stark reality of death. In certain groups, the climate of mourning and sadness may prevail for a long time and the exposure of minors to the sight of the corpse and to manifestations of strong grief are part of a conception of the child not as a subject to be protected from the pains of life, but as a full protagonist in adult society.

The practices of mourning, burial and the cult of the dead can be better understood when embedded in the religious beliefs of the group. The morphology of burial changes, depending on whether death is perceived as the definitive end of existence or whether there is a belief in resurrection. For example, burial by inhumation, which is common among Christian groups, and which until recently was accompanied by a religious ban on cremation and dissection of bodies, is also rooted in the belief in the Last Judgment that at the end of the world will bring about the resurrection of bodies. The body must remain in the grave because it will be reconstituted identical at the end of the world.

Conversely, the abandonment of the body in open-air cemeteries to be eaten by vultures, invariable for example in the Zoroastrianism of ancient Persia and in Tibet, corresponds to a conception of death as a moment of passage to other lives. There is no need to preserve the body as another body will be assigned in the cycle of reincarnations. In Tibet, moreover, there are conceptions of equality of the human being with everything else in the universe whereby the dead body must serve, in a compassionate act, to nourish other living beings.

The cult of the dead can be very intense in cultural systems where there is a close bond with the ancestors, who are considered an integral part of the family, to be turned to when making decisions, to be honoured and kept present in the living room (e.g. Japan); the different beliefs on the fate of the soul after death can lead to private prayers or through sacred figures (e.g. priests, shamans) to help the soul of the deceased to come out of a certain status (e.g. masses for purging souls, rites to help the dead leave this world or rest in peace).

4. Is the practice essential (to the survival of the group), compulsory or optional?

Since it is not a single univocal practice, it depends on which practice

is being considered. There may be compulsory practices, as for instance in cases of religious and/or cultural indications regarding the management of the body of the deceased, as well as optional practices, especially with regard to the management and manner of expressing grief. It must be considered, however, that adherence to a particular model of mourning and/or practice of managing the body after death is generally regarded as the most appropriate and best, on the basis of one's own belief system related to life and death.

5. Is the practice shared by the group or is it contested?

The practice is shared by the group to which it belongs. It must be considered, however, that there is no one-size-fits-all model, so that even within one group we can actually find different approaches to mourning, burial and cult of the dead. There are also some practices of mourning, burial and cult of the dead that may be abandoned by the group to which they belong, such as the strong externalization of mourning with weeping and shouting, or the practice of washing the bones that was common until a few decades ago in the archipelago of Okinawa, Japan, which consisted in drying up the bodies in a large ceramic or cement container in the first phase of burial and then, in the following 3-7 years, exhuming the bones to wash them in sea water.

6. How would the average person from that culture (or religion) behave?

An average person would adapt to the practice of mourning, burial and cult of the dead common to the group to which he or she belongs. However, especially with regard to mourning, it must be considered that the individual psychological component plays a fundamental role, which is why there can be no 'standard' and identical reaction for all individuals.

7. Is the subject sincere?

In this case, sincere adherence to the practice, as well as opposition to particular treatments after death, exclude the existence of a detrimental intent with respect to the body of the deceased and are indicative of a willingness to offer appropriate care to loved ones even after death. If the participation is sincere, one could also determine the absence of harm (e.g. on minors cohabiting with the deceased's relatives) with respect to certain ways of experiencing mourning, because they are

typical of a given cultural context and therefore not only accepted, but even essential for the elaboration of grief and death. To this end it would be useful to ascertain:

- the correspondence of the practice/opposition to particular treatments (e.g. to the autopsy examination)/particular ways of experiencing grief, or lack thereof, to the subject's reference belief system;
- the thematic or philosophical links, in the culture of origin, between these funeral practices/rejection of certain treatments on the bodies of the deceased/mourning and conceptions of immortality, eternal life, religious dogmas and the afterlife;
- the possible repercussions that the non-implementation of the practice (or implementation of the treatment opposed to it) has,for the culture of origin, concerning the fate of the soul of the deceased or, even, on that of the surviving relatives (it could, for instance, call into question access to eternal life, or bring about the damnation of the soul or interference between it and the lives of the surviving relatives);
- the compatibility of the practice with the health and hygiene regulations of the system and the possibilities of implementing any exceptions safely; and
- the presence of certain practices developed by some religious/cultural communities in order to adapt to the regulations and culture of the host country.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Mourning among Italians has undergone significant changes. Dramatic forms of manifestation accompanied by heartrending cries have been replaced, especially in urban areas, by a rule of emotional restraint that brings Italy closer to Asian countries where there is almost no crying (e.g. Vietnam). While in the past it was common to expose children to the sight of corpses and to funeral rites, there is now a tendency to avoid this exposure, again with a prevalence of such behaviour in urban areas.

As far as burial forms are concerned, Italy is close to those groups that practice inhumation and cremation.

With respect to the cult of the dead, Italy provides for visits to

cemeteries to bring flowers once a year as a collective rite, as well as individual visits during the year. In cemeteries, it is customary to bring flowers while other practices such as banquets or dances, which prevailed before the reform of cemeteries in the Napoleonic period, have disappeared. In addition to cemeteries, the cult of the dead is sometimes practised in homes with the display of photographs of the deceased (on dedicated tables or in the places most exposed to visits from guests such as the living room), sometimes accompanied by lighting candles or placing a vase of flowers next to them. At the level of religious practices widespread in the dominant Catholic religion in Italy, the cult of the dead may take the form of asking the priest to perform masses in suffrage of the deceased and for the liberation of his soul from the pains of purgatory.

9. Does the practice cause harm?

Practices that are linked to the bereavement event can affect three categories of actors: the deceased themselves, their surviving relatives, and the community.

Certain treatments of the body after death or certain burial methods could be interpreted in our legal system as actual criminal conduct against the deceased (think, for instance, of practices involving the burning of bodies on pyres or leaving the corpse in the wild, waiting for it to decompose and only thenafter recovering the remains), but if they are customs consistent with the culture of origin and have particular meanings, the harmful intent of acting maliciously on a corpse would be excluded.

In other cases, the damage could concern the health of the next of kin and others involved in the rituals, as well as the community at large, for instance when there is a danger of spreading a certain pathogen through the wake over the body, in the absence of ascertaining the cause of death, or other health hazards due to the violation of hygiene and health regulations.

Certainly, on the other hand, for some groups it is detrimental, for the deceased and the next of kin, not to be able to perform the ritual practices that are culturally typical of their own community/religion (so much so that many foreigners already plan to return their remains to their country of origin during their lifetime). The renunciation of particular rituals because they are incompatible with mortuary regulations, the impossibility of holding vigil before burial, or the performance of autopsy examinations or other examinations on the body of the deceased that are not accepted in one's own culture, could,

in fact, render subjective and irreparable harm to the deceased by hindering or preventing the path to eternal life or to, for instance, reincarnation. At the same time, the relatives of the deceased may also be affected, either because of possible interference of the soul of the deceased with the future earthly life of the relatives or directly because of their suffering for not being able to provide adequate care according to their own culture.

Potentially, the fear of not being able to perform one's rituals related to the cult of the dead could also lead some people of diverse culture to avoid hospitalisation or to omit reporting deaths, thus creating a danger to their own and the community's health.

The practices of mourning, burial and cult of the dead could, in certain cases, be perceived as causing harm to the child, for example, when he or she is exposed to overly dramatic forms of expression of grief, or to obligations connected with mourning that prevent him or her from a life of relationships (e.g. prohibition to participate in festive occasions or social events for a year or more) or to cults of the dead that keep alive the memory of the dead. In general, the child socialised in a certain cultural group does not suffer from such arrangements, which are only perceived pathologically by the majority culture due to a lack of habit or cultural sensitivity.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

For the majority culture, certain practices related to mourning, burial or the cult of the dead typical of some minorities could be perceived as symptomatic of a lack of seriousness with regard to the subject of death, or as morbid, the result of irrational credulity, or manifesting a lack of trust in medicine and science. In other cases, they could be interpreted as outright insults to the corpse and as heinous and criminal conduct. The problem is not particularly appreciated, however, because in general there is a 'transitory' conception of the other, so the moment of his or her death is not often reflected upon, nor is there a widespread awareness of the extreme diversity of existing religious funeral rituals compared to those of the majority culture.

Practices related to the cult, burial and ancestor worship have an impact on the value of the dignity of the body of the deceased and on the collective feeling of pity for the dead, both of which are linked to the perception of a moral duty on the part of the relatives to guarantee their loved one adequate care and homage even after death, in ways that are as respectful of his or her wishes as possible. Such practices not

only facilitate the processing/acceptance of grief by those who are still alive but also, depending on beliefs, guarantee the deceased's access to 'eternal' peace.

In the Italian legal system, the practices of mourning, burial and everything that generally concerns the cult of the dead and the treatment of the body after death are ascribable to the protection of the following constitutional rights: religious freedom **(Article 19 of the Constitution)**; the principle of equality between religious denominations **(Article 8 of the Constitution)**; the principle of positive secularism deriving from them, according to which the State must have an attitude of promotion with respect to forms of exercising forms of worship other than the majority one, as well as protection of the same, both in individual and collective manifestations. The practices in question are also likely to impact on the right to health **(art. 32 of the Constitution),** which is why there are regulations (such as, for example, the Mortuary Police Regulations, **Presidential Decree no. 285 of 10 September 1990,** or **Law no. 130/2001** on cremation and the scattering of ashes) that regulate the exercise of funeral rituals and in general the treatment of the body of the deceased so that the health of relatives or the community is not endangered.

A distinction is sometimes made between primary burial rights, which relate to the right of every person to be buried in a funerary structure, obtained in concession from the state for a given period of time and in some cases transmissible by deed inter vivos or mortis causa (this is a right that has been equated with the right to a surface area similar to that obtained for the construction of social housing), together with the other powers attached to it (use and enjoyment of the tomb for example) and secondary burial rights, making reference in the latter case to the very personal and intransmissible rights pertaining to the relatives of the deceased, such as those of access to the burial place, non-violation of the tomb and opposition to any transformation that would cause harm to the tomb, which may find protection, according to certain case law interpretations, in the fundamental rights of the individual **(art. 2 Const.)**.

11. Does the practice perpetuate patriarchy?

In general, there are no differences in the manifestations of mourning and forms of burial whether a man or a woman dies. There are, however, some profiles in which one could speak of patriarchal influences in the consequences of mourning. Generally, mourning does

not produce a prohibition of the subjects to remarry, but in some groups the pressure, especially on widows, not to remarry may be strong and not comparable to that existing on men who are encouraged to do so (e.g. rural Sardinia). Following the death of a spouse, moreover, obligations may arise to marry the spouse's brother (e.g. Jewish levirate), which, although not necessarily born with patriarchal logics of subjugation of women, but rather of preservation of the patrimony within the same family axis, have consequences on the rights of women and men involved in such marriage obligations.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

The different behaviours practised by different populations are perceived as the most appropriate in order to manage a moment of crisis such as the death of a member of one's community, both with regard to mourning and to the subsequent management of the deceased's body.

The various practices of burial and cult of the dead, moreover, can be fundamental in transmitting intergenerationally the values shared by the group they belong to, both in religious and cultural terms. Moreover, such practices are often strongly linked to the perception and meaning of being human and of life after death, which is why they are fundamental to the cultural context to which they belong.

Often, in migratory contexts, the upbringing of sons/daughters according to the model proposed by one's own community is therefore perceived as fundamental in order to maintain a strong bond with one's own cultural experience.

Proposed balancing act: Forms of mourning should all be recognised and not necessarily be considered traumatising for the children involved, for the good of educational pluralism; forms of mourning that prevent remarriage or require certain people to marry (e.g. the groom's brother, or levirate, motivated by descent and/or economic reasons) should be rejected as impacting on the right to marry; forms of burial should generally be recognised unless they pose a serious risk to public health as there is a risk of poor hygiene; the ancestor worship, even if it takes place in a festive manner (dances and banquets), is carried out intensively in the domestic sphere (periodic prayers, altars to ancestors) and therefore should also be admitted as it does not impact on other significant constitutional rights. Human remains, funerary objects, and all sacred objects linked to the cult of the dead and belonging to indigenous populations must be considered for their

spiritual and existential value and not as mere objects of scientific study or collectibles.

Legal Insights

1. *One value, many practices.*

The practices and behaviours linked to the time of mourning, burial and in general concerning the treatment of a body after death and the ancestor worship throughout the life of their living loved ones may be considerably varied, but they all lead back to the same value component: the feeling of veneration and care for the dead, even more so if they belong to one's own emotional sphere. This sentiment is linked to a twofold urgency in most beliefs: that of guiding loved ones towards afterlife existences, variously understood (eternal life, reincarnation, reunion with the earth and/or nature, etc.); and that of facilitating the detachment between the deceased and those linked to them who have remained alive. It can be found in any form of culture and in any age, albeit in extremely different ways and with very different meanings. It manifests itself individually, but also collectively, and is usually only lost in those situations in which the human being seems to lose his very essence of humanity (think, for instance, of genocidal wars).

In other words, these practices take on existential and profound dimensions in the lives of individuals, and consequently, so do the controversies that may arise in relation to them.

In spite of the fact that they can be traced back to a single value component, these practices, especially if they refer to cultures other than the majority culture, are particularly susceptible to conflict with the various norms that the different legal systems put in place to make the management of mourning compatible with the interests of the community, first and foremost with that of public health.[66]

2. US and Australian jurisprudence

[66] Just think of the rules laid down in the Mortuary Police Regulations in Italian law (Presidential Decree 285/1990) or the precise provisions on cremation and ashes dispersal (Law 130/2001).

The attention of doctrine and jurisprudence to these issues, and the possible multicultural implications that may arise from them, are certainly much more pronounced in those contexts where coexistence between different cultures has a longer history.

Taking some American and Australian pronouncements as an example, it is possible to understand some of the problems that the variability of funeral rituals or ways of experiencing mourning may cause at the legal level in a multicultural society. Among the most relevant ones identified by certain scholars (Renteln, 2004; Goodchild, 2021) include, for instance: the opposition of the relatives of the deceased to an autopsy examination, which for some cultures and religions is a form of corruption and offence to the body, capable in some cases of hindering access to the afterlife;[67] negligence with regard to the treatment of the body by healthcare facilities or funeral parlours that prevent them from fully carrying out rituals and/or funeral wakes in accordance with their cultural and religious customs, creating further suffering for the relatives of the deceased;[68] and different ways of

[67] Some examples from US jurisprudence: the *Albareti v. Hirsch* ruling (1993) concerned the case of a Muslim man who was killed in Manhattan during a robbery in the shop where he worked and on whom an autopsy was performed despite the opposition of his relatives; the *You Vang Yang v. Sturner* ruling (1990) concerned a young Hmong man, Neng Yang, a resident of Rhode Island, who had died in hospital from unknown causes and on whom doctors had performed an autopsy despite the opposition of his relatives. *Sturner* (1990) concerned a young Hmong man, Neng Yang, a resident of Rhode Island, who had died in a hospital from unknown causes and on whom the doctors had performed an autopsy to ensure that he did not have a contagious disease, without obtaining the consent of his relatives who culturally did not accept it; the ruling in *Montgomery v. County of Clinton (1990, 1991, p. 1)*, which was not accepted by the doctors. See also *County of Clinton* (1990, 1991) which concerned a young Jewish boy, Sannie Montgomery, who died in a shooting during a police chase in Michigan and on whom an autopsy was performed without informing his mother of the procedure. For a more detailed discussion of these pronouncements, see Renteln (2004) pp. 160-167, wherein it is pointed out that for some cultures, including Muslim, Orthodox Jewish, or for some Mexican or Hmong ethnic groups, autopsy is a form of corruption of the body that in some cases even prevents the soul of the deceased from accessing eternal life after death, can lead to perpetual damnation and even have repercussions on the lives of surviving relatives.

[68] This was the case, for example, in the American case *Lott v. State* and *Tuminelli v. State* (1962), in which the medical staff exchanged the bodies of two women who had died in the same hospital a short time apart - Rose Lott, a Catholic, and Mary Tuminelli, an Orthodox Jew - in the mortuary and each of them was prepared for the

dealing with mourning in the culture of origin, interpreted in court as forms of unsuitability to care for children and/or grandchildren.[69] In other cases the disputes concern, on the other hand, conflicts that arise within family groups, even those which appear homogeneous from a cultural point of view, over the choice of burial place, between more traditional sites typical of their community of origin or ones which are more 'modern' and homologated to the rituals in use in the majority society.[70]

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ritual that was contrary to their own beliefs (Renteln 2004, pp. 171 and 172); the case *Doersching v. State Funeral Directors Board* (1987), on the other hand, which took place in Mexico, concerned a funeral parlour that had not properly carried out the embalming of a deceased person's body, thus preventing the Mexican family from holding a regular wake (Renteln, 2004, pp. 172 and 173).

[69] This was the case in which the social services had deemed a grandmother of Greek origin unfit for custody of her grandson, fatherless and abandoned by his mother, because the grandmother appeared to be too persevering in the mourning of her child (she kept many photos of the deceased in the house, surrounded by small lights, and wore black). The decision (*In the Matter of Peter L. Jr., Christina L., v. James Krauskopf, as a Commissioner of Social Servcice*, 1983) was upheld in the first instance, but then overturned by the Supreme Court of the State of New York, which attributed the grandmother's attitude to her and the child's cultural heritage and found it appropriate. For a more detailed discussion see Ruggiu (2012, p. 39 ff.).

[70] For example, in the Australian case *Kitchener v Magistrate Thomas* (2019), which occurred in New South Wales, following the death of an Aboriginal man, a conflict arose between the latter's father, who wanted his son to be buried in his village of origin and his de facto wife, who did not belong to the Aboriginal community and requested that her husband be buried close to his place of residence so that the couple's children could visit him frequently. *Frail v Shorey* (2021), also in New South Wales, concerned the burial of two children who died in a car accident. Both parents were Aboriginal, but belonged to two different communities and were separated. The mother requested that the children be buried in the village where they had grown up and where she resided, according to traditional Aboriginal ceremony. The father, on the other hand, asked that they be cremated and the ashes divided between the two parents. The former argued that cremation was not permitted in their culture of origin and provided cultural evidence to the court in this regard. The second, on the other hand, argued that it was permitted. In the first case, the judge valued the will of the surviving widow over the cultural claims made by the deceased's father, while stating that he considered both claims valid. In the second case, on the other hand, the cultural wishes of the children's mother were better safeguarded, considering the evidence put forward by the latter to be more reliable, especially in relation to the mother's community's opposition to cremation. The two cases are discussed in Goodchild, Kelly (2021).

In some of these disputes, relatives of the deceased often ask the courts to award damages for the suffering they have suffered, such as in the case of objections and challenges to autopsy examinations, especially when carried out without consent, or other culturally inappropriate treatment of the deceased's body. In other disputes, however, judicial intervention is required to decree burial places and arrangements. In Australian pronouncements, for example, the judge is called upon to carry out a balancing act between the different interests involved: the possible cultural demands made by some of the deceased's relatives, the deceased's probable wishes, especially in the absence of testamentary provisions, and the wishes and sensitivities of those most affectively attached to the deceased (children, spouse, common law spouse).

In some contexts, moreover, the issue of the cult of the dead and the importance of the bond with one's ancestors has become intertwined with that of the fundamental rights of colonised native peoples. In the USA, for example, for many years, funerary sites, tombs, human remains, grave goods and sacred objects related to the cult of the dead belonging to indigenous peoples were dismantled and plundered for the commercial development of urban and residential areas,[71] acquired by cultural institutes, including governmental ones, to become the subject of scientific research,[72] and displayed to enrich collections, without any involvement or consent of the direct descendants or tribes to which they belonged. As a matter of fact, these graves and dead were denied the dignity and respect that is normally present towards the dead and graves of other peoples.

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[71] In this respect, the case Wana the Bear v. Community Construction (1982), dealt with by the California Courts of Appeal, is emblematic. In this case, approximately 200 graves of individuals belonging to the Californian Miwok tribe were demolished for the construction of a residential area in Stockton, California. A descendant of the tribe, Wana the Bear, had tried to oppose the continuation of the work, explaining that it was a cemetery area protected by law. Nevertheless, the California Courts of Appeal ruled in favour of the construction company, assuming that the site could not be considered a cemetery, as its use and function had long since lapsed. Case described in https://law.justia.com/cases/california/court-of-appeal/3d/128/536.html .

[72] At times, studies have been done to prove the alleged 'inferiority' of indigenous peoples or to fuel the illegal market for indigenous artifacts. For a more detailed discussion on the subject see Trope, J. F., and Walter R. Echo-Hawk, (1992) Nafziger (2009); Kuprecht (2012).

It had become evident that the already existing rules on respecting the dignity of the dead did not allow this situation to be curbed. According to some, these practices violated constitutional principles: the egalitarian principle (equal protection as enshrined in the 14th and 15th Amendments of the US Constitution, which was violated because it created strong discrimination in the protection of the burials and human remains of natives), or the right to religious freedom (as enshrined in the 1st Amendment). Thus in 1990, partly thanks to the Native American rights movements, the federal government decided to intervene with a special act, the Native American Graves Protection Act (NAGPRA), enacted on 16 November.

This law established that, from that date, all human remains and any grave goods or sacred objects found in planned or random excavations from the effective date of the act, on federal or tribally owned lands, are the property of the native descendants of the tribe to which they belong, or those related to it, either directly or if not identifiable. The Act also requires federal museums and cultural institutions that receive federal funding to inventory human remains, grave goods or sacred objects of indigenous origin, facilitate their return to direct descendants or the tribes to which they belong, and enter into consultations with them.[73] This federal law sought to fully realise the human rights of indigenous peoples by facilitating the return of remains and grave goods and finally recognising their existential and religious as well as scientific or cultural value. The law was then amended in December 2023[74] to further implement these protections. Its full implementation is complex. The provisions foresee a number of positive actions by institutions that come into contact with or possess such funerary material, such as an inventory of possessed objects and consultation with the tribes concerned. In addition, the law establishes specific sanctions for institutions that do not comply and subsidies for those that cooperate in restitution. However, a limitation of the protection

[73] The evidence of the link between remains, grave goods and tribes is based on the concept of 'cultural affiliation', which can be demonstrated not only through scientific, historical, archaeological and anthropological examinations, but also through the oral traditions of tribes (Kuprecht 2012).

[74] Available in https://www.federalregister.gov/documents/2023/12/13/2023-27040/native-american-graves-protection-and-repatriation-act-systematic-processes-for-disposition-or

lies in the fact that the legislation only covers federal, and not state, institutions. In addition, the inventories cover a considerable amount of sacred material[75] which is, however, only a fraction of the millions of native objects and remains dispersed among other museums or private collections. In spite of these limitations, this is a very important act that allows for the creation of a participatory network between the federal government, the institutions of science and culture and the native peoples concerned, enhances cultural exchange and promotes respect for the ancestors of indigenous people, who have too often been dehumanised in the past and seen as mere objects of study or collectors' items.

3. Italy

Especially in countries where the phenomenon of immigration is relatively recent, such as Italy, there are far fewer doctrinal and jurisprudential reflections on these issues. The subject of another culture is perceived as a subject in continuous movement (Gusman, 2010), which is why the moment of his death is a secondary phenomenon that little concerns the majority society. Sometimes it is the immigrant himself who expresses the desire to return to his homeland after death. The impossibility of being able to perform certain rituals in the host country, the limited presence of cemeteries for foreigners and, in general, the host community's mistrust of his traditions related to the cult of the dead is an element that often accentuates the sense of exclusion.

It is certain that also in the Italian legal system, in the abstract, there could be conflicts relating to such practices. Some funeral rituals could be equivocated in our legal system as true and proper offensive acts, violating, for example, the rules in the penal code that protect the sentiment of piety for the dead (Art. 407 et seq.). Or other controversies might arise if, for cultural or religious reasons, the rules laid down in the mortuary regulations or in other hygienic and sanitary provisions

[75] In Kuprecht (2012), the 2010 United States Government Accountability Office (U.S. GAO, Report to Congressional Requesters) report is quoted that at least 209,626 sacred objects were believed to be related to native tribes by the institutes called to inventory them.

for the treatment of the body after death were not respected.[76] However, these do not seem to be frequent cases and this is partly due to the great ability of minorities to 'negotiate their own rituals' (Gusman, 2010) and make them compatible with the provisions of the host society.

It is worth pointing out that when Italian jurisprudence has dealt with issues related to the management of mourning, of the body after death and above all of any suffering experienced by the relatives of the deceased as a result of negligence and other disrespectful conduct on the part of the various operators involved, even if not with reference to the cultural subject matter, it has traced some of these situations to constitutionally guaranteed rights which are sometimes susceptible, in the event of their injury, to be compensated in the form of non-asset damage.[77] Significant in this regard is the distinction, sometimes referred to in case law, between primary sepulchral rights, such as those to which each person is entitled to be buried or to bury others in a given sepulchre - a real funerary artefact, (cemetery niches, chapels and family tombs), usually given in concession by the administration to private individuals, for a given period of time (Ramuschi, 2019) - and secondary burial rights, of a very personal and intransmissible nature, due to the relatives of the person lying in a tomb. According to this jurisprudential interpretation, these multifaceted rights consist of the possibility of access to the tomb, of opposing any transformation that would undermine the respect due to the remains, and of the relatives' interest in having a place to honour the deceased according to Article 2

[76] One thinks, for example, of the rules that require a certain period of time before the burial of the body, which in some cultures must take place as soon as possible, or of other prescriptions that are primarily intended to protect the health of the relatives of the deceased and the community in general.

[77] This is the case in the judgment of the Supreme Court of Cassation, section III - 10/01/2023, no. 370, which concerns the cremation of a deceased person after the twenty-year concession, carried out by mistake by the competent administration, in the belief that the relatives of the deceased were unavailable. The non-expression of consent by the relatives concerning cremation or reburial had resulted, instead, from a failure to receive the notice sent by the competent authorities to the wrong address. Compensation for non-pecuniary damage was thus awarded to the relatives of the deceased because they had wanted to proceed with a new burial and not with cremation.

of the Constitution, together with Article 19 of the Constitution on religious freedom.[78]

In affirming that 'the interest in the cult of the dead is not only harmed by the destruction or dispersal of the corpse, but also by the imposition of forms of worship that are not previously accepted by the relatives of the deceased' and in attributing these aspects of spirituality to forms of manifestation of personality and religious freedom, the Supreme Court opens the way to attributing relevance to all issues related to the cult of the dead which have such an impact on the existence of individuals, thus offering a perspective that could potentially be extended to disputes on the subject of mourning that have multicultural connotations.

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

1.The treatment of bodies

The diverse methods to prepare the bodies of the dead all deal with the inevitable process of bodily decomposition:
- Avoidance: cremation or funeral cannibalism
- Acceleration: exposure or ritual abandonment
- Dissimulation: burial
- Slowing down: temporary embalming, thanatopraxis
- Freezing: mummification, cryogenisation

Starting from this scheme, however, it must be borne in mind that the choices made in the treatment of corpses are almost never exclusive within a society: in fact, different forms of treatment of corpses may

[78] Cass. Civ., sec. III - 10/01/2023, no. 370 cit. refers to the 'protection of the relative's feelings towards the deceased' and with regard to secondary burial rights it is specified that: "secondary rights of burial have as their content sentiments that enhance the spiritual aspect of man and constitute the highest and most fundamental part of the community's affective heritage, and represent from the legal point of view the class of values most positively qualified by law and protected both in function of their implementation, and against possible violations."

coexist, as for example in Italy (where we find a minority who choose cremation, around 30%, in parallel with the majority who choose burial), just as the treatment may vary according to the rank and social position of the deceased.

Without straying too far from the Italian context, in countries such as the Netherlands and Great Britain we find, for example, cremation as the method most frequently chosen, or in the United States where the majority of the population chooses partial embalming before burial.

A further example of the coexistence of different types of treatment of corpses concerns traditional Tibetan rituals which involve cremation, burial, immersion or the cleaning of corpses by the feeding of animals. Religious leaders, on the other hand, were mummified in order to become objects of devotion.

Cremation and funeral cannibalism fall into the category of avoiding the putrefaction of bodies. By cremation we mean the act of burning the body. We find traces of ritual cremations as far back as the Palaeolithic period, with evidence of its use in the historical period as far back as ancient Greece and ancient Rome, from 750 BC.

Geographically, cremation is also a widespread practice, with societies practising it on all continents.

In the West, the practice of cremation underwent a reversal of meaning: due to the influence of Christianity and the doctrine of resurrection, cremation was for a long time practised exclusively for pejorative purposes, reserved for categories of individuals who were enemies of Christianity. It was only from the end of the 19th century that cremation began to spread, largely due to space problems and hygiene issues in increasingly crowded cities.

Funeral cannibalism, strange as it may seem to us, falls into the category of avoiding the putrefaction of bodies. An example is given to us by the Warí, a small population living in the Amazonian region of Brazil, on the border with Bolivia. This people, in fact, until the 1960s, ate a large part of the bodies of the dead: this behaviour was seen as the most respectful way of treating their dead, in order to avoid placing the dead in the earth, at the mercy of animals. The Warí were later forbidden to practise these funeral rituals by the Catholic Church and the state authorities.

Adriano Favole (2003), an anthropologist, proposes a possible explanation:

"The most plausible explanation of Warí cannibalism is to be found in the complex representation of the body that this group has elaborated: the Warí express with particular poignancy the idea that the body is a bio-cultural construction. They see the human body as a nexus of kinship, personality and social relations. Kinship is physically defined as the sharing of bodily substances [...]. By eating the dead, the Warí reaffirm the cultural character of bodies and reappropriate those social relations of which they are (literally) constituted.

To allow bodies to be broken down by the biological processes of putrefaction would amount to a kind of rejection of the corpse or a denial of the humanity that is intrinsic to them (Fables, 2003, p.58)."

In the category of accelerated decomposition of bodies, we find exposure, or ritual abandonment. By exposure we mean the entrusting of the body of the deceased to atmospheric agents or animals. It is, however, a ritual act for which there is a social control of the practice, with the consequent recovery of the remains, and therefore it should not be understood as a way of disposing of one's dead.

One of the most famous examples of ritual abandonment of the corpse, understood as an exposed body, can be found among the Parsis or Zoroastrians, a religious group particularly widespread in India, who consider human corpses to be highly contaminating. For this reason, these peoples began to build so-called 'Towers of Silence', or *dahkma,* or platforms raised from the ground where they could lay their corpses, which soon became prey for vultures. With progressive urbanisation, from the 20th century onwards, it became increasingly difficult for the adherents of this religion to carry on this funeral practice, until it was abandoned and the subsequent choice between burial or cremation was made.

By burial we mean here all those practices of corpse treatment that have the aim of both concealing and allowing putrefaction. This term obviously has an important semantic breadth, both with regard to the burial sites, which can be earth, as well as tree roots, caves, water, etc., and with regard to the variety of body containers, i.e. sheets, skins, cloth, coffins and sarcophagi, etc.

The category of 'burial' thus encompasses very different practices, united, however, by the concealment of the putrefaction of bodies, which is thus 'allowed' and not avoided or accelerated.

Graves, or in general the burial places of the dead, mark a very important gathering place:

"Burials - the places of the dead - structure the world of the living: as long as the memory of that ancestor is preserved, the group will maintain its compactness and unity. When this is lost, the identity of the ancestor will dissolve into that of a founder of a new group and a new grave (Fables, 2003, p. 66)'.

What emerges, therefore, is that, in different societies, the organisation of the world of the dead has a strong influence on the organisation of the world of the living, resulting in a territorial bond that shapes and moulds social identities.

Finally, the last categories that can be found are slowing down and blocking. By slowing down we mean all those forms that involve interventions on corpses with the aim of preserving the integrity of the body, at least for the period of the funeral rite. An example of this practice is Thanatopraxis, i.e. a treatment of the inner cavities of the deceased with antiseptic liquids and the use of cosmetics to treat the face, which is widespread mainly in the United States, southern France and Spain. The aim of this practice is to allow the body to be exposed for the rather long period of the wake, followed by burial.

Blocking, on the other hand, refers to all those interventions whose aim is to preserve the body of the deceased for an indefinite period, such as mummification and cryogenisation, i.e. a practice (widespread in the United States) of preserving bodies by progressively hibernating the corpse and storing it at temperatures of -160 degrees, with the hope that in the future advances in biomedicine will make it possible to bring the deceased back to life.

2. The Muslim funeral rite

The body must be washed with hot water, to be purified, and then wrapped in a cloth, the *kafan* (a term also used to describe the whole operation), which is a white cotton sheet without seams.

There is then a moment of collective prayer, in the house of the deceased or in the mosque, followed by the moment of burial in the ground (*dafin*). The ceremony must be simple, avoiding ostentation,

and those present throw three handfuls of earth on the body of the deceased, who has his head turned towards Mecca. Generally, a funeral banquet is then recommended, during which passages from the Koran are recited.

The Islamic funeral rite prohibits cremation in an unconditional manner, as it is considered contrary to the dignity of the person.

During the Covid-19 pandemic,

"The closing of borders has made it impossible to transport the bodies of foreign-born Muslims back to their country of origin, a widespread practice especially among residents in France and Italy. Forced to organise funerals in their country of residence, Muslims face the problem of the lack of space dedicated to them in Italian and French cemeteries.
“Before the crisis caused by the COVID-19 epidemic, only about fifty municipalities in Italy - out of almost 8,000 - had a Muslim cemetery, UCOII president Yassine Lafram told the *Post (The Post, 2020)."*

The pandemic has thus brought to light a problem that actually existed before, namely the scarcity of Muslim cemeteries where the faithful can bury their loved ones. While it is true that many first-generation Muslim immigrants choose to have their remains repatriated, it is necessary to reflect on the wishes of people who have been resident in Italy for a longer time, perhaps second- or third-generation immigrants or simply citizens of the Muslim faith who do not have foreign origins and who therefore do not have a sacred burial place for their loved ones. It is also important to bear in mind that, for the Muslim religion, it is important to organise the funeral as quickly as possible, as waiting for burial goes against the dignity of the deceased, and it is equally important to be buried among people of the same religious faith.

3. The evolution of death in the West

In historian Philippe Ariès' classic work, *Man and Death from the Middle Ages to the Present* (Ariès, 1980), the transformation of the relationship with death in the West is illustrated. The work is of

particular interest as it provides judges with a diachronic look at how the West experienced death and the related practices of mourning, burial and the cult of the dead, and finds similarities with practices that are still common among certain groups today. Aspects useful for *iuris dicere* include: the fact that death for a long time had a public dimension, in the sense that it was common to expose the dying person to the community, including children who were fully involved in the stages of mourning, burial and subsequent cult of the dead; sudden and unconscious death was abhorred as the subject had to have time to repent and confess, just as burial was obligatory as the body was considered dormant until the resurrection of the bodies, which is why other practices such as cremation were considered disreputable; cemeteries were places included in cities, where activities of the living such as markets and even festivals took place (Ariès notes how the model of the Spanish closed squares originated from the cemetery ossuaries that surrounded a space where a market took place). Ariès identifies a moment of caesura in Napoleon's decision to issue the Edict of Saint Cloud, *Décret Impérial sur les Sépultures,* which required that cemeteries, hitherto inside churches or in town squares, be built outside the city walls in ventilated areas. That this rule produced a strong cultural caesura compared to previous practices is well demonstrated by the opposition it aroused in Italy, even from the cultural *elites.* It should be recalled, in this regard, that *I sepolcri* by Ugo Foscolo was written precisely to contest the displacement of cemeteries from the centre of cities and churches, in areas outside urban areas, a profile that, according to Foscolo, would have compromised the cult of the dead and the inspiration to great deeds that this cult nourishes in citizens.

Ariès points to a progressive process of estrangement and removal of death, which is increasingly relegated (from the house open to all neighbours, to the house with relatives only, to the hospital). *Mutatis mutandis*, the tendencies of some cultural groups to experience the tomb as a place of communion with the deceased in ways that go beyond bringing flowers and that also include dancing, banquets, celebrations, might be better understood by considering how, among these groups, that process of distancing death from life that, according to Ariès, took place in the West, did not occur.

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8. Mangel (Roma begging)

Cases: children begging or parents begging with their children (criminal law)

Cultural test

1. Can the category 'culture' be used? No. *Mangel* is an economic activity. It could be defined as the economic practice of asking, which is carried out in a public space and in an informal manner.
2. Description of the cultural practice and the group. The practice of *mangel* consists of asking for a donation, almost always in money, in public places such as squares and streets in the city centre, or at the exit of busy places such as churches or markets, i.e. contexts where there may be a meeting between strangers. In Italy, this practice has developed since the 1980s, especially among Roma immigrants. It is an economic activity with clear social and political meanings, the result of an adaptation by the Roma to a context where it is difficult to have access to regulated work activities, and which therefore manifests clear power relations. According to the Roma, begging is a real work activity, practised mainly by women and characterised by knowledge of body techniques and other specific skills related to gestures. In the activity of begging, the person begging tells a story worthy of pity through posture, gestures, words and body behaviour, all following careful preparation, which is fundamental to the success of the activity. The 'construction' of a story and of a begging body is in fact a process, which requires study and analysis specific to work activities, and which needs to be constantly updated because it must take into account the changing context in which one operates. Roma groups make up 0.25% of the Italian population. They currently number around 150,000, of which just under half have Italian citizenship. They are an extremely heterogeneous reality, a 'world of worlds' (Piasere, 1999) living in different living contexts and working in extremely distinct activities. One feature they have in common is that they often live in a condition of marginality, both economic and social, which often leads them to be victims of discrimination.
3. Embedding the individual practice in the broader cultural system. The Roma compare begging to a full-fledged labour activity, so it

cannot be analysed as a culturally defined activity. Suffice it to say, for instance, that there is no *Romani* term for begging, but the activity of going begging is referred to with the expression *av te mangav*, 'going to work'. The *mangel,* therefore, is not to be understood as begging or charity, but rather as a specialised work activity, generally carried out by women with their children, who stay with their mothers throughout the day.

Another element to take into account is that Roma children are used to being with their mothers on a daily basis until at least the age of ten, which is why a mother is used to taking her children with her even when begging. A mother who does not take her children to her activities is not considered a good mother in many Roma groups, and her behaviour could be interpreted as abandonment of the child. This aspect is very important to take into account if one wants to understand why children are widely present during this activity, and to avoid interpreting *mangel* as a Roma cultural trait that prevails over childhood.

The activity of the *mangel* is read as economic and labour-intensive in that it is a 'gathering' activity traceable to the role of the Roma as 'contemporary hunter-gatherers' (Piasere 1995, p. 348). With the decline of productive activities related to the traditional Roma economy (e.g. horse-breeding, copper working, circus) due to urbanisation, the *mangel* represents a means of procuring a livelihood.

4. Is the practice essential (to the survival of the group), compulsory or optional?

It is an economic activity and, as such, necessary for sustenance. For some individuals, the practice of *mangel* is the only economic activity they engage in, and it is perceived as a livelihood activity and not an enrichment activity.

5. Is the practice shared by the group or is it contested?

Generally, Roma practice begging almost exclusively abroad, i.e. in the context of migration, where certain economic-social conditions and relations have been created that have led to the abandonment of traditional activities. Carrying out such activity at home, where they strive to create an image of themselves as good Gypsies who derive their livelihood from traditional activities, may be considered shameful in some contexts.

From ethnographic studies, it is quite evident that the earnings of beggars are very low, generating an income close to the poverty line. In fact, it is the practice, once the amount needed for daily sustenance has

been reached, to leave the *mangel* activity and return home to avoid, as we read in some ethnographic accounts, 'becoming rich'.

It is also important to emphasise that there are no income differences between Roma women practising with children or without children. It is quite clear that the presence of children depends on the need to bring them along during the day, and not on the need to exploit an economic potential by arousing a greater feeling of pity during the activity of asking, as is often interpreted. The Roma parent has no interest in exposing their children to the risks to which children are subjected on the streets; in fact, the children, although often autonomous in the activity of begging, are always under the constant supervision of an adult.

6. How would the average person from that culture behave?

The link "Roma=begging", which is often made by the *gagé* (a term used by the Roma to define non-Roma), is inevitably leading to a habit of subalternity on the part of Roma groups, who are paradoxically 'culturising' an activity that is purely economic. The difficulties of access to a regulated labour system, in fact, lead various Roma groups to become accustomed to the practice, to make it customary and thus to identify with it.

The activity of the *mangel* enacts a clear imbalance in the power relations between the giver and the taker; it is a kind of negative reciprocity with a strong political dimension, which encapsulates a system of inequality and reproduction of a very large social distance that Roma groups are internalising.

7. Is the subject sincere?

In order to bring to light elements capable of affecting penal determinations, including a possible lesser degree of criminality and hence the granting of certain benefits, it might be useful to carry out some factual investigations:

- the impossibility for the parent, specifically the mother, to perform that activity without the presence of the child, particularly because of the close mother-child relationship typical of the culture under consideration;
- age of the minor (the majority jurisprudential interpretation excludes that the act is punishable when the minor is not capable of being conscious and perceiving the 'negative and diseducational' stimuli of begging);
- the state of need;

- the interference of the activity with the life of the child and the care of the child in the family context.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Although it is difficult to give reliable figures on the diffusion of begging in Italy, it can be said that begging was a widespread phenomenon in the past, and that in the Middle Ages it was still seen with a positive value, as it was linked to the doctrine of charity, and thus a means for the giver to 'buy' the salvation of the soul. With the arrival of the modern state, the practice was subjected to various forms of sanctions, above all that of the Fascist era; at present, it is freely practised by Italians, although most are generally unaccompanied by minors, as is often the case among Roma groups.

9. Does the practice cause harm?

The practice may cause harm, but only under certain conditions.

Physical harm could occur in cases where the parent takes their children with them to beg even in adverse weather conditions.

The possibility of psychological harm to the child would instead be closely linked to the conception that the cultural-family group to which the child belongs has of the practice itself. If, for example, the latter is not regarded as humiliating but rather as a natural way of finding resources in a state of need, it could be perceived as a normal habit also by the child and, although contrary to state norms, will not necessarily generate any psychological harm in the child.

Another element that could affect the configuration of psychological harm is, for example, the degree to which the child is involved in the majority culture (e.g. attending school and peers belonging to majority groups) and the influence of the latter on the child's perception of the practice.

Psychological harm would then be excluded if the child could not be aware of the activity performed by the parent, for instance because he or she was too young.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The practice of *mangel* is perceived by the host group in two different ways.

A part of the majority accepts the practice: it generates in one's neighbour a feeling of pity and empathy with respect to the state of need of others, is not considered detrimental to certain values, but rather affirms certain Christian values which are also coherent with the

concept of solidarity between fellow citizens as set out in Article 2 of the Constitution. Begging is seen, from this position, as a peaceful way of redistributing wealth, where the state does not fully succeed in this task. In addition, begging is seen as a mechanism that prevents the Roma from committing crimes such as theft to procure a livelihood. The presence of minors in the *mangel* is seen by this position as a lesser evil than if the parent were criminally punished and the child loses contact with the parent as a result of incarceration.

For another part of the majority, the practice generates discomfort and clashes with certain values. Firstly, it clashes with a conception of work as a duty and an instrument of personal and societal fulfillment: in fact, work is perceived positively because it is associated with the attainment of resources through effort, while begging corresponds to the obtaining of something in exchange for nothing, representing the attainment of an economic goal through the process of non-work.

For this reason, the reports about beggars that are made by *gagé* citizens to the authorities are reports that are the result of a non-tolerance of the practice, that is, the expression of a disturbance that does not recognise an activity that, although lawful, is considered a nuisance.

Secondly, when the practice involves minors, it clashes with values concerning the protection of childhood, an educational moment that in the majority culture must be characterised exclusively by play, carefreeness, health care and education. For the majority culture, in this case there is an exploitation of minors, symptomatic of 'bad parenting' that jeopardises the health and dignity of the child and takes him or her away from schooling.

Thirdly, the practice clashes with the value of public safety, being seen as 'dangerous', especially when carried out in the presence of minors, because it is highly 'diseducational' and potentially capable of initiating minors into delinquency and idleness and thus, in the future, of generating a danger to social peace and public safety.

On a legal level, the practice is often defined by jurisprudence as 'cultural' - even in the absence of in-depth anthropological studies - and contravenes criminal law when it is exercised in a 'harassing' manner or is carried out through or with minors.

In the first case, it is sanctioned as a misdemeanour, by Article 669 bis (*Harassment of begging*), a provision designed to protect public order and tranquillity.

In the second case, it is related to more serious offences that protect

individual personality and personal liberty, in particular Article 600 octies of the criminal code (*Employment of minors in begging*), which protects the psycho-physical liberty of minors.
In addition to the mere impairment of psycho-physical freedom, some court rulings highlight how the practice is highly diseducational, depriving of education and 'predisposing to idleness and delinquency'. Despite the fact that, therefore, with some legislative amendments, the intention was to bring this practice back among the crimes that protect the person, it seems that in the majority view, even in terms of case law, the conduct is still sanctioned in a securitarian perspective that, albeit to a residual extent, refers to values such as tranquillity, public order or public safety rather than the mere protection of the individual personality of minors**.**

11. Does the practice perpetuate patriarchy?

It does not appear that the practice has any bearing on the perpetuation of patriarchy. Indeed, anthropological research shows that it is an activity intended for women in some groups, but in others reserved for men. Moreover, the latter often participate in other ways in the practice, e.g. by patrolling the public space where the activity takes place, to ensure a form of security.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Behind this practice are clear forms of power configuration, and there is an obvious condition of subalternity to which the Roma themselves are becoming accustomed. The reports to the authorities made by the majority, accompanied by the constant debate in public opinion on the subject, are leading to a 'culturalisation' of the practice, i.e. a self-representation of the Roma as beggars, who are moving from carrying out an economic practice to identifying themselves with it culturally as well, making it their own identity characteristic.

It could therefore be said, in line with what the anthropologist Leonardo Piasere argues, that the choice to practise these working techniques is an adaptive response to the context, the result of encounter-clash processes with the majority. In this encounter, the Roma seek to fill those marginal spaces and activities where less attention is attracted, occupying "that niche that the imperfection of the law of supply and demand always leaves empty" (1999, p. 94), and identifying themselves in this role.

Proposed balancing act: The application of the rules on begging should be inspired by the constitutional principles of solidarity and assistance as well as by Article 30 of the Italian Constitution, which protects the child's right to his or her family of origin, a right that the imprisonment of the parent would compromise. A constitutionally compliant interpretation suggests that the facts of simple, harmless and non-traumatic begging of minors should not be subsumed in the case of Article 600 octies of the Italian criminal code (anyone who takes advantage of a child while begging). For instance, as is already the case in the first instance courts' jurisprudence, parents who take newborn children with them to breast-feed them should be acquitted. To this could be added cases in which the child is still of pre-school age, if no other harm is derived from begging, or cases in which parents do not know who to entrust their children to or need to find financial resources, especially in cases in which there is a total absence of state assistance and aid.

Legal Insights

The specific reference to the practice of *'mangel*', as begging peculiar to some Roma peoples, is not so frequent in supranational or Italian jurisprudence. However, the issue of begging, understood in a general sense, has always occupied an important place in the legal debate and many of the rulings pertaining to it concern precisely the begging practised by the Roma, even if not always explicitly defined as *mangel.*[79]

The attention paid by legal systems to this practice is mainly due to the fact that it, even though it is linked to the constitutional principle of solidarity (e.g. there is a duty for citizens to help each other therefore begging, being a pacific request of help, is fully legal for adults) - as it is today consecrated in the Italian legal system in Article 2 of the Constitution - is, for some, in contrast with other values, such as those of public decency, security, productivity and work. In fact, it is a practice carried out by subjects without means of support and often marginalised by the majority (in the past represented by those unable to work, the disabled and other subjects within the same citizenship, but today mainly by foreigners and migrants) that brings out inequalities and is often perceived as an annoying element, incompatible with the idea of a modern society that has managed to

[79] Cass. Pen., sec. V - 17/09/2008, no. 44516; Edu Court, *Lacatus v. Switzerland,* 2021

defeat poverty. This is why begging has often been the subject of interest in state legislation (Sciutteri, 2022),[80] of mayors' orders that prohibit it in the name of urban decor (Pepino, 2010), and of jurisdictional pronouncements of state and supranational bodies.

In the Italian context, the many interventions of the Constitutional Court aimed at adapting the criminal provisions on begging, inherited from the Rocco Code (Article 670 of the Criminal Code of *Begging*, Article 671 of the Criminal Code of *Employment of Minors in Begging*), to the new solidaristic and pluralistic constitutional framework are particularly significant. In fact, countless questions of constitutional legitimacy were raised between the 1960s and 1990s, based on these provisions. The questions dealt with by the referring judges are quite varied but, if reduced to a minimum, they always concern the contested compatibility of the criminal response to begging against the values and principles advocated in the constitution, in particular with respect to the principle of solidarity and its multiple declinations. For some, the criminalisation of begging contrasted with Article 38 of the Constitution: it acted as an obstacle to the exercise of solidarity in the form of private assistance or, again, it made the weakest subjects bear the burden of the non-fulfilment of the State's duties of assistance, by not providing any form of clemency for those who were forced to beg because they lacked the assistance due. For others, the penalisation of begging implicitly imposed the obligation to work - identified in Article 4 of the Constitution not as a compulsory element, but as a spontaneous one - and was therefore capable of opposing all those ideologies other than the dominant one, which did not envisage work as a founding element of their social system. For others, begging was incapable of causing concrete injury to benefits such as public order and social tranquillity, but constituted harmless conduct, consisting of a simple request for help, perfectly exercisable in relation to the principle of solidarity and individual freedom (Article 2 of the Constitution). Moreover, it was pointed out that the application of the criminal sanction to a person begging out of necessity would violate the

[80] In the Italian penal system, the offence of begging has always been present: however, during the Savoy penal code (1840) and the Zanardelli code (1889), some public security laws provided for exclusions from punishment for persons in a state of need, because they were deprived of any kind of family or state assistance or unable to work; the Rocco code (1930), on the other hand, punished the offence without providing for any possibility of exclusion in Article 670 of the criminal code, by placing it to protect order, decorum and public tranquillity.

principle of reformational punishment under Article 27 of the Constitution.

Among the most significant responses that the Constitutional Court has given to these issues, it is worth recalling at least three: in pronouncement no. 102 of 24 April 1975, the applicability of the criminal offence of Article 54 of the Criminal Code was admitted, opposed to the state of necessity defence for those persons who had begged because they lacked any means of subsistence (to date not admitted by the majority jurisprudence which does not recognise the state of economic need as the object of the offence); pronouncement no. 519 of 15 December 1995 states the constitutional illegitimacy of art. 670 first paragraph of the Criminal Code - which punished "simple" begging, not harassment - mainly on the basis of the principle of inoffensiveness; pronouncement No. 115 of 22 March 2011 brings out the link between the issue of begging and the exercise of the powers of local authorities to curb it, and although not specifically concerning begging, reaffirms the limits of local government power that had previously expanded to implement forms of municipal criminal law, even in the fight against begging,

The ECHR, in its ruling *Lacatus v. Switzerland* (19 January 2021), which examined a Swiss penal provision in light of the Convention, deals precisely with a young woman of Roma ethnicity forced to beg because she was completely deprived of any means of subsistence, and states that the penalisation of simple begging, not harassment or fraudulent begging, is in violation of Article 8 of the ECHR, inherent to private and family life, because it punishes conduct that is inoffensive and which is, for some, the only means of survival.[81]

[81] The ECHR's ruling is particularly interesting because it surveys the phenomenon of begging. Moreover, in sanctioning the non-compatibility of the criminalisation of non-molestationary begging with the Convention, it reports the observations of two international bodies regarding the tendency of states to repress begging: according to the **United Nations Special Rapporteur** on extreme poverty and human rights, the prohibition of begging and vagrancy is a way of making poverty invisible as well as a serious violation of the principles of equality and non-discrimination, which leaves police authorities too much enforcement discretion, inevitably makes people living in poverty more vulnerable to harassment and violence, and facilitates discriminatory social attitudes towards the poorest and most defenceless (Report (A/66/265, 4 August 2011, submitted to the UN Assembly); for the **EU body GRETA** (The Group of Experts on Action against Trafficking in Human Beings, which monitors the implementation of the relevant Convention on Trafficking in Human Beings), criminalisation of begging is

To date, Italian legislation seems to be in compliance with the dictates of the Constitutional Court and the ECHR, as it only criminalises 'harassing' begging (Article 669 bis of the Criminal Code) and begging with the use of minors (Article 600 octies of the Criminal Code), the former introduced as a contravention in 2018 (Decree-Law No. 113 of 4 October 2018), and the latter first sanctioned by Article 671 of the Criminal Code among contraventions and then included among offences against individual personality and for the protection of minors as of 2009 (Law No. 94 of 15 July 2009).[82] This formal conformity, however,

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not an adequate way to solve the problems of trafficking in human beings for the purposes of exploitation and forced begging, because it punishes the victims rather than the perpetrators.

[82] JURISPRUDENCE. In *Cass. Pen. sez. V - 28/11/2008, no. 44516* cited above, the term 'mangel' is explicitly mentioned and the cultural character of the practice is identified as a custom in use among certain Roma ethnic groups. Also on the basis of this reconstruction, which was not accepted by the Roma community itself, the judges of legitimacy derubricated the offence initially ascribed to the parent for employing their children in begging from the more serious case of enslavement (Article 600 of the Criminal Code) to that of ill-treatment in the family (Article 572 of the Criminal Code).

In Cass. *Pen. sez. V - 30/03/2012, no. 40666*, the Court of Cassation diverted the offence ascribed to the parents of a minor Roma girl for her use during begging from the offence of enslavement (art. 600 penal code) to that provided for by art. 671 penal code, still in force at the time of the facts in the contravention form, considering however the latter as prescribed, valuing in the decision the family context of origin of the minor, considered "serene"; in *Court La Spezia, 25/09/2013, no. 650* the mother of a minor is condemned under art. 671 criminal code. with the minimum sentence of 15 days and with a suspended sentence, the defendant is in fact remorseful and there is a positive prognosis that she will refrain from similar conduct in the future; in *Cass. Pen. sez. I - 14/12/2021, no. 7140*, despite not accepting the possibility of recognising a cultural exemption or that inherent in the state of necessity, both put forward by the defence, the conviction of the father of a minor, again of Roma ethnicity, for the crime under Article 600 octies of the Criminal Code was confirmed, to a sentence of four months imprisonment, with suspension of the execution of the sentence and granting of the general extenuating circumstances; in *Criminal Court of Cassation section V - 28/12/2020, no. 37538* the sentence of a grandmother and a mother of a minor for the crime referred to in Article 600 octies of the criminal code was confirmed and the diseducational nature of the practice with respect to minors, in contrast with the need for education, and its value as a negative stimulus also with respect to minors of tender age, was highlighted.

Of all the pronouncements cited, only *Cass. Pen. 44516/2008 cited above, defines* Roma begging with the term "mangel". In pronouncements no. 40666/2012 and no. 7140/2021, there is no direct reference to the mangel but it emerges that the persons involved in the case are of Roma ethnicity and there is an albeit minimal

does not completely safeguard against the possibility of incriminating 'simple' and non-molesting begging. In a fractured society such as today's, the very activity of begging is often perceived as 'harassing', especially if it is carried out by foreigners who are not incorporated into the productive fabric, as in the case of some Roma groups. Forms of 'simple' begging, however, could in fact also lie behind forms of begging with minors. In fact, it is quite likely that Roma mothers frequently take their children with them during the only activity that can guarantee a minimum form of subsistence, in a context that does not ensure any kind of assistance, not so much with the intention of educating them to delinquency but rather because of necessity and their own conception of motherhood, which involves not separating from one's children, especially if they are very young.

Despite the fact that the aversion against begging, especially when exercised with minors, has as its objective the protection of their interests (thus placing it among the offences for the protection of the individual personality), in concrete application the protection of securitarian logic may prevail. For this reason, the observations that the judges of the 1960s, 1970s and 1990s made with respect to the problem of begging can be particularly useful in assessing the real damaging capacity of such conduct and the compatibility of their criminalisation with the constitutional framework and the principles of the European Convention on Human Rights. These observations are in fact extremely topical and still usable today, in a debate on begging that is enriched by multicultural issues and still stands out in a social context in which access to state assistance continues not to be taken for granted by some.

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

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treatment of the cultural element in the legal arguments. On the other hand, pronouncements no. 650 of the Court of La Spezia and Criminal Court of Cassation no. 37538/2020 do not contain any kind of reference to the cultural element.

For the understanding of this practice, the following is an excerpt from the essay 'Is begging a Roma cultural practice? Answers from the Italian legal system and anthropology' by Ilenia Ruggiu (Ruggiu 2016).

Among anthropologists, begging has been defined in the following ways:

- the activity of the last 'hunter-gatherer' society living in the West (Formoso 1986); a form of resistance (Koprow 1991);
- a key to the Roma foundation myth (Fraser 1993);
- an economic strategy and a means of survival (Okeley 1995; Piasere ed. 2000a; Tesar 2012);
- a false representation of marginality to exploit non-Roma (Asseo 1988);
- a deviant version of Marcel Mauss's gift theory (Piasere 2000c).

The many different voices and discourses on begging that emerge within anthropology complexify the 'simplistic' choice made by Italian judges to define begging as culturally related to the Roma. The following descriptive overview of the main positions emerging within anthropology shows why begging should be considered an economic practice connected to other Roma cultural practices, but not part of their culture.

An early anthropological reading of Roma begging defines it as **'a form of gathering' carried out by the last society** of **'hunter-gatherers'** living in the West. In defining the Roma as 'a population of travellers and gatherers', Bernard Formoso (1986) looks at the Roma through the lens of evolutionary anthropology, as people who remained at the stage of the earliest human societies in which gathering was a pervasive feature of all social and economic life. Formoso specifies that the object of gathering no longer consists of the natural products that the land can offer, but rather of cultural products, such as money and other objects acquired through begging. While Patrick Williams has strongly criticised Formoso's position, in 1995 Leonardo Piasere, editing the volume 'Gypsy Communities, Gypsy Communities', (Piasere ed. 1995a), took up Formoso's definition of begging as an evolutionary form of 'collecting' and re-read it through the lens of economic anthropology (Godelier 1974).

In this work, Piasere sees begging as **'an economic strategy'** (Piasere 1995b) adopted by the Roma to negotiate their values and aspirations within Western societies: 'The Roma did not come to the West to sell

their labour, either manual or intellectual, nor to invest productive, commercial or financial capital; they did not come to enter the structure of production or circulation of goods in the capitalist economic system. On the contrary, they came to the West not with the intention of earning a living by begging and/or taking: both activities can be considered a form of aggregation or a form of gathering. It is clear that, unlike the hunter-gatherers who are normally studied by anthropologists, for the Roma the natural environment is less important than the social environment' (Piasere 1995c:347). Piasere describes the differences and similarities between 'primitive' and 'contemporary' hunter-gatherers: 'for a gathering operation of any kind, three elements are necessary: a territory in which resources are accessible, people, and tools. These elements are called forces of production, and the territory the Roma preferentially occupy is a large or medium-sized city. [...]

The 'economic role' of begging is also emphasised by Judith Okeley (Okeley 1995:275). Studies conducted in the 1980s and 1990s do not directly address the question of whether begging is cultural or not. On the one hand, they show a rather shared way of life that is rooted in the everyday life of the Roma, but at the same time they all emphasise **the economic dimension** of begging [...] It is more recent research work on begging that better clarifies the question of whether it is cultural or not. The work I refer to is entitled "The Meanings of Begging in Gypsy Cultures" (Piasere ed. 2000a).

Evocatively, 'meanings' and 'cultures' are in the plural. A first important position that emerges in this work is the diversity of meaning that begging can have within the various Roma groups. Field studies show huge differences in the activity of begging, its perception, its origins and its continuity. For example, in the Romanian **Cortorari** group, it is practised mainly by men and is a recent activity, which is only accompanied by more traditional activities, such as selling horses (Tesar 2012:11623). In contrast, among the **Sinti Estraiχarja** living in northern Italy, the activity is reserved for women (Tauber 2000).

Alessandro Simoni is sceptical about the cultural nature of begging and suggests leaving the answer to the individual group. He observes that: "**among groups that can be labelled as Roma, the frequency, economic function, cultural dimension and characteristics of child begging are extremely different**" (Simoni 2009:100). For this reason, anyone wishing to read begging through the lens of culture should keep "the cultural nature of begging within the specific group and not within

a mythical 'Roma culture' that has more to do with stereotypes than with serious anthropological evidence" (Simoni 2009:101).

In contrast to these positions, a second group of anthropologists writing in this paper clearly rejects the cultural paradigm in favour of the economic one. In his contribution, **Leonardo Piasere** argues that: "to **claim that begging is part of 'Roma culture is nonsense**" (Piasere 2000c:421). Piasere justifies this loud and clear assertion with the following argument: rather than 'a long-lasting traditional activity supported by internal patterns', begging is 'a response to an externally imposed process of pauperisation that has worsened over the centuries' (Piasere 2000c:418). The anthropologist comes to this conclusion after an in-depth analysis of begging since 1417, and his critique of the cultural reading is particularly useful because it shows that the supposed 'millenary tradition' cited by the Supreme Court in 2008 and 2012 must be deconstructed: the fact that begging is an ancient habit does not mean that it belongs to Roma culture. In fact, one of the main misunderstandings that lead to considering begging as a traditional habit is the fact that it seems to have a strong historical dimension. In fact, begging accompanied the entry of the Roma into Europe, and seems to be embedded in their founding myth (Fraser 1993).

> The earliest written European sources on the emergence of the Roma in Europe, dated 1417, mention the mendicancy practised by gypsies [...] who travelled in Europe to complete a pilgrimage to atone for the religious sin of apostasy. These false pilgrims asked for and received public offerings from public institutions. This early use of begging was referred to by Fraser Angus as the 'Great Trick'. In reality, it was a planned operation to make money at the expense of the gadgè (Fraser 1993: 60-84). Despite these ancient roots, it is precisely - and paradoxically - the history of begging itself that proves that it is something external to Gypsy culture. In fact, what the Roma practised then was typical behaviour of the Christian pilgrims of the time. They were incorporating, for their own needs, a practice that was 'foreign' to them: 'they used the form of mobility in the territory (pilgrimage) accepted at that time' (Piasere 2000c:410), they asked for (and received) public offerings that helped them in their (pretended) pilgrimage.

It is also important to note that **the Roma did not only rely on begging**: 'begging was never isolated, but was always accompanied by **divination**, **selling horses**, **setting up circuses** in the squares and **stealing**' (Piasere 2000c:410). The situation changed within a

few generations: those who were pilgrims receiving public offerings from the villages became suspect and institutions started paying them to leave. By 1499, public offerings no longer existed: the gypsies 'begged from door to door', asking for private assistance (Piasere 2000c:412). The process of **persecution and marginalisation had begun**.

This does not mean that the Roma completely lost their ability to beg: in fact, they began to rationalise it. By begging, they professed marginality as a means of survival (Asseo 1988) and, by keeping it out of their cultural values, they developed an **'adaptive capacity' to erase the shame otherwise implicit in begging** (Piasere 2000c:421).

In this context, **Piasere's attempt to read begging into Marcel Mauss's gift theory is convincing.** This well-known theory is based on the idea that **all societies are founded on the 'gift' that serves to strengthen human relations**.

The pattern of the gift theory is a 'give-receive-exchange' triangle. In begging, this scheme is reversed and becomes 'ask-receive-exchange (uncertain)', with these two main differences: the request breaks with the gratuitousness of the gift (I give because someone asks, so there is no longer spontaneity), and the exchange is not certain, but postponed to some future benefit that serves to strengthen human relations, to some future benefit that will come from God or from the good conscience of the donors. In this regard, Piasere quotes a Roma interviewee who states that by asking for alms "I allow good Christians to go to heaven" (Piasere 2000c:423).

With these nuances, **begging remains an economic activity, and Leonardo Piasere's position in this regard has not changed, and he recently defined child begging as an 'economic strategy'** (Piasere 2013:2). (Ruggiu, 2016, pp. 41-44)

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Baldino, N. (2020). "«Ora sì che sei una vera romní!». Mangel e identità rom." *Etnografia e ricerca qualitativa*, 3, settembre-dicembre, pp. 463-482.
Ciniero, A. (2013). "I rom del Campo Panareo di Lecce tra marginalità socio-lavorativa e contingenza. Uno studio di caso." *Dada Rivista di antropologia post-globale*, 2, 111-133.

The scholar, following detailed fieldwork, analyses the historical reasons that led to the use of the practice of mangel among a Roma group in the Lecce area. This is a clear example that demonstrates the economic (and not cultural) roots of this activity, which is strongly linked to a condition of difficulty in accessing the socio-economic resources of the context.

Piasere, L. (2000c). "Antropologia sociale e storica della mendicità zingara." Polis, XIV(3), 409-28.

A fundamental text for understanding the social and political reasons for the perpetuation of mangel economic activity. Piasere is one of the most authoritative scholars of Roma populations, and in

this article, he analyses the various social, economic and political components that have an influence on Roma begging.

Saletti Salza, C. (2008). "I minori 'nomadi' e le relazioni economiche e sociali con i gagé. Qualche riflessione sull'accattonaggio tra i romá." *Minorigiustizia*, n. 3,

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Piasere, L. (1995). *Comunità girovaghe, comunità zingare*. Napoli: Liguori.

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9. Displays of affection concerning children's genitals

Cases: family members kissing or fondling minors (boys and girls) on the genitals (criminal law)

Cultural test

1. Can the category 'culture' be used?

The culture category can be used when the behaviour comes from a member of certain groups, where the practice is commonly adopted in the context of displays of affection towards one's children/grandchildren or for other cultural purposes. In this case we are faced with a cultural genital kissing/caressing/touching, but not a sexual genital kissing/caressing/touching.

2. Description of the cultural practice and group

Kissing, caressing and touching the genitals of children is a widespread cultural practice in different human groups. Depending on the group, the behaviour affects both male and female children, or only male children, and has various phenomenologies: widespread kissing and caressing over the whole genital area; single kisses on the child's penis; bringing the child's penis to the mouth and sucking it lightly; finger tickling on the genitals; massaging, manipulation, hickeys, rubbing. In some cases, family members take pictures of the above-mentioned gestures to put them in the family album or display them in the home. The age of the child on whom the behaviour is practised varies from 0 to 6 years, but may extend beyond. The subjects giving the kisses are usually the parents. Depending on the group it may be only the fathers, mothers or both, but it may also be grandparents, uncles, and, in the case of *genital greetings*, other extended family members. Cultural genital *kissing* or cultural genital *caressing* is a **behaviour totally devoid of sexual intent.**

A case of kissing the baby's genitals is the ***metzitzah b'peh***. The religious practice of Jewish circumcision may be sealed by a kiss, with which the *mohel* (circumciser) sucks the baby's blood and disinfects the wound. This is an oral sucking that is still employed by some orthodox Jewish groups, although with increasing rarity, used in place of the official dressing (so far this cultural practice has never been confused with a sexual act).

The practice in its various manifestations is aimed at different purposes depending on the group: greeting the child; expressing

affection; cuddling the child; expressing total acceptance of the child; relaxing the child and putting him to sleep; expressing pride in the male child (see entry in this Guidebook, 'homage to the child's penis').

In some groups (e.g. Italy, Spain) the gesture can be said to be a cultural habit that the parent puts in place naturally and is assimilated to any other kiss given on any other part of the child's body that serves to show affection.

In some groups (e.g. Afghanistan), the practice serves to express the utmost love and acceptance of the child: the rationale is that a child's penis is seen as an unclean point of the body, being the point from which the child urinates. Kissing one's child/grandchild on the penis or putting it in one's mouth shows how much a father/grandfather/uncle loves the child precisely because it is not the 'holiest and cleanest part of the body'. Parents use to take pictures while putting the child's penis in their mouth. Those pictures are then placed in the family album as any other souvenir of the child' life.

In some groups (e.g. Albania, Bulgaria), the practice takes on the function of 'homage to the child's genitals' in that placing one's child's penis in one's mouth serves to express pride in the child who will perpetuate the family name and a celebration of virility (see the entry 'homage to the child's penis' in this Guidebook).

In other groups (e.g. Roma, Italy, Spain) the practice has the so-called function of *gendering* the child, i.e. making the child aware of his or her male or female gender in order to prepare him or her for his or her future reproductive life (Tesăr 2012). In these cases, the practice is supported by phrases of praise towards the genitals such as "che bel pisellino/che bella patatina" (what a beautiful pea/willy (for the boy)/what a beautiful little potatoe (for the girl) (Italy); "*que huevecitos* (what little eggs)/que *chocho mas bonito* (what a beautiful vulvette)" (Spain).

Depending on the group, the values underlying the practice are those of total physical relationship with the child's body, of unconditional affection towards the child, of fertility, of having male children capable of perpetuating the name.

Kisses and caresses on the genitals of boys and/or girls without sexual intent, but with the above-mentioned purposes, are attested in Albania, Romania, Bulgaria, Afghanistan, Pakistan, Turkey, Egypt and the Arab world in general, the Dominican Republic, the Philippines, Cambodia, Vietnam, Thailand, Italy, as well as among numerous Roma minority groups.

3. Embedding the individual practice in the broader cultural system.

As a way of cuddling and expressing affection towards children, the practice is related to several other cultural aspects: the meaning of genitals and the sense of modesty in a culture, the importance of procreation, the boundary between clean and unclean.

A group's sense of decency influences its approach to nudity and genitals. While some groups (e.g. the Anglo-Saxon world influenced by Protestant Puritanism) limit if not completely exclude opportunities for nudity and the approach of children's genitals, in other cultures the bodies of adults and the younger generation are shown naturally (e.g. in Japan, families bathe naked together until their children are teenagers).

Kissing and caressing children on the genitals is linked in some groups to a sense of pride in having a son/daughter. It is, in such cases, a practice to be understood in the context of groups that have a fertility culture that places maximum emphasis on procreation.

Kissing children in the genitals is to be linked in Afghanistan to the sense of total acceptance of the child's body that Afghan culture wants to express, trespassing on the boundary line of what is contaminated (Douglas 1966).

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice is optional, but often occurs as an automatism of the socialised parent in that cultural group, who puts it in place naturally, both in public and private contexts. The greeting to the genitals can be spoken of as an actual practice as it is part of the rituals of greeting the child, while in other cases the behaviour is more of a cultural habit that parents practise in domestic intimacy.

5. Is the practice shared by the group or is it contested?

The practice is shared; no parent belonging to the groups where *cultural genital kissing* is widespread would read any harm in the gesture to the child. It should, however, be noted that the practice in some groups (e.g. Albanians) has disappeared from urban areas and has remained limited to social classes that perpetuate traditional lifestyles in rural areas. This is a spontaneous abandonment and not born out of a contestation of the appropriateness of the practice, which can, however, create a situation in which the urbanised part of a group is no longer familiar with the practice and the judge, therefore, risks believing that the person (generally coming from rural areas) is lying in making a *cultural defence*.

6. How would the average person from that culture behave?

The average father, mother, uncle, aunt or other relatives/friends belonging to a group were cultural genital kissing or caressing exist (e.g. Afghan, Pakistani, Albanian living in rural areas, Telogu) would kiss or caress the genitals of his boy or girl or would utter words of tenderness toward the genitals (e.g. Italian, Spanish, Roma).
7. Is the subject sincere? Factual findings: verify that the person is indeed the child's parent/relative and that there is no context of abuse that could justify a different reading of the act (i.e., as a paedophilic act.) Several elements have given, in comparative Italian jurisprudence, evidence that the father practising a kiss for cultural reasons was sincere: the shock of the parents/family members who did not understand why the complaint was made; the reactions of the diaspora community in Italy that endorsed the behaviour; the fact that the child filmed by the cameras installed in the house did not show annoyance or fear at the father's gesture, but continued to suck the bottle and lay quietly beside him after the kiss (Court of Reggio Emilia, 12 November 2012); the presence of the mother while the gesture took place, which confirmed its naturalness; the wiretaps intercepted with friends of the father who were all amazed that the Italians did not understand that it was a gesture of affection (Court of Reggio Emilia, 12 November 2012).
8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice. The Italian group is used to kissing children's genitals externally in private immediately after bathing: this gesture takes place in the intimacy of the home and is usually performed by the child's mother, but in a context where fathers also participate in physical care activities, it is also being extended to them. There are other behaviours performed by Italians that could have a potentially sexual reading, but which everyone is able to decode in the Italian semiotic system. Italian parents also caress their children's buttocks in public; they take nude photos of their children which they place in the family album without anyone ever considering this as paedo-pornographic material because the context makes the meaning of the photos immediately comprehensible. Until they are aproximately 5 years old, Italian children stay naked at the beach without anybody questioning that the parents are paedophiles.
9. Does the practice cause harm? No. The child is not harmed in any way by these practices; on the contrary, it could be argued that his/her physicality and the development of its relationship with its his/her own body is

accentuated. It is believed that the child is able to understand that the gesture is offered as a cuddle. If necessary, assess whether to prepare a psychological report on the child.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The practice of genital kissing and caressing, different from those that Italians perform, evokes a paedophilic gesture. Italians are ignorant of the meaning of the gesture and are therefore scandalised by the behaviour that they read as sexual and therefore detrimental to the child's rights to sexual integrity. Although the context might suggest that one is not in the presence of a paedophile, the practice nevertheless arouses embarrassment as it is alien to the normal rules of displaying affection towards children practised by Italians.

Inadequately translated, the practice appears to violate the child's right to sexual integrity. It is important to note that without cultural understanding, the child's right to family unity and the parents' right to educate their children in a manner consistent with their cultural beliefs may be violated.

11. Does the practice perpetuate patriarchy?

The answer to this question is complex. In cases where the kiss is a form of 'homage to the child's penis', the practice expresses a celebration of the male child and could, therefore, be understood as patriarchal. However, it should be noted that, generally, in the cultures under examination there are celebrations of affection also towards the pubis of the girls, which is usually caressed (e.g. Albanians), so rather than patriarchy in these cases one should speak of a culture highly celebratory of fertility and reproduction. In any case, if in the case of the male child one wanted to speak of a patriarchal practice, it should be noted that the practice does not humiliate or control the child, but is intended to express the father's pride in his male child, so it is a practice that does not violate women's or children's rights.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Minorities who practise cultural genital kissing or caressing believe that, since the child does not suffer any harm, the areas of the body to be kissed can be chosen as expressive of affection towards their child. Psychology has shown that it is essential for a child's full development that it has physical contact with other bodies. Children who have not been caressed have shown severe psychological trauma. The parts of the body that it is legitimate to caress vary from culture to culture, just as the relationship with nudity also varies within the same culture (e.g.

naturist hippies).
Minorities have certain relevant rights to protect the practice under consideration. Article 30 of the Italian Constitution provides for the right and duty of parents to educate their children, in accordance with a pluralist view of the education/training of the child. Article 30 of the Convention on the Rights of the Child (New York 1998) provides for the child's right to enjoy his or her own culture, and thus to be socialised with its practices if they are not harmful.

Proposed balancing act: Since the practice does not cause any harm to the child and the findings of the anthropological investigation show that it is not incompatible with constitutional values, it is considered that the practice can be accepted in the Italian legal system.

Legal Insights

Kisses and caresses on the genitals of boys and/or girls without sexual intentions are attested, according to research carried out to write this Guidebook, in Albania, Romania, Bulgaria, Afghanistan, Pakistan, Turkey, Egypt and the Arab world in general, the Dominican Republic, the Philippines, Cambodia, Vietnam, Thailand, Italy, as well as among numerous Roma minority groups (Dauth, Ruggiu 2020). These displays of affection can easily be confused with paedophile gestures and have given rise to several court cases.

The following is a brief description of Italian and comparative case law on the cultural practice of kissing/kissing on the genitals:

Italy

1. *Criminal Court of Reggio Emilia* (judgment of 21 November 2012) acquits an Albanian father who kissed his son on the genitals as a gesture of paternal pride due to the absence of the subjective element since, although the act was objectively of a sexual nature, the man performed it with a cultural motive (showing pride for having a male child according to an Albanian tradition).
2. *Court of Appeal of Bologna* (judgement of 19 April 2017) confirms the acquittal, with a different reasoning, i.e. arguing that not only is the subjective element of malice not found, but

that the objective element of the offence is even lacking since the kiss was a cuddle given for the purpose of reaffirming the pride of procreation.

3. *Court of Cassation sec. III Criminal* (Sent. no. 29613 of 29 January 2018,) annuls with reference using these three main arguments: a) the recognition of a cultural exemption meets the insurmountable limit of the inviolable rights of the person. "The right, also inviolable ... not to deny one's cultural, religious and social traditions" (para. 3.4. right) must be balanced against the child's sexual freedom; (b) the latter was violated because the kissing involved an erogenous zone and, according to the Court's case law, this makes the act in itself invasive of the child's sexual sphere, beyond the subjective intentions of the father c) the existence of the cultural practice is not certain since the cultural evidence adduced by the defence - a statement, moreover not authenticated, from the Prefecture of Vlore - does not mention kissing, but only caressing, and in this case we are dealing with real *fellatio.* Moreover, the existence of the practice is denied in Albania, since the Albanian penal code (Art. 100 ff.) provides for the crime of sexual abuse.
4. Court of Appeal of Bologna, in its capacity as referring judge, issued a new ruling on 16 May 2019 in which it sentenced the father for the offence under Article 609 quater - sexual acts with a minor - to two years and eight months' imprisonment and to compensation for damages to be paid in civil proceedings.
   (For details, Ruggiu 2019a)

Germany

24 May 2020, Regional Court Hamburg acquits a Bulgarian father of Roma origin who had fondled his child's penis in an internet video chat, recognising the lack of sexual intent following the cultural expert report presented by anthropologist Harika Dauth, of the Max Planck Institute of Social Anthropology, Halle (for details, Dauth, Ruggiu 2020).

USA

State of Maine v. Mohammad Kargar, 1996 Maine Superior Court USA convicted an Afghan father of sexual abuse by stripping him of his parental rights, the Maine Supreme Court overturned the

decision applying the *de minimis non curat lex* standard. (USA)(https://law.justia.com/cases/maine/supreme-court/1996/679-a-2d-81-0.html)

Krasniqi v. Dallas Cty. Child Protective Service Unit TX, 809 S.W.2d 927 (Tex. App. 1991), which convicted two Albanian parents, Sadri and Sabahete Krasniqi, who had emigrated to Texas, of sexual abuse for fondling their daughter on the vulva.

State of Maine v. Michelle Ramirez, 2005 Maine Superior Court acquits Dominican woman by admitting, following anthropological expertise, that the practice of kissing her son on the genitals is a Dominican cultural practice. (https://law.justia.com/cases/maine/superior-court/2005/kencr-04-213.html)

Switzerland

In 2021, a public prosecutor in the Canton of Ticino (Switzerland) dismissed the case of a mother from the Dominican Republic who had touched her 10-year-old son's penis as a practice of maternal pride. The public prosecutor decided to do so after the police inspector presented studies on the field that proved that in that part of Dominican Republic it was common practice to touch and utter words of praise toward genitals of children up to 10 years old.

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

The following is a detailed description of the cultural practice of kissing/kissing on the genitals among different groups.

Roma peoples. Among various groups belonging to the broader Roma population, the practice of kissing/petting the genitals of boys and girls fulfills the so-called function of '*gendering the body*', i.e. the

process of preparing the child to fully assume his or her male gender and the associated reproductive functions.[83]

Among the Jarana, a group of *gitanos* living near Madrid in Spain, kissing and touching a child's genitals is an integral part of this process:

"From the moment of birth, adults emphasise and celebrate the child's genitals, particularly in the case of boys... their [adults'] attitude encourages children to become proud of their genitals and to develop their own identity within which genitals play a central role."[84]

The words defining the genitals (*pija* for male genitals and *chocho* for female genitals) are used as affectionate nicknames and often as nicknames to call the child:

"they [the words *pija* and *chocho*] are also used, in a metonymic way, to indicate the male or female child - thus pregnant mothers are often asked whether they are expecting a *pija* or a *chocho*. Along with other landmarks, these are among the first words a child learns.... Affection towards children up to the age of 5 or 6 is shown by rubbing or cupping their genitals in your hands, or kissing them and giving them clamps down there'[85] .

Although both sexes are treated with great affection,

"boys are most celebrated. Jarana mothers love to play with their little boys' penises, pictures of naked male children aged two or three hang on the wall of many gypsy homes, and boys are very much encouraged to be proud of their penises.'[86]

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[83] We are grateful to anthropologist Harika Dauth for this insight and for providing us with the bibliography on Roma peoples.

[84] P. GAY Y BLASCO, *A 'different' body? Desire and virginity among Gitanos*, in *The Journal of the Royal Anthropological Institute* , 3(3) 1997, pp. 517-35, p. 520.

[85] P. GAY Y BLASCO, *A 'different' body? Desire and virginity among Gitanos*, 1997, cit., p. 521.

[86] P. GAY Y BLASCO, *A 'different' body? Desire and virginity among Gitanos*, 1997, cit., p. 522.

Among the Cortorari, a Roma group from Romania, the use of touching and kissing the penis and vulva serves both to show affection and to make children aware that they have sexually different bodies (*gendering the body*). Again, the words *kar* (penis) and *miž* (vulva) are the first that children learn:

"For a child at a preverbal stage of development, being able to point to his genitals when asked by adults: 'where is your penis/where is your vulva? (*kaj lo kio kar/kaj la ki miž?*)' is considered a sign of his intelligence. It is common to rub and kiss both boys' and girls' genitals to show affection.'[87]

These gestures are accompanied, as the child speaks and grows, by practices designed to encourage a free relationship with one's sex and very much centred on the genitals:

"Phrases such as 'eat my penis/my vulva (*xa miri kar/miž*)', which normally amount to turpitude when uttered between adults, are taught to children whose ability to use them is highly valued. In infancy, during the process of language acquisition... children are exposed not only to sexually explicit language, which may have no meaning, but also to gestures that materialise these statements... After the age of two, children are teased by adults and already know how to defend themselves using phrases such as 'eat my penis/ vulva' to which adults reply 'why do you have a penis/ vulva?' Having reached an age where they are more intrepid, children start to show their genitals without fear, or even on purpose.'[88]

Roma peoples, therefore, confirm a varied and widespread use of the practice of kissing or caressing children's genitals.

Albania

Some cases of fondling of girls' pubises have also given rise to court cases such as *Krasniqi v. Dallas Cty. Child Protective Service Unit TX*,

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[87] C. TESÃR, *Becoming Rom (male), becoming Romni (female) among Romanian Cortorari Roma: On body and gender*, in *Romani Studies* 5, Vol. 22, No. 2, 2012, pp. 113-140, p. 126.

[88] C. TESÃR, *Becoming Rom (male), becoming Romni (female) among Romanian Cortorari Roma: On body and gender*, cit. p.126.

809 S.W.2d 927 (Tex. App. 1991) in which two Albanian parents, Sadri and Sabahete Krasniqi, who had emigrated to Texas, were convicted of sexual abuse for caressing their daughter on her vulva. The parents defended themselves on the grounds that in Albania caressing has no sexual value, but serves to show affection.

Turkey. Staying in the European geographical area:

"In Turkey, it is considered appropriate to express verbal admiration and kiss the genitals of an infant during nappy changing."[89]

Note, incidentally, how this gesture also survives in many Italian families.

Orthodox Jews, the religious practice of Jewish circumcision may be sealed by a kiss, with which the *mohel* sucks the baby's blood and disinfects the wound. The practice is called *metzitzah b'peh* and is an oral sucking that is employed by some Jewish groups, although increasingly rarely, in place of official dressing. Such sucking is symbolically linked to the theme of the blood of the Covenant, from a functional point of view it has a practical function because it would promote coagulation following the excision of the foreskin and would have a disinfectant function (saliva). Its morphology, i.e. the fact that it manifests itself with contact between the lips of an adult and the penis of a child, implies a potential subsumption within the offence of 'sexual acts with a minor'. However, in this case it is interesting to note that in Italy no *mohel* has ever been charged with sexual acts with a minor or with sexual violence for having practised it. A general acceptance of this practice also seems to be widespread in other Western democracies. In New York, home to the largest community of Orthodox Jews outside Israel, several children who underwent circumcision contracted herpes as a result of *metzitzah b'peh*.[90] Then-New York City Mayor de Blasio resolved the dispute as a matter involving the child's right to health, demanding that the

[89] R. E. HELFER, C. HENRY KEMPE, *The Battered Child*, University of Chicago Press, 1968, (5th ed.), p. 85.

[90] 'Too Much Religious Freedom - Infants Infected with Herpes after Jewish Mohel Applies Oral Suction to Circumcised Penises', 19 *J.L. & Health* 297 (2004)

community identify the *mohel* responsible for the contagion, but without contesting any violation of the child's sexual freedom, and allowing the *metzitzah b'peh* to continue. In this case, the greater familiarity with the Jewish practice means that even the majority in Italy or the United States do not read it as a sexual act, and therefore the courts do not subsume it under any criminal offence.

Afghanistan. In Afghanistan, the practice of kissing children's genitals consists of a twofold morphology: the father either places the child's penis entirely in his mouth and sucks it lightly, or he blows a shallow kiss on the penis. Fathers often have a photograph taken while performing this gesture, which will then enrich the family photo album. The practice corresponds to the following meaning:

"[The kiss] is given to show love towards the child and this is true whether the penis is only kissed or placed entirely in the mouth because there are no sexual feelings involved... Afghan culture looks at the child's penis as a part of the body that is not particularly pure and holy because it is the place from which the child urinates... [For a father] kissing his child there shows how much he loves and accepts it precisely because it is not the purest and holiest part of the body."[91]

This description is taken from the cultural expert report rendered in the Kargar case, an Afghan father denounced by neighbours for being seen putting his son's penis to his mouth, and decided, in the United States of America, by the father's acquittal on the basis of the principle of *de minimis non curat lex.*

Manchu (China). Although the source is secular, coming from a *quisque de populo* and not from a scientific study, another example of the practice of kissing and caressing children's genitals is attested among the Manchu, a cultural minority in China:

"A Manchu mother ... sucks her small child's penis in public, but would never kiss him on the cheek. In fact, among the Manchu, *fellatio* is an accepted form of sexual behaviour in the context of the

[91] *State of Maine v. Mohammad Kargar,* 679 A.2d 81, 1996, transl. mine.

relationship between mother and child, while any other kiss, in any other form, is always seen as sexual.'[92]

Kissing the penis, therefore, is, in this cultural context, perfectly normal and appears as a cuddle, whereas a kiss on the cheek is perceived as an unacceptable gesture. Indeed, among the Manchu, *fellatio* is a sexual behaviour except in the mother/child context, whereas a kiss on the cheek is always sexual, even and especially between relatives. A mother kissing her child on the cheek would be committing incest. Exactly the opposite is true in Italy, where *fellatio* is always perceived as sexual, while a kiss on the cheek never is.

Cambodia, Vietnam, Korea, Philippines, Thailand. The practice of kissing or caressing children's genitals is also attested, in literature and from various secular sources, in several other Asian states. The practice is generally abandoned when groups urbanise, move up the social ladder or emigrate to western countries.

The practice is attested in literature in Cambodian, Vietnamese and Korean communities that have moved to the United States.[93] In 2006, a Cambodian immigrant mother in Las Vegas was accused of sexual assault after being seen performing *fellatio* on her 6-year-old son. At the time, a spokesperson for the Cambodian Association of America pointed out that this practice was not widespread throughout Cambodia, but was indeed perceived in some rural areas as an expression of love and respect, although, in her experience, it was not performed on children older than one or two years.[94]

Jim Webb's novel *Lost soldiers* describes a scene in which a Thai father takes his son's penis to his mouth. The author of the novel, who is American, has been accused of indulging in scabrous paedophile scenes and has defended himself by explaining that he

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[92] https://www.reddit.com/r/AskAnthropology/comments/38ikwr/did_manchu_women_really_fellate_their_sons/

[93] K. Malley-Morrison, D. Hines, *Family Violence in a Cultural Perspective. Defining, Understanding, and Combating Abuse*, Sage, London-New Delhi, 2004.

[94] C. Adams, *Do Other Cultures Allow Sex Acts to Calm Babies? It depends on how you define 'sex act'*, 14 December, in https://www.washingtoncitypaper.com/columns/straight-dope/article/13043372/straight-dope-do-other-cultures-allow-sex-acts-to-calm, 2012.

himself witnessed the gesture during one of his trips to Thailand, a gesture whose cultural and non-pathological nature he reiterated.[95]

New Guinea. The practice is also attested among the peoples of New Guinea where:

"It is not unusual for mothers to caress the genitals of their infants, even causing an erection, and make amused comments about children's genitals."[96]

In this cultural context, the practice takes on the function of a cuddle, a gesture that is part of the bodily contact between mother and child.

Hawai'i. Among the indigenous cultures of the Hawai'i Islands:

"genitals were considered holy and were valued as inherently positive. They were treated with respect and veneration and were kept covered for protection, not shame... Genitals were believed to possess a *mana* (spiritual power)'. Practices directed at the genitals of infants included 'the penis being uncovered [by lowering the foreskin] daily,'[97] the mother 'pouring her milk into the vagina' of her daughter... etc.' All these practices analysed in relation to genital preparation exemplify behaviour between adults and non-adults that should not be seen as erotic, sexual or abusive at all. It was seen as an appropriate aspect of the care adults had to give to non-adults, a necessary task.'[98]

In the Hawaiian cultural context, the practice therefore takes on ritual and sacralised contours.

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[95] C. Adams, *Do Other Cultures Allow Sex Acts to Calm Babies?,* 2012, cit.

[96] W. Schiefenhövel , *Ritualized adult-male/adolescent-male sexual behaviour in Melanesia: an anthropological and ethological perspective,* in J.R. Feierman (ed.) *Pedophilia: Biosocial Dimensions*, New York: Springer-Verlag, 1990, pp. 394-421, p. 407.

[97] M. Diamond, *Selected cross-generational sexual behaviour in traditional Hawai'i: a sexiological ethnography*, in J.R. Feierman (ed.) *Pedophilia: Biosocial Dimensions*, New York: Springer-Verlag, 1990, pp. 422-444, p. 430.

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10. Marriages with/among statutory minors

Cases: minors, even those under the age of 14, involved in conjugal ties performed according to traditional rites of their culture, indicted for violation of statutory rape (criminal law).

Cultural test

1. Can the category 'culture' be used?

Yes. In some social groups, marriage with/among legal minors is considered an important custom, a distinguishing factor conferring a strong sense of identity to the community. It is seen as a protection from cultural 'otherization' for the younger generation, a way to teach children what 'good behaviour' is and to give them a role in the community.

2. Description of the cultural practice and the group.

Marriage with/among minors is a union, which may be formal or informal, contracted between either an adult and a minor or two minors, and is often identifiable as an agreement between two families who decide to create a binding bond between themselves and their children.

Marriages with/among statutory minors occur in different places on five continents, mainly in Niger, Chad, Mali and Bangladesh, but also in Europe among the Roma. In most cases, only one member of the couple is underage, usually the female, and this is often due to their shorter reproductive life span compared to men.

Often, marriage with girls is presented as a strong tradition, a valuable cultural practice, as it is a determining factor in the construction of personal and social identity, and in the attainment of a recognised status. Moreover, it is frequently considered a means of protection for girls who, in some contexts, are subject to abuse or abduction, and who, through marriage, obtain protection. It is, therefore, a very different practice from the 'sale of daughters', and not to be confused with it.

The practice of youth marriage and its regulation vary from context to context. In Transylvania, for instance, marriage between young people has no legal validity as it is forbidden by Romanian law. Rather, it is a 'prenuptial agreement' between two families, and takes place in the form of a 'promise', usually when the children are between the ages of 2 and 8, with the expectation that the marriage will take place when the

girls reach the age of 12-13 and the boys 13-15.

In contexts where marriage with/among statutory minors is widespread, girls who do not marry before the age of 18 usually do so shortly afterwards, and may have largely similar experiences of married life to those who married younger. In these contexts, in fact, the pre-legal marriages rarely differ qualitatively from their subsequent legal marriages in terms of associated customs, practices or social expectations. In other words, the 'child marriage' often turns out to be an anticipation of a practice that is carried out in any case before the age of 20.

3. Embedding the individual practice in the broader cultural system.

Marriage with/among persons under the age of 14 is often a practice considered important not only to establish agreements between families (the wealth and social status of the families involved is a determining factor for marriage among young people), but also to preserve group identity and to prevent assimilation into the dominant culture. Marriage, in fact, usually takes place between children belonging to the same community, so that the possibility of passing on the group's cultural traditions is ensured.

Once an agreement has been reached and until marriage, tradition dictates that the girl stays with her future husband's family so that the young couple can get used to each other and prepare for life together. As the representatives of the Roma communities claim, the two children grow up as 'brother and sister' and are both loved as children by the boy's family.

4. Is the practice essential (to the survival of the group), compulsory or optional?

Marriage with/among minors is often associated with certain social conditions, which seem to influence the perpetuation of the practice over generations, making it essential for the survival of certain social groups. Among these conditions, it is important to point out:

- a **low life expectancy**, so the practice is influenced by the group's need for reproductivity;
- a **strategy** in which marriage between young people represents the best available option for both daughters and parents in the face of an **economically disadvantaged environment** with few job opportunities, or even a shortage of basic necessities;
- in contexts of family disagreements, marriage can act as a

conciliatory means for families to reach a conflict resolution.

These conditions make us understand how, often, marriage between young people is not an adverse situation but, rather, a necessity. It is, in short, a strategy of access to various vital resources, which is supported by symbolic and discursive representations structured and shared by society.

5. Is the practice shared by the group or is it contested?

It depends. In contexts in which communities have not come into contact with the educational system of the dominant culture, the practice is generally accepted and shared. In **European Roma groups**, influenced by the educational system of the dominant culture, marriage with or between intra-fourteen-year-olds **has begun to be perceived negatively**. In any case, rather than openly condemning marriage, there is a tendency to see it as a 'taboo', a subject that one should not talk about in order to avoid conflict with the culture to which one belongs. Various anthropological studies show, in fact, how many interlocutors who no longer live in the community of origin are reluctant to talk about topics such as sexual relations, sex education, gender, contraceptive measures and the impact of early pregnancy.

An increase in 'Western educational practices' aimed at this topic has therefore meant that the tradition of marriages with/among minors has declined in many contexts.

Child marriage is sometimes mistakenly associated with arranged marriages. Moreover, in the global health discourse, early marriage is sometimes described as a 'harmful cultural practice', without properly considering the specific motivations and circumstances that may lead to this choice.

Furthermore, it is essential to recognise that early marriage is not only about potential compulsion, but may involve choices that are considered appropriate in the specific cultural circumstances. At the same time, it is important to promote an open dialogue concerning the human rights, safety and well-being of those involved, so that they have access to information and educational opportunities to make informed and autonomous decisions about their future, including the possibility of deciding whether and when to marry.

6. How would the average person from that culture behave?

Social contexts can be very different. However, it is clear that the practice is closely linked to the attainment of a social 'status', as well as to family needs; therefore, it is presumable that there is often custom in

carrying it out.

The will of the young people, especially with regard to the latter generations, is however generally respected, and families do not commit to continuing the marriage if they realise that the young people do not like each other or if they consider that the marriage cannot last.

7. Is the subject sincere?

In order to ascertain the sincerity of the adherence to the cultural practice on the part of those involved (young bride and groom over 18, family members taking part in the wedding organisation, etc.), it may be useful to carry out some factual checks on the subject:

- the acceptance of the bond of traditional marriage by the two 'spouses' involved;
- the absence of coercion of minors by adults involved in the organisation: situations of subjugation and other forms of conditioning;
- the existence of consensus on the shared life perspective;
- the functionality of the social context of cohabitation created after the marriage;
- the age of those involved in the traditional marriage.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Even if it is not formalised in a marriage bond, the anticipation of the age at which Italian minors have sex and begin a romantic and intimate relationship may be considered a cultural equivalent. In fact, it is not uncommon for an Italian girl or boy under the age of 14 to engage in sexual relations with an older teenager. The criminal legislator has taken into account this change in the customs and sexual freedom of the under-14-year-old girl or boy by decriminalising the hypothesis of sexual intercourse between an under-14-year-old person and a person who is four years older (Article 609 *quater* of the criminal code). Therefore, the instance of a 13-year-old girl having sexual relations with a 17-year-old does not currently fall under the criminal law. This is a culturally conditioned rule that only takes into account the cultural practice of the Italian majority and does not consider, for example, that among the Roma the most frequent instance is that of a similarly aged girl who, having reached puberty (and consequently become an adult), marries a boy who is usually eighteen or twenty years old (the higher

age of the man depends on the fact that he must already have the means to support the family). Thus, sexual intercourse that takes place within a stable and potentially desired relationship that is also aimed at starting a family, such as the one that takes place in the Roma marriage, is sanctioned as sexual abuse, with the husband being sentenced to prison. It is precisely the change of customs in Italian society and the fact that sexual freedom is also recognised for under 14-year old minors that could ground a new assessment of cases concerning, in particular, Roma marriages where the age difference is only slightly greater than that contemplated by Article 609 quater of the Italian criminal code.

9. Does the practice cause harm?

The practice does no harm if it is the result of a conscious choice to live together, assisted by a certain planning, and aimed at building a family unit.

The choice of marriage, even if carried out by two very young individuals, is in fact and for certain groups of the populations concerned, an important form of fulfillment for the individual, certainly even more so in cases where the prospects linked to education and vocational training have not been fully accessible.

Indeed, in some contexts it would be detrimental to question this choice by criminalising it, which would weaken the desire to participate in society by building a family unit and undermining the degree of socialisation previously achieved.

10. What impact does the minority practice have on the culture, constitutional values and rights of the (Italian) majority?

In the perception of the majority Italian host group, the practice of marriage with/among statutory minor children is perceived negatively, as a choice imposed on individuals too young to self-determine.

For the majority culture, first of all, the practice conflicts with certain values related to the protection of minors such as dignity, freedom and self-determination. This perception is linked to a different view of the phases of a human being's existence: for the majority culture, the individual, as long as he or she is a minor, must be devoted to play, education and building his or her future, far from lifestyles that are instead reserved for 'adult' life such as work or marriage.

Secondly, for the majority culture, the practice would also be detrimental to the constitutional value of gender equality, presenting itself as a severe limitation for the personal and professional fulfillment prospects of the young women in particular.

From a legal point of view, it should be pointed out that, under the

civil law, it is, for instance, possible to marry from the age of 16, on the basis of the emancipation institute (Art. 84 of the Civil Code; Art. 117 of the Civil Code). This obtains, following an assessment of the minor's psycho-physical maturity and in the presence of serious reasons, a decree of admission to marriage from the judicial authority at the request of the interested party.

In the penal sphere, a provision directly inherent to the institution of marriage, even between minors, is Article 558 bis, which, however, specifically concerns coercion and inducement to marry and which should therefore exclude those cases in which valid consent has been given.

Outside of such cases, Italian criminal law prohibits any kind of sexual act for children under 14 years of age, except for those acts occurring between adolescents, between whom there is no more than a four-year difference, for whom the limit drops to 13 years. Abusive situations between those involved, as well as cohabiting relationships between them, may raise the permissible age limit to 16 years.

This cultural practice therefore lends itself to being sanctioned more frequently through Article 609 quater (Sexual acts with minors), which provides within it a ground of non-punishability for sexual acts occurring between minors - who have reached the age of thirteen, if the age difference is no more than four years - and an attenuating circumstance of lesser seriousness. The rule thus establishes a graduated form of protection for the child according to age and circumstances. The rule is specifically geared towards protecting the psycho-physical development of the child in the area of sexual maturity.

11. Does the practice perpetuate patriarchy?

The practice could perpetuate forms of patriarchy if seen in the abstract and outside the cultural context of origin because it seems to impose on young women a choice of life as a housewife and devoted to the family, thus precluding other forms of personal and professional fulfillment. However, since it is a choice to which the minor is guided in her cultural horizon, the contraction of the marriage bond does not necessarily signify the subjugation or limitation of the individual's prospects. The choice of married life may itself have been evaluated as a form of personal fulfillment by the individuals concerned.

Furthermore, functional family situations could be delineated where there are no forms of patriarchal subjugation.

Even if in the majority culture the binomials "woman-home/husband-work" are often associated with a patriarchal structure, it is well known that in reality this functional distinction does not always realise

dynamics of women's subjugation, leading, on the contrary, to the determination of "matriarchal" systems, also experienced in the majority culture and in which the woman's role has always been central (e.g. marriage in Sardinia where within a patriarchal structure, a matriarchal matrix remains in which the woman retains the government of the household economy by administering her husband's money).

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

The good reasons the minority presents for continuing the practice are the following:

In the first place, marriage represents a moment of realisation of the individual's existence and as such assumes the characteristics to fall within those modes of expression of the individual as understood and protected by Article 2 of the Constitution. The choice of marriage at a young age concerns a conception of the phases of the individual's existence that is slightly different from the majority culture, but equally valid. The choice is rooted in a 'culture of fecundity', where the family assumes a central role. The Italian culture itself has been the bearer of this in the past, and to this day there are still substantial groups of individuals who hold this view of the phases of existence, in which marriage and childcare assume a fundamental role (think, for example, of those belonging to particular Catholic religious groups). By contrast, the diametrically opposite tendency, now widespread in the majority culture, is marked by strongly 'individualistic', economic and professional perspectives of fulfillment, in which the building of a family unit is a late event, when not completely ignored.

Secondly, these are 'alternative' life choices strongly dependent on economic and social factors that act both ways and go beyond cultural differences. In fact, marriages at a young age can also be considered an equally valid life choice due to a lack of those alternative, more individualistic perspectives common to the majority view. At the same time, the same economic and social factors are capable of conditioning majority individuals in the opposite direction, leading them to generate a culture of infertility. Since institutions are not allowed to completely annul the effects of these social and economic factors on the lives of individuals, both choices present themselves as valid alternatives and implement forms of 'pluralistic' adaptation to the characteristics of today's society.

Finally, one must consider the sexual freedom of minors under the age of 14 and their right to have consensual sexual relations even before the

age of 14, which in some cases is recognized by Italian law itself with hypotheses of non-punishability or reduced seriousness of the act.

Proposed balancing act: The cultural practice of marriages with or between statutory minors requires a balancing act between cultural rights, children's rights and the child's individual sexual freedom. Even when the legal limits appear insuperable, the relationship of traditional marriage and/or cohabitation established with or between minors should be assessed from the perspective of the minor's choice and in relation to the cultural context in which he or she has grown up, especially if through this bond it aims to build forms of personal and family fulfillment. The minor's sexual freedom and cultural identity should prevail in all those cases where no adverse situation is apparent (e.g. lack of consent of the minor, situations of exploitation and abuse in the marriage relationship).

Legal Insights

In relation to the practice of marriages with or between minors, one of the first problems that emerges is that in the common view, juridical and otherwise, this cultural practice is often unconditionally juxtaposed to that of forced marriages, on the basis of an absolute presumption according to which a minor's consent to marriage is never validly given, but always the result of coercion. While it is true that *child marriages* and *forced marriages* may coincide, especially in situations of abuse, they are still two phenomena that must be kept distinct from an ontological and legal point of view.[99] A presumption of this kind is undeniably 'culturally oriented': it derives from a very precise structuring of the phases of the individual's existence and values typical of the majority culture, as emerges from anthropological findings. Moreover, the presumption does not always find full confirmation in the Italian legal system itself and in other legal systems recognised by it.

[99] According to the UN High Commissioner for Human Rights, a *child or early marriage* is one in which at least one of the parties is under the age of 18, whereas a *forced marriage* is one in which at least one of the parties has not expressed full and free consent to the marriage. For a more detailed discussion, see Campiglio (2020).

In the international sphere, for instance, on the one hand, there is a desire not to recognise marriage bonds arising among the very young, by means of norms aimed at protecting against gender discrimination or protecting the rights of children[100] but on the other hand, when we refer to marriage as an institution of important social value that seals the right of individuals to create a family, it appears to consist of two main elements: the full and free consent of the betrothed, and the requirement of a 'suitable age' or 'minimum age', unspecified and adaptable to different contexts.[101]

There is also no homogeneity in relation to European legal systems: while some states, such as Sweden and Germany, have recently taken definite positions strongly against *child marriages*, those contracted before the age of 18, whether by coercion or not; while for others there is already a capacity to marry at the age of 16, as in the case of Scotland and Portugal.

The Italian legal system is open to marriages between minors by providing for the possibility of contracting the bond once the age of at least 16 years has been reached (through the institution of emancipation), but in reality the capacity to marry is even wider. The action of the annulment of the bond contracted in the absence of the age

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[100] CEDAW, Convention on the Elimination of All Forms of Discrimination against Women: Art. 16. Par. 2. 2. *Engagements and marriages of children shall be without legal effect and all necessary measures, including legislative provisions, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official register compulsory*.

Istanbul Convention: Art. 32_ Civil consequences of forced marriages_ *The Parties shall take the necessary legislative or other measures to ensure that marriages contracted by force may be invalidated, annulled or dissolved without representing an excessive financial or administrative burden for the victim*;

Article 37_ Forced marriage _ *1. Parties shall take such legislative or other measures as may be necessary to penalize the intentional act of coercing an adult or a child into marriage. 2. Parties shall take such legislative or other measures as may be necessary to penalize the intentional enticing by deception of an adult or child into the territory of a Party or of a State other than that in which he or she resides, for the purpose of compelling him or her to enter into marriage.*

[101] ECHR _ Art 12. Right to marry_ *From the minimum age for marriage, a man and a woman have the right to marry and to found a family according to the national laws governing the exercise of this right*.

International Covenant on Civil and Political Rights_ According to Art. 23(3), marriage may not be celebrated without the free and full consent of the couple.

Universal Declaration of Human Rights, United Nations, 1948: Art. 16(2) also refers to the free and full consent of the future spouses.

requirement (Article 117, second paragraph of the Civil Code), at the behest of persons outside the married couple (i.e., parents or a public prosecutor), is limited, for instance, to the minor's reaching the age of majority, if there has been procreation or conception and 'in any case' where the minor's will to maintain the bond has been ascertained. To complete this openness, the regulations concerning marriages contracted between foreign citizens (Article 116 of the Civil Code), do not contemplate, among the necessary requirements, that of age, which must conform to that indicated for the validity of the bond in the country of origin.[102] (See Bonfanti 2020; Campiglio 2020; Pesce 2021.)

A more marked limitation is certainly represented by penal discipline which, although not directly dealing with marriages with or between minors, indicates 14 years of age as the age of consent to sexual acts, with some exceptions. In fact, Article 609 quater of the criminal code (Sexual acts with minors), which punishes sexual acts with minors, provides for articulated regulations. It emerges from the provision that sexual acts with minors who have not reached the age of 14 years are prohibited, recognising a certain freedom of self-determination in sexual matters for minors and even depenalising sexual acts performed with persons who have reached the age of at least 13 years (Article 609 quater, paragraph 5), provided that there is no difference in age between the persons involved of more than four years. This cause of non-punishability has been present since the introduction of the rule on sexual acts in the Italian legal system (Law no. 66/1996), and has recently been amended (Law no. 69/2019) in a sense that broadens its applicative scope, extending the maximum age difference to benefit from the mitigating circumstance from three years to four. The same law, however, also provides for hypotheses in which sexual acts with minors are criminally relevant even if they have reached the age of 14,

[102] In this regard, Campiglio (2020) reports some excerpts from the report on the Civil Code, from which emerges the Italian legislature's specific wish not to include an age requirement for marriages between foreigners, considering that it was not the case to derogate from the principles of private international law according to which 'the status and capacity of persons are regulated by national law, and it is not the case to derogate from this rule for the age requirement, since in the various legislations, it is established in relation, above all, to the physical development of citizens'. The same author (p. 11) also points out an interesting fact, from the point of view of multicultural analysis, namely that before the 1975 reform of Italian family law, it was the same Article 84 of the Civil Code that laid down a much lower age for marital capacity, specifically 16 years for men and 14 for women.

and this happens not only in the presence of certain abusive situations, but also when there is a relationship of cohabitation between the minor and the other person (specifically, these hypotheses are set out in Article 609 quater of the Criminal Code, paragraph 1, no. 2, paragraph 2, among them: sexual acts with ascendants, parents, guardians, other adult persons holding caring, educational and/or working relationships).

In this sense, the legal system values the consent given to sexual acts by minors who have reached the age of 14 years (and in some cases 13 years) and legitimises, by means of the cause of non-punishability already referred, sexual relations between peers or in any case between adolescents. In this way, the Italian criminal code takes into account a cultural transformation: due to the liberalisation of customs and the shortening of childhood, even in the majority culture, sexual intercourse between minor children is more frequent. The legislature recognises a certain freedom of sexual self-determination for minors. The doctrine has pointed out, however, the following paradox: 'the Italian penal code entirely reflects the majority culture. The law protects, in fact, the cultural practice that sees frequent cases of Italian thirteen- and seventeen-year-old lovers having sexual relations, but not the Roma couple that marries, since, generally, marriage with the Roma rite takes place when the man is in his twenties. The hypothesis of the more stable Roma relationship project remains outside the cultural horizon protected by the penal code. It could be said that the impact of an early marriage is much greater than that of an early sexual relationship, so the difference in regulation is justified, yet it is difficult not to find the two different sanctioning outcomes jarring and, in some way, vitiated by a monocultural approach" (Ruggiu 2022, 85). Article 609 quater, paragraph 1, no. 2, subparagraph 2) of the Criminal Code, which criminalises sexual intercourse within a cohabiting relationship even if the minor has reached the age of 14, has been applied to Roma married by the traditional rite, also revealing the monocultural paradigm that inspires the penal framework of sexual relations with minors.

A more specific regulation inherent to the institution of marriage is Article 558 bis of the Criminal Code (Constriction and induction to marriage), recently introduced by Law No. 69/2019, which, however, punishes marriages to which adults or minors are induced or forced. In modern Western society, it is no longer so common to contract a marriage at a young age, which is why a large part of the discipline inherent to the institution of emancipation and to the concrete

assessment of the marital capacity of a minor of at least 16 years of age is only lightly applied, whereas the penal discipline is much more used in relation to the management of occasional relationships between or with minors. In the past, on the other hand, especially after the reform of family law, it was quite common for Italian judges to decide on such evaluations and to grant clearance for the marriage of very young persons (Monteverde, 1979). These instances have disappeared, not because they are worthless, but as a result of societal evolutions that see the institution of marriage as less relevant in the evolutionary path of individuals. It follows that the Italian discipline on the subject of marriages and sexual acts with or between minors is itself deeply culturally connoted and in continuous evolution. It would seem, therefore, that the problems connected with the marital capacity or sexual self-determination of minors are not so far removed from the legal culture, or even the majority one.

The Italian Supreme Court had an opportunity to pronounce itself on the subject, in a case concerning the bond between a minor, aged 15, and a boy who had just come of age:[103] the two had in fact contracted a marriage according to the Roma rite and had a child together. The boy was condemned for violation of Article 609 quater of the criminal code on the basis of the fact that, although the minor had reached the age fixed by law for a certain capacity of sexual self-determination (13-14 years of age), there was a de facto cohabitation between the two, which was relevant, under the second paragraph of the rule, as an element that made the act punishable. In the present case, the judges took into account the circumstances of the concrete fact: the generally extenuating circumstances were made operative and the penalty applied was very light compared to the edictal framework provided. However, the cultural datum was not examined in depth; it was limited to highlighting the non-validity of Roma marriage in the Italian legal system[104] and therefore the impossibility of it constituting a form of

[103] Cass. Pen. sez. III - 31/05/2017, no. 53135

[104] In the ruling under examination, the Court of Cassation bases the non-recognition of Roma marriages in the Italian legal system on the order Cass. Civ., Sec. 6 - of 27/09/2013 no. 22305, in which a decree sanctioning the prohibition of the expulsion of a non-EU citizen because he was married by "Roma" rite to a pregnant woman was annulled. In fact, the conjugal relationship, as established by the prevailing interpretation, had in any case to be recognised in the legal system of the foreigner's State of origin, something that did not exist in the case of a traditional Roma marriage. The assessment of traditional Roma marriage may,

cultural exemption. All the more reason, however, precisely in the most complex cases, for why the use of anthropological data in the evaluation of the concrete case with respect to the interests of the child, could contribute to the realisation of a better balance in which none of the child's rights are penalised. To complete and enrich the instruments of modulation of criminal liability already present in the legal system, one thinks, for instance, of the use of the mitigating circumstance of lesser seriousness provided for by the law[105] or by influencing the assessment of the offensiveness of the fact in relation to the meaning of cohabitation, at least when it is undertaken as an autonomous life choice and often rooted in the values and cultural context in which one grew up. The balance between the protection of the minor's psychophysical development both in the sexual sphere and his right to live according to his culture of origin, or to see his right to private and family life and self-determination respected, should always have the minor's interest as its objective. However, on the subject of culturally oriented facts, this balance cannot always be unconditionally satisfied by those forms of protection recognised as typical by the majority culture, as they are forged in a specific legal tradition, the 'western' one, and thus they are themselves profoundly 'culturally oriented'. Whether it is a question of freedoms linked to the contraction of a marriage bond or inherent to self-determination on a sexual level, the reference is always to a nucleus of potential freedoms of the minor that fully involve his existential sphere, referable to what Article 8 of the ECHR defines as the right to private and family life and for the protection of which the law accentuates the role of the evaluation of the concrete case, and in which the reference to the cultural context of origin must be heard.

In the legal (Bonfanti 2020; Pesce 2021) and anthropological (Tosi Cambini, 2015) spheres, the question arises as to whether, on the subject of the fundamental rights of the child, the criminalisation or non-recognition of these ties, often identified as 'de facto' ties because they arose on the basis of traditional or religious rites, is always and in any case the most optimal solution for the child, especially in those

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however, be subject to change today, both with regard to the recognition of cultural rights as inviolable rights of the individual, and no longer as mere custom, and because of the new significance attributed in so many areas of the legal system to de facto family ties.

[105] As, moreover, highlighted by the Supreme Court itself in a similar case, especially in cases where stability of the bond emerges and there are children in common, Cass. Pen. sez. III - 16/05/2017, no. 46461

contexts in which cultural rights and the right to private and family life are also relevant in the balancing act. In these cases, anthropological investigations make it possible to refine the assessment of the concrete case, as required by legislation on this subject,[106] to "relativise" the presumption that all child marriages are always and in any case forced, and instead to find some way to bring out possible profiles of deservingness and protection of such relationships.

Anthropological Insights

[Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice].

Among the Roma, the marriage system is considered a central element of culture, necessary for the maintenance of differences with the majority, and therefore a symbol of resistance to assimilation. The patterns of this marriage system have decisive consequences on social life, educational, work and residential choices, the formation of kinship groups, demography and health. It is a complex and changeable institutional system, consisting of repeated values, beliefs and practices related to family conflict resolution and social control, as well as beliefs and values related to femininity. These strategies are also decisive in shaping the demographic structure of

[106] In Art. 4. Par. 5 of the EU Directive 86/2003 on family reunification, with the specific aim of avoiding reunifications linked to forced marriages, is inscribed the possibility for Member States to impose a minimum age limit, maximum at twenty-one years, for the reunification between the sponsor and the spouse to take place. However, in the Communication from the Commission to the European Parliament and the Council concerning guidelines for the application of Directive 2003/86/EC on the right to reunification of 2014, it is specified that "the minimum age level may serve as a reference, but it cannot be used as a general threshold below which all applications are systematically rejected, regardless of the concrete examination of the applicant's situation. The minimum age condition is only one of the elements that Member States must take into account when examining an application. If it results from the individual assessment that the justification to apply Article 4(5), i.e. to ensure better integration and to avoid forced marriages, is not applicable, Member States must provide for an exception and consequently allow family reunification in cases where the minimum age condition is not fulfilled, for instance when it is clear from the individual assessment that there is no abuse, as in the case of a common child".

the group and its resistance to assimilation, and continue to be so despite the changes that have occurred in many areas of Roma life over the past thirty years. This is why marriage ceremonies continue to be focal points of system consolidation and collective markers of difference and identity.

In Roma marriage, the role of the family is fundamental: it presents itself as a supreme, unique and indivisible power, uniting all members of the group and acting as a central government. Values, morals, language, customs and the feeling of identity: this cultural tradition belonging to the Roma people is transmitted by the family institution. In fact, the Roma kinship structure makes it possible to maintain ties by fostering the groups' production and economic subsistence methods, solidarity, cooperation and mutual aid. The family is also the refuge and fortress of protection against any external aggression by the *gagé* society.

Marriage therefore constitutes one of the pillars of the family. Marital union opens and closes ties, strengthening the bonds between members belonging to the same or a different group. It is one of the main bases of social organisation, in which filiation rights and the political ties it creates affect both spouses and the respective family groups to which they belong. The marriage system thus enables the transfer of rights, obligations, property and symbols, functioning as a generator of norms. The family, and the institution of marriage in the Roma community, present themselves as sources of information for each individual, distributors of status, rights and duties, as well as support for the structure of political and economic organisation between families and groups, based on relations of mutual solidarity. Among the Roma, it is difficult to conceive of an individual outside the family and the group, which is why the rite of marriage is a form of recognition indicative of the legal character attributed to it by members of the various Roma groups, and the cultural perpetuation of this type of marriage is undoubtedly due to the corporatist force with which it is endowed.

The marriage system is, therefore, a fundamental part of Roma reproductive strategies that has been, and continues to be, of crucial importance; but it is also a system that has been transformed in the last three decades, since Roma have had almost universal access to compulsory primary education, i.e. since they have received significant public support and contributions in the form of subsidies and public income, housing and health care. Currently, the average

age of marriage is 16 for girls and 18 for boys, with a clear upward trend in the minimum age.

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11. Female genital mutilation

Cases: girls and women undergoing genital alteration surgery (criminal law)

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes, the category culture is usable insofar as the practice is performed within certain groups by which it is shared, transmitted intergenerationally and has particular symbolic and social meanings. The category religion, on the other hand, is not usable.

2. Description of the cultural (or religious) practice and group.

Female genital mutilation (FGM) includes all those procedures that involve the partial or total removal of the external female genitalia or other modifications to the female genital organs for non-medical reasons. They are part of those practices known in the anthropological field as corporal marks that tend to modify the natural state of the human body according to certain rules established by each society. The origins of the practice are unclear: it is hypothesised that some forms already existed in ancient Egypt and ancient Rome.

According to a joint statement by WHO, Unicef and UNFPA, there are four types of categories, all of which can be classified as FGM:

- Type I: Excision of the foreskin, with or without partial or total removal of the clitoris.
- Type II: Excision of the clitoris with partial or total removal of the labia minora.
- Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and affixing the labia minora and/or labia majora, with or without excision of the clitoris (infibulation).
- Type IV: Unclassified. Includes perforation, penetration or incision of the clitoris and/or labia, stretching of the clitoris or surrounding tissue, scraping of the tissue surrounding the vaginal orifice or incision of the vagina.

These operations are generally performed by women, ritual workers, on girls, young women and women outside of a hospital setting. The terminology 'female genital mutilation' - used in this Guidebook because it is the one adopted in the judicial and legislative spheres - is strongly criticised by various scholars and by the women subjected to the practices themselves, as it carries ethnocentric and victimising judgments. In fact, alternative terms have been proposed that are

considered less judgmental (see anthropological insights *below*).

An estimated 200 million women of various ages have been subjected to these practices, mostly in African states, some Asian countries and the Middle East. FGM is, in fact, practised by various ethnic and religious groups, including Muslims, Christians, Jews (Ethiopian Jews) and 'traditional' African religions, and is generally performed on girls between the ages of 0 and 15 years, although there are also cases of women who are already adults. The age at which FGM is performed varies according to local traditions and circumstances. As well as the age, the type of practice performed also varies widely: according to current estimates, around 90% of cases comprise types I, II or IV, and around 10% type III (mainly in the north-eastern region of Africa: Djibouti, Eritrea, Ethiopia, Somalia and Sudan).

In every group in which it is practised, there is not necessarily an unambiguous and/or fixed explanation of the reason behind it. The aim is not to harm the female sexual organ per se: in some cases it is considered a rite of passage, i.e. as rites that accompany changes in role or social position, thus sanctioning a transition from one status to another. In other cases it is a matter of aesthetics or linked to a concept of morality relating to the sexual sphere of women. The practice is often associated with a *gendering* function, aimed at symbolically defining gender identity, marking the difference between male and female gender. It can also be understood as a way to define ethnicity or to reinforce aesthetic preferences, presenting a strong identity and symbolic value of a social aggregation.

3. Embedding the individual practice in the broader cultural system.

FGM is understood as investiture, enshrining a social difference, female belonging and solidarity, and thus emphasising the importance of social meanings and symbolic apparatuses.

Practices such as excision and infibulation are often linked to a perception of gender and female sexuality subordinate to male sexuality, indicating a hierarchical approach to gender relations and a clearly defined role of woman and mother. This practice is in fact justified as preparatory to marriage, as it would prepare the woman for her new role in relation to the male gender, and is symbolically associated with fertility. On the one hand it symbolically 'completes' the woman, on the other only a 'complete' woman is ready for marriage and procreation. Excision thus enables the woman to contract marriage in full compliance with socially established rules.

In some contexts, the prestige and importance of the 'closed' woman is emphasised, as opposed to the 'open' ones, with the association with a control of female subjectivity and sexuality and the preservation of her virginity and chastity.

In some countries, this practice takes the form of an 'economic' valuation of the girl in question, through the so-called 'bride price' (see 'Bride price' in this Guidebook) by which the groom's parental group transfers assets to the bride's group, at the time of the wedding, as a form of compensation for the loss of the woman.

4. Is the practice essential (to the survival of the group), compulsory or optional?

It depends on the context in which it is practised. In most cases it is considered compulsory from both a personal and a community perspective. Not undergoing FGM could lead to social exclusion and loss of status. In some contexts (e.g. urbanisation), the social pressure of the group could weaken and lead to a lower degree of compulsoriness, in which the family regains some agency and can choose whether or not to subject their daughter to the practice.

5. Is the practice shared by the group or is it contested?

The practice of FGM is generally shared by the group to which it belongs, with intergenerational transmission.

Increasingly widespread, however, both in countries where FGM is practised and in countries of immigration, are associations of women who oppose this type of intervention, who actively work to eliminate it and to propose other models and values. Already since the 1990s, several non-governmental organisations and local African associations have been carrying out some training projects aimed at the 'reconversion' of ritual sex workers, with the aim of attempting to retrain them professionally so that they can earn a salary in other ways, without harming the psycho-physical health of the girls. In some cases, gestural simulation of the ritual is encouraged (e.g. in Guinea, this simulated alternative has led to a reduction in the practice of about 20 per cent), while in other cases, small alternative business activities are sponsored, through some very convenient loans.

Some local women's associations in several African countries are engaged in awareness-raising and education campaigns, leveraging local participation, often involving the girls' relatives. For example, in Senegal, thanks to an education and information programme in rural areas, more than 200,000 people have decided to abandon the practice (PRB 2002).

Furthermore, in many countries on the African continent, this type of

practice is officially banned (e.g. in the Central African Republic, Djibouti, Egypt, Ghana, Senegal, Somalia, Kenya) although in reality the enforcement of these laws is not guaranteed, creating a conflict between official and customary law.

6. How would the average person from that culture (or religion) behave?

The average person would subject their daughter to the practice.

7. Is the subject sincere?

In criminal law, the ascertainment of the subject's sincere adherence to the practice is intended to highlight the lack of a harmful intention towards the child, just as in the case of male circumcision (see the entry Male Circumcision, in this Guidebook): parents who subject their daughters to these practices often act in the belief that they guarantee them a certain social status, the certainty that they will be accepted in the community to which they belong and will not be considered 'different'.

The lack of injurious intent can be identified on the basis of certain elements:

- the value of FGM in the cultural or religious system to which it belongs: meaning, function, perception of the practice in the eyes of the agent;
- the mode of execution used (intervention performed in a healthcare setting, domestic, group ritual);
- where appropriate, the reasons that led to carrying out the operation in unsafe conditions: social and economic conditions of the persons involved; the existence or not, in the place where the event occurs, of a system of participation in the cost of the operation (even in states other than Italy, given the extraterritoriality clause contained in the rule sanctioning FGM);
- the good faith of the parent and his or her belief that he or she has relied on a person with expertise in the matter, even if not a doctor, because he or she may be recognised as such within the community (e.g. ritual workers).

In terms of international protection, if FGM has already been undergone, it can be ascertained through clinical observation. When, on the other hand, the subject fears undergoing them, ascertaining the sincerity of that fear can help:

- identification of the state and community of origin;

- as highlighted by some case law, the in-depth analysis of the diffusion of the practice in the social context of origin, since it is not sufficient merely to provide formal data, i.e. that the practices are prohibited by law in that State and/or that they are compulsory or optional from a cultural or religious point of view, but rather to investigate the real diffusion of the practices, the existence of a 'social conditioning' to their use, and the degree of marginalisation of individuals who oppose them;

the implementation of a 'gender' approach to the issue: it happens that applicants do not promptly point out that they are victims of FGM because they do not know that it is a practice that is not widespread among all women; at other times, they omit to talk about it out of shame, modesty or because it represents traumatic events in their lives.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

One can find a cultural equivalent in intimate cosmetic surgery of the female genitals. Among the various types of surgery are: hymenoplasty, i.e. the repair of the hymen, nowadays better known by the English term *rivirgination*; vaginoplasty, i.e. the tightening of the muscles of the vagina to 'rejuvenate' it; clitoral *repositioning* or *clitoral lifting,* i.e. a partial excision of the clitoris to 'proportion' it. All these cosmetic interventions are aimed at adapting a presumed image of women and the female body that, as in the case of FGM, should conform to a socio-cultural image. The female body should in fact show itself to be apparently young.

Latu sensu also other operations on erogenous zones of the body such as plastic surgery to augment the breasts or buttocks are cultural equivalents that correspond to similar aesthetic and reproductive logics.

9. Does the practice cause harm?

FGM objectively takes the form of alterations to a woman's physical integrity. The consequences of these alterations present very different degrees of harmfulness and danger depending on the types carried out. In the most serious cases, such as those of infibulation and excision, the damage to physical integrity can be high and even result in death. Risks are common both during the operation - due to complications related to the way the operations are performed, mostly carried out in environments that are unsuitable from the point of view of asepsis and hygiene - and after the operation, especially during any pregnancy.

However, this degree of injury is not found in much less invasive forms of surgery, which often consist of small incisions (such as the arué at the Edo Bini). Even in the latter case complications can occur, but it is rare that there is a danger to the minor's life. In general, there is no evidence that this type of operation results in a permanent decrease in the function of the organs concerned.

The most severe and invasive forms of FGM are likely to result in significant physical damage that not only affects the woman's sexual life, but also puts her general health at risk. In fact, the consequences of the interventions can be protracted over time, aggravated during pregnancies, and even lead to or facilitate other infectious diseases. In this case, the damage is also psychological, especially if the operations are carried out in adolescence, as in most cases.

It is obvious that in the commensuration of the psychological damage, the woman's willingness to undergo that practice assumes a fundamental importance. It is probable that if the woman believes in the value and meaning of that practice, she will develop a less traumatic re-elaboration than that undergone by those who instead show forms of remonstrance with respect to the practice and perceive it as a constraint. Psychological damage may also be determined by the fear of reliving the same traumatic and painful experience in the future or of having to have it endured by some family member.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The practices analysed are perceived very negatively in majority culture. The term 'mutilation', which is used in the legal debate to describe them, in itself reveals their characterisation by the majority society. The strongly evocative and generalised term is an obstacle to bringing out the distinction between the various types of FGM in terms of harm.

FGM is almost always identified in the most severe forms of infibulation and excision. They therefore evoke bloody and sexist forms of control over women's life and sexuality.

The most serious FGM clashes with the values of the physical and psychological integrity of individuals, of life, of gender freedom and equality, and of personal freedom. They appear as an instrument of social control over women's self-determination, over their freedom to manage their own bodies and sex lives.

The practice takes on criminal relevance, which is why religious and cultural freedom and its relationship with other fundamental legal goods are also involved in the debate.

As the issue of international protection and asylum is also intercepted here, the issue also calls into play other values: that of the reception of individuals subjected to persecution and inhuman treatment; and those of security and public order, resulting in the need to keep protection procedures under control.

For a part of the jurisprudence, which follows the discipline of international law, FGM are real forms of gender-based persecution and are therefore capable of triggering advanced forms of protection such as subsidiary protection, granted due to the danger of inhuman and degrading treatment, or even refugee status. The rights allegedly violated are: the right to life, the right to physical integrity, the right to health, the right to personal freedom and sexual self-determination.

In the eyes of the ECtHR, FGM constitutes forms of torture within the meaning of Article 3 and also infringes the right to private and family life enshrined in Article 8 of the Convention.

The rights of persons who, although not directly affected by FGM, because they are male, have opposed the practice of FGM on their daughters or granddaughters, have also often been violated. In this case, their right to defend their daughters/granddaughters from inhuman and degrading treatment as well as their right to freedom of thought is allegedly violated.

In the criminal field, the practice of FGM is now expressly prohibited by Article 583 bis of the Criminal Code (Practice of mutilation of female genital organs), a provision introduced by Law No. 7 of 2006, designed to protect the physical integrity and health of women. The provision has an extraterritorial value (in fact, it is also applicable when the act is committed by and/or against an Italian citizen abroad or a foreigner resident in Italy) and punishes with a more serious penalty the more invasive forms of mutilation such as clitoridectomy, excision and infibulation (and 'any other practice that causes effects of the same kind'), with a less severe penalty other forms of operations not falling within the previous types, with the specification that in the latter case the operation must be carried out with the aim of 'impairing sexual functions' and an illness in body and mind must result from them. When the offence is committed to the detriment of minors, the penalty is increased, entails the loss of parental responsibility and disqualification from the offices of guardianship, curatorship and support administration. The physical integrity and health of women were protected against such practices even before the introduction of this specific case, thanks to the offences of injury (Articles 582 and 583 of the Criminal Code). The introduction of the rule has a symbolic value

that aims to highlight the position of the state with regard to these practices and partly follows the attitudes held by other European legal systems, consistent with the assumptions of international law on FGM. However, some scholars have considered Law No. 7/2006 to be an incomplete instrument insofar as the criminalisation, which was even extended beyond Italian borders, was not followed by a provision guaranteeing the victims of these practices more effective instruments of protection such as those offered by the granting of international protection status.

11. Does the practice perpetuate patriarchy?

Through the most severe forms of FGM, the quality of life of women is undermined, which becomes far inferior to that of men, given the health complications that the former may suffer both at the time the intervention takes place and thereafter. The same argument does not apply, however, when the interventions do not have such damaging characteristics and perhaps mostly have a symbolic function furthering group membership.

There are various elements that can affect the ability of practices to perpetuate patriarchy: the type of intervention and its incisiveness on the quality of women's health and life in general; the function for which they are put in place; the perception of the practice by the woman undergoing it and her adherence to it.

In cases where it is the woman herself who no longer considers the practice to be in keeping with the values of her existence, especially in the face of social and moral control, the practice is symptomatic of a patriarchal system, which is most likely contested. The same cannot be said, however, for those forms of mutilation, which although named as such, have a minimal incidence and are sometimes a source of pride on the part of the woman herself. The practice is symptomatic of a patriarchal system and is capable of perpetuating it, especially when it takes on the aforementioned functions of controlling female subjectivity and sexuality, through the implementation of certain physical limitations aimed at imposing a morality on the female gender and not also on the male gender.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Groups wishing to continue the practice appeal to the functions it performs, in the different contexts, which are reported here. It emerges that practices can:

- have a function of role or social position modification

- be related to aesthetic issues
- be linked to a concept of morality relating to the sexual sphere of women
- be associated with a *gendering* function, aimed at symbolically defining gender identity
- define ethnicity and have an identity function
- have a purifying function
- have a social function linked to a hierarchical definition between genders, as well as a function preparatory to marriage and procreation.

Proposed balancing act: in the case of infibulation and excision, as they affect fundamental personal rights, the cultural practice cannot be recognised; while in all other cases a case-by-case analysis is suggested to assess the harm caused and the will of the person who has undergone the intervention. In general, in the cases that causes a permanent change in the sexual organ, and are performed without the child's consent, the child's rights to physical integrity, sexual freedom and consent to medical acts ideally should prevail against the cultural rights and freedom of rising their own children vested in the child's parents. Nevertheless, the criminalization of parents that perform female genital mutilation is not an optimal solution, as the child would then be saddled with yet another violation to his/her rights (e.g. right to a family) should the parents be jailed.

Legal Insights

The debate on the practice of female genital mutilation developed from the 1920s onwards and reached a particular pitch in the 2000s, giving rise in the international arena to a series of resolutions and documents highlighting the impact of the practice on human rights, and inspiring many of the state interventions in this field.

To date, among the main points of reference on the subject of FGM in the panorama of international law, the United Nations and Council of Europe legislation certainly stand out, especially in relation to the

instruments for combating this type of impairment and the relationship between FGM and the right to asylum.[107]

1. *FGM and* Italian *criminal law*

In the criminal sphere, Italy has criminalised FGM with an *ad hoc* regulation, Article 583 bis of the Criminal Code (Law 7/2006). This has been considered by some scholars as a form of closure to cultural diversity: as is the case for male circumcision,[108] the act could have continued to be prosecuted through the simple discipline of injuries (Articles 582 and 583 of the Criminal Code), creating less inequality of treatment with respect to the 'male' equivalent of the practice, especially in relation to those forms of intervention lacking a real capacity to permanently injure physical integrity (Mancini, 2017; Basile 2013).

To date, the application of this doctrine has been minimal. From the existing case law on the subject, however, some interpretative logic can be deduced that, in terms of balancing the rights involved, reveals a judicial tendency to distinguish between more and less serious FGM. The first case[109] dealt with by the Italian Courts immediately after the law came into force concerned a Nigerian mother of the Edo-bini ethnic group who had turned to a 'traditional' midwife to have a small incision operation (the *arué*) performed on her newborn daughter, which was then considered by the medical experts to be scarcely harmful to the

[107] Among them: The *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* (2011), which entered into force on 1 August 2014, ratified by Italy with law 77/2013, is the first specific legally binding instrument in this field. It deals with female genital mutilation in Art. 38 and adopts a concept of "mutilation" that deviates slightly from the classification proposed by the WHO because it excludes from the category the fourth type of FGM, and therefore the less severe forms; *UNHCR, Guidance Note on Asylum Claims Regarding Female Genital Mutilation, 2009*. Resolutions include those of the European Parliament corresponding to 2009, 2011, 2012, 2014, 2018 and finally the last one of February 2020_ *European Parliament resolution of 12 February 2020 on an EU strategy to end female genital mutilation worldwide*.

[108] In this regard, there has been talk of a form of 'squinting' multiculturalism, which often stigmatises cultural practices as criminally relevant behaviour, not necessarily on the basis of the index of offensiveness but rather 'depending on the deemed greater or lesser 'proximity' to Western civilisation or to a certain morality or religion' (Caterina, 2020).

[109] Court of Verona, 14 April 2010; Court of Appeal of Venice 2012.

minor's physical integrity, since although it could cause an illness, it did not tend to permanently weaken the sexual organ.

Of particular importance in the proceedings were the degree to which the practice was detrimental to physical integrity and health, ascertained by means of a medical report, and the anthropological analysis of the motivations behind the mother's behaviour. This behavioural analysis was deepened through the hearing, proposed by the defence, of some qualified witnesses such as: a university lecturer in educational anthropology; a university lecturer in mediation pedagogy; and a priest of the Pentecostal Church, belonging to the Edo-bini ethnic group (Basile, 2013).

In the first instance, the comparison between the cultural practice and the injured legal asset (physical integrity of the minor, health of the minor) had a significant influence on the commensuration of the sentence, while on appeal it led to the acquittal of the mother for lack of the specific intent required by the law (second paragraph of Article 583 bis of the Criminal Code): the judges considered that there was no intention to impair the sexual functions of the minor, given the reasons in deference to which the mother had subjected her daughter to the intervention (function of humanisation, identity function, purification function).

The second case[110] concerns an Egyptian mother living in Italy who in 2007 had her two underage daughters subjected to an excision operation during a holiday in her homeland. Although treated differently, the cultural factor still had a substantial influence on the reduction of the sentence. The cultural reasons that had prompted the woman to act were held to be 'recessive', with respect to legal values protected by the Italian Constitution and inherent in the fundamental rights of the individual, nor was excusable *ignorantia legis* held to exist, with respect to the prohibition under Italian law. The balance identified by the judge between the rights at stake could have been even more

[110] Trib. Torino, sez. GIP, 30 October 2018, no. 1626, Corta d'appello di Torino, sez. II, 26 February 2020, no. 1410. Cass. Pen. sez. V - 02/07/2021, no. 37422. This concerns genital mutilation operations performed on two minor sisters of Egyptian origin living in Italy, with the consent of their parents. The operations, carried out at the same time at a doctor's office during a holiday in the African country, resulted in the removal of the labia minora in one case and the excision of the clitoral hood in the other. For both of them, the technical consultancy pointed out disabling effects such as possible limitations of sexual functions, due to the severance of some nerve endings and possible obstetrical complications.

effective through its explication in the ruling also at the "communicative" level, highlighting more the degree of harmfulness of the practice, which certainly played a fundamental role in the judge's evaluations. The balancing act carried out would have been more anchored to the principle of offensiveness, since in this case it was a practice seriously damaging to the physical integrity and health of minors, and with equal solutions it would have been more in keeping with the pluralism that a multi-ethnic society requires, more in keeping with a view to resolving the conflict rather than exacerbating it on the basis of the universal assumption that it is up to each migrant to conform to the majority culture.

2. FGM and international protection

Law No. 7/2006 does not provide for the granting of refugee status or other forms of international protection to FGM victims, despite this having been initially provided for in the draft Article 5. However, in the area of international protection, it is worth highlighting certain 'best practices' that the Court of Legitimacy is implementing, both in terms of the legal nature of FGM with respect to the discipline of international protection, and in terms of the ways in which the obligation to cooperate in the investigation is carried out, all of which are useful to guide the work of territorial commissions and courts of merit.[111]

According to some guidelines, the risk of undergoing FGM (or a repetition of it) is likely to trigger important forms of protection such as subsidiary protection, pursuant to Article 14 lett. b) (d. lgs. 251/2007) or even refugee status: FGM constitutes a form of serious damage to a woman's physical and psychological integrity and to her health; it can amount to inhuman and degrading treatment; it constitutes a form of persecution for belonging to a specific social group (the female gender); it can also trigger the higher protection of refugee status "if the phenomenon is practised, in the social and cultural context of the country of origin, in order to achieve unjustly discriminatory treatment, whether direct or indirect" (Cass. Civ. sez. lav. - 16/02/2022, no. 5144; Civil cassation sec. I - 25/10/2021, no. 29971).

[111] Cass. Civ. sez. I - 22/06/2020, no. 12220; Cass. Pen. sez. V - 02/07/2021, no. 37422; Cass. Civ. sez. VI - 15/07/2021, no. 20291; Cass. Civ. sez. I - 25/10/2021, no. 29971; Cass. Civ. sez. I - 28/10/2021, no. 30631; Cass. Civ. sez. VI - 12/01/2023, no. 762; Cass. Civ. sez. - 16/02/2022, no. 5144; Civil cassation section III - 18/03/2022, no. 8980; Civil cassation section I - 14/07/2022, no. 22234; Civil cassation section I - 15/12/2022, no. 36845.

Women subject to this type of treatment are to be considered victims of violence (ex art. 17 Legislative Decree 142/2015), included in the category of persons with special needs (Cass. Civ. sez. VI - 12/01/2023, no. 762).

With regard to the performance of investigative cooperation, courts need to completely assess the social contexts of origin, using data such as any state regulatory framework which prohibits FGM, and the optional or mandatory nature of the practice in the ethnic-religious group to which one belongs. It is advisable to carry out an in-depth investigation that takes into account the actual spread of the social custom, the possible existence of a "collective conditioning" on the basis of which it is in any case perceived as dutiful (Court of Cassation Civ. sez. I - 25/10/2021, no. 29971), as well as the degree of social marginalisation for individuals who decide to deviate from it, which may exacerbate the state of subjective vulnerability (Court of Cassation Civ. sez. VI - 15/07/2021, no. 2029). On this question, the Court appears to be open to the possibility of recognising protection even for male petitioners who may be opposed to the practice on the basis that it violates the rights of their relatives (Cass. Civ. sez. I - 15/12/2022, n. 36845, Cass. Civ. sez. I - 14/07/2022, n. 22234, Cass. Civ. sez. lav. - 16/02/2022, no. 5144, Cass. Civ. sez. VI - 15/07/2021, no. 20291, Cass. Civ. sez. I - 22/06/2020, no. 12220).

Moreover, for the Supreme Court, the risk should not be considered non-existent just because FGM has already been carried out, as it is possible for it to be repeated, for example after pregnancy (Civil cassation, section I - 28/10/2021, no. 30631). The Supreme Court also invites us to consider the danger of repatriation when the applicant is pregnant, as the gender of the unborn child could exacerbate the danger in the case of an unborn girl (Civil cassation sect. III - 18/03/2022, no. 8980).

In this sense, Italian jurisprudence appears to offer a more advanced protection, even compared to the positions of the European Court of Human Rights, which, while recognising FGM as a form of torture, has often downgraded the danger as not actual in the event of repatriation. Emphasising elements that the Italian Supreme Court has instead deemed misleading and not symptomatic of the real situation of danger,

rather it has warned the judges of merit against them on the basis of the principles mentioned above.[112]

What has been observed on the subject of FGM gives rise to a reflection. If it is true that we are dealing with practices with respect to which the host legal system is called upon to provide a form of 'protection' from culture, it is equally fundamental that, even in this protective action, the anthropological datum assumes a fundamental role together with consideration of the real extent of the damage for an optimal strategy in terms of balancing the interests at stake, both in the criminal sphere and when working in the field of international protection. The anthropological enquiry 'fills in' the values, instances and fundamental rights involved by guaranteeing cultural rights, insofar as they are not concretely offensive to the values protected by the norms and/or are in the pursuit of the minor's interest in the criminal sphere; enhancing the persecutory mechanism that would otherwise be implemented with respect to individuals who do not share those cultural practices and who do not see a valid life alternative.

Anthropological insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

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[112] The grounds of the Edu Court are anachronistic compared to the progress of the Italian courts and the assumptions reached by international and domestic law. In addition to the mere consideration of formal data (legal framework, criminal prohibition to perform the practices, practices that are only optional in the ethnic group to which they belong), sometimes the credibility of the applicants is questioned for not having denounced FGM in a timely manner, in other cases the strength and emancipation achieved by the applicants after their escape is valued as a symptomatic element of their ability to oppose such practices once they return home. For a more extensive discussion on the subject, see Crescenzi (2021). Some cases: *Hirsi Jamaa and Others v. Italy* [GC], Application No. 27765/09, judgment of 23 February 2012; R.W. and Others v. Sweden, Application No. 35745/11, decision of 10 April 2012; *Ameh and Others v. United Kingdom,* Application No. 4539/11, decision of 30 August 2011; *Bangura v. Belgium,* Appeal No. 52872/10, decision of 14 June 2016; *Sultani v. France*, Appeal No. 45223/05, decision of 20 September 2007; *Jabary v. Turkey*, Appeal No. 40035/98, decision of 11 July 2000; *Izevbekhai v. Ireland, Appeal No. 43408/08*, decision of 17 May 2011. *Collins and Akaziebie v. Sweden,* Application No. 23944/05, decision of 8 March 2007; *H.L.R. v. France* [GC], Application No. 24573/94, decision of 29 April 1997.

As highlighted in this fact sheet, according to a joint statement by WHO, Unicef and UNFPA, there are four types of categories, all of which can be classified as FGM:

- Type I: Excision of the foreskin, with or without partial or total removal of the clitoris.
- Type II: Excision of the clitoris with partial or total removal of the labia minora.
- Type III: Narrowing of the vaginal orifice with creation of a covering seal by cutting and affixing the labia minora and/or labia majora, with or without excision of the clitoris (infibulation).
- Type IV: Unclassified. Includes perforation, penetration or incision of the clitoris and/or labia, stretching of the clitoris or surrounding tissue, scraping of the tissue surrounding the vaginal orifice or incision of the vagina.

The different types of operations performed on women's genitals constitute an extremely complex phenomenon, which is linked to cultural motivations.

This is a set of practices for which it is very difficult to establish a close correlation between age and intervention, even within the same geographical context and/or ethnic groups. In some cases it is indeed possible to refer to socially predetermined ages, while in others there is a relationship between events considered relevant, such as the physical development of girls, or to particular key moments of psychological and social life (e.g. marriage).

1. Female Genital Mutilation: the name issue

The joint declaration of WHO, Unicef and UNFPA (2008), which is useful for a classification into the four categories identified above, identifies the category 'Female Genital Mutilation', composed of the four micro-categories listed in the Guidebook, and is the premise for any consideration of FGM used by all national and international organisations, as well as by health professionals.

However, how to name this practice has been, and continues to be, a controversial issue, and the various terms commonly used are associated with different ways of interpreting the practice and different ways of relating to the people involved (Johnsdotter, 2020).

In early descriptions of these practices, dating back to Ancient Egypt, they were called 'circumcision', in analogy with male procedures. Nowadays, local terms for the cutting off of male and female genitalia,

however, often have a more symbolic meaning, and rather refer to the process or purpose of the procedure. For instance, in Somalia, the term *halalays is* used, which, like the Arabic term *khitan*, means 'cleanliness', commonly used in a religious rather than a hygienic sense. The Malian term *bolokoli* literally means 'washing hands'. Other terms may refer to the bigger picture, e.g. 'going to the bush', or to the context in which the FGM procedure is essential for initiation (Johnsdotter 2020).

The label 'mutilation' was coined and promoted by the American journalist and activist Fran Hosken, with her report 'Genital and Sexual Mutilation of Females' in 1979, presented at the Copenhagen Women's Conference in 1980. Since then, particularly within international organisations and those targeting this practice, the term FGM has been used more and more frequently. However, the use of the term 'mutilation' has been strongly criticised, as it immediately expresses a negative meaning and often carries ethnocentric prejudices. This expression is mainly criticised by women personally involved, as it implicitly condemns them and relegates them to the role of passive victims. The expression 'female genital mutilation' also gives a rather partial and limited view of the operations that fall into this macrocategory of body modifications or alterations, which does not take into account the different possible implications on the psychophysical health of women (as far as damage and physical consequences are concerned, it is in fact not possible to compare all the operations that fall into the FGM category on the same level) (Fusaschi, 2003; Johnsdotter, Mestre, 2017). One proposal is to replace the term 'mutilation' with 'modification', with the intention therefore to create a discussion ground free of a priori prejudices, and open to dialogue.

2. Contexts

Different forms of FGM are performed not only in the home context of the women in question, but also in the migratory context. In fact, the different operations change both geographically, based on the type of intervention performed, and with respect to the actors involved.

"The context changes, as does the entire ritual, but what is preserved is the symbolic value attributed to the operations themselves, a value that is not merely reified but certainly recontextualised" (Fusaschi 2003, p. 86). According to some studies (Fusaschi 2003), in urban and diaspora contexts, ritual operations often focus exclusively on the individual, presenting themselves as 'intimate' ceremonies almost always performed in the 'private' domestic context.

People performing female circumcision use specific instruments, which may be artfully constructed ritual knives or rudimentary tools used for the occasion.

In general, the person carrying out the operation is almost always an initiated woman, often elderly, whose knowledge is usually handed down from mother to daughter (Fusaschi, 2003). For example, in Somalia, this is the *Gedda,* or grandmother, but understood as the village elder. In some contexts, mothers and grandmothers are precisely the ones who 'prepare' their daughters and granddaughters for the event, passing on what kind of conduct they will have to keep as adults and how they will have to behave when they become mothers and wives in turn. In other contexts, ritual workers are called from other places, outside their own community (as is often the case in migratory contexts).

3. Male and female circumcision: two different approaches (see entry Male circumcision in this Guidebook)

Reviewing the literature, it is evident that, especially until the 1970s, FGM and male circumcision were understood as symmetrical poles of a process of *genderisation of* bodies, as compulsory stages of access to the (sexually defined) adult role (Johnsdotter, 2020). Male circumcision has been essentially distinguished from female genital practices, according to global health organisations such as the WHO and feminist and women's rights activists, who likewise expressed similar views on the incomparability of the practices. Within these discourses, female genital practices have often been framed as harmful cultural practices that promote gender inequality, discrimination and aggression against women, as well as having a detrimental effect on the health of women and girls. Male genital practices, on the other hand, have been perceived as healthy and not harmful in any way (Johnsdotter, 2018).

However, it is interesting to note that the attempt to redirect the practice of FGM into purely symbolic forms (i.e. a small puncture on the foreskin of the clitoris to encourage the exit of a drop of blood, thus fulfilling the symbolic function of *gendering* or purification) has sometimes provoked negative reactions, based on the position that any form of FGM, even if 'symbolic', must be treated firmly (Kruseman, 2010), even though this type of intervention is decidedly less invasive than male circumcision, in which healthy tissue is completely removed.

3.1 Criticism

In recent decades, FGM practices have begun to be strongly contested within several groups and disciplines, on ethical, medical or personal grounds, especially in Western countries but also in the countries where they are practised (especially when it comes to the most invasive forms, i.e. type I and type II, infibulation and excision). The medical and health complications that infibulation and excision entail, leading in some cases even to the death of the woman, as well as the alteration of sexual pleasure and thus effects on sexual life, are rationales now shared in jurisprudence, legislation and by activists in the groups where they are practised to support their condemnation. This condemnation is generally extended to all types of FGM, even the least invasive, as they are seen as an interference in the sphere of sexual life, as well as an instrument of patriarchal control over female sexuality. The arguments used to support a position against FGM *tout court* are therefore: the focus on harm, medical risks and long-term medical consequences, and the claim that such modifications violate children's rights and women's rights.

As pointed out in the fact sheet on male circumcision (in this Guidebook), until recently research on male circumcision assumed and focused mainly on the health benefits of circumcision, in stark contrast to FGM, for which, on the other hand, studies have focused exclusively on the possible harms and risks. However, despite the difference in approach in public discourse, both male and female circumcision are procedures that intentionally alter the genitals, for non-medical reasons, of children who often do not give their consent. In both cases, tissue is removed (in the female case, other, more invasive types of modification are also included) from the healthy vulva or penis and, when performed on infants or children, raise ethical challenges regarding consent, autonomy, and notions of bodily integrity.

Beyond the more serious cases of infibulation and excision, in which the dimension of serious damage is evident, it is interesting to question why some practices are perceived as problematic (e.g. Islamic veiling that does not produce any damage to the person's physical integrity; mild female mutilations in which the tissues soon heal without leaving any marks) while others (e.g. male circumcision) are commonly accepted even though they produce a permanent alteration of the body and reduce sexual pleasure (the removal of the foreskin, a particularly sensitive part, typically produces this effect).

Cultural elements of the majority may explain the different legislative and judicial treatment of the above-mentioned practices: for example, a society such as the Italian and European one in general, in which a

patriarchal and paternalistic matrix is present, may be inclined to a discourse of victimisation of women, especially when racialised, which produces a greater focus on the protection of girls and women, who are not considered as having agency, unlike men and children, who are instead perceived as less vulnerable.

A further element regarding the different treatment could be the habituation to a certain practice such as male circumcision, due to the fact that it has been practised for decades by minorities living in their own territory. The debate on FGM has also brought with it many activists against male circumcision.

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Anthropological bibliography (recommended reading):

Fusaschi M. (2003). *I segni sul corpo. Per un'antropologia delle modificazioni dei genitali femminili,* Storia, Filosofia e Scienze Sociali. Bollati Boringhieri.

An essential text for understanding what practices and meanings characterise FGM (or female genital modification). It is an excellent ethnographic and critical analysis useful for understanding the complexity and great diversity of practices gathered under the most common definition of FGM.

Anthropological bibliography (for more details):

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12. Homage to the child's penis

Cases: members of the household kissing, fondling, giving "hickeys", praising, displaying photographs of the male child's genitals (criminal law)

Cultural test

1. Can the category 'culture' be used?

The category culture can be used when the behaviour comes from a family member (mother/father/grandfather/grandmother, other relatives or friends) within certain groups, in the context of manifestations of pride in one's children/grandchildren. In this case we are faced with a cultural genital kissing/caressing/touching aimed to prize the male child, and not with a sexual genital kissing/caressing/touching aimed to give sexual pleasure to the adult.

2. Description of the cultural practice and the group.

The homage to a male child's genitals, known in literature as "homage to the penis" (Money, Prakasam, Joshi 1991), is a cultural practice, widespread in various groups, that may consist of a wide range of behaviours such as caressing, kissing, hickeying, tickling, rubbing, manipulation, display of photographs, praise and/or verbal appreciation of the child's penis (and/or testicles), all united in their phenomenological diversity by the following element: a celebratory attitude, devoid of any sexual component, towards the male child's genitals. The practice is a *species* of the broader *genus* 'Displays of affection concerning children's genitals' (see entry Displays of affection concerning children's genitals in this Guidebook) and is treated here separately for its peculiarities.

Participants in the aforementioned behaviour diverge, depending on the cultural group: potentially both parents, or only the father or only the mother; more or less close relatives or only male or female relatives; and/or guests and friends of the family.

As far as the recipients are concerned, they are male children. The age of the children who are the recipients of the various forms of "homage to the penis" may differ: in some groups, it is babies and infants, in others, children up to the age of six or seven. In some cases (Dominican Republic), the practice is attested until the child reaches puberty.

The practice of 'penis homage' can present itself in a threefold phenomenology: physical, verbal, visual.

In its **physical phenomenology**, the practice of 'penis homage' may

consist of kissing, sucking, mouthing and lightly nibbling with the lips (in a loving way and without any pain for the child), touching, stroking, rubbing, playing with, tickling, uncovering and displaying the child's penis.

In its **verbal phenomenology**, the 'penis tribute' may consist of words uttered by the adult to praise the child's penis (sometimes, in addition to the penis, the testicles are also celebrated), appreciate its beauty, jokingly challenge the child on genital-related issues, as well as may consist of encouraging the child to urinate during toilet training.

In its **visual phenomenology**, the practice of the 'homage to the penis' may consist of taking and displaying photos of the male child naked or urinating in family albums or frames (Italy, Japan), and of sending photos of the child with its genitals in evidence to relatives and friends to celebrate the birth of the baby (Italy until 1970). With the advent of technology, photos have been joined by videos of babies, generally taken while bathing, which are sent via mobile phone to relatives. Historically, as we shall see (Anthropological Insights, §. 4. The *ostentatio genitalium* of the baby Jesus as a pictorial genre of Renaissance Europe), the pictorial genre of the *ostentatio genitalium* of the baby Jesus, widespread in Europe throughout the Renaissance until the Council of Trent, and the *ostentatio urinarum* or *puer minguens*, an artistic genre manifested in fountains or paintings, is part of the visual phenomenology, and survives, in some groups (including Italians), in family photographs that immortalise the male child while standing up to pee.

Multiple, in their common celebratory attitude, are the functions that the behaviours enumerated above fulfill: expressing the glory of the family's prosperity and perpetuation; showing pride and happiness because a male child has been born; honouring the genitals as a symbol of fertility; expressing paternal pride for the continuation of the surname that occurs through the male child; praising the child's virility; teaching the child to become aware of its male gender (distinct from the female gender) and proud of its genitals to prepare it for its future reproductive function, according to a process defined as *gendering the body* (on the morphological and functional details in the individual groups *infra* detailed description of the practice). In no case is the function of the practice aimed at adult sexual gratification.

Forms of homage to the child's penis are attested in Albania, Romania, Bulgaria, Pakistan, Turkey, Egypt and the Arab world in general, the Dominican Republic, the Philippines, Cambodia, Vietnam, Japan, Spain, Italy, particularly Southern Italy, numerous Roma minority groups.

3. Embedding the individual practice in the broader cultural system.

The practice of homage to the penis is linked to the following other cultural elements: a high value attributed to fertility and reproduction; a high value attributed to the male gender; a cultural continuity, generally unconscious, i.e. a pagan legacy regarding the sacred nature of genitals (in ancient Rome, male genitals were sacred and there were public representations of the phallic symbol: it is an unproven hypothesis that in minority cultural *enclaves* in Italy, especially in rural areas, this form of celebration of male genitals is a cultural continuity with those pagan roots).

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice is optional: it is an **automatism** of which parents are often unaware, implemented in the family context. The **groups do not even name the practice** (the name 'homage to the penis' has been attributed by transcultural medical-psychological doctrine, Money, Prakasam, Joshi 1991), as it does not belong to the category of structured or ritualised behaviour, but rather to habits that are transmitted intergenerationally without a precise awareness of origin and meaning.

5. Is the practice shared by the group or is it contested?

Homage to the penis is a cultural behaviour shared by the group where the child's socialisation takes place and is transmitted intergenerationally. No protest actions against the practice have been reported. It should be noted that, depending on the group, in certain social classes and in urban areas, the practice tends to disappear or remain only in its verbal manifestations.

6. How would the average person from that culture behave?

The father/mother/relatives belonging to the groups where the behaviour takes place would kiss, caress and make verbal appreciations directed at the child's penis.

7. Is the subject sincere?

Factually ascertain that the family member engaging in the behaviour **is not a paedophile**.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

The practice of penis homage has been and is widespread in Italy. It manifests itself in the three physical, verbal and visual forms examined above (question 2).

On a physical level, in several areas, especially in southern Italy, it was and still is customary for mothers to kiss the child's penis. For example, in the Piana degli Albanesi in Sicily, the kiss on the infant's penis given by the mother could be born out of a gesture of pride, performed to affirm 'you are a man' (source: Professor Antonino Colajanni personal communication, Rome, June 2019).

Throughout Italy it is still common, especially after a bath, to kiss the baby all over the body and, in several families, even the genitals may be the object of a superficial kiss in a context in which the whole baby is sprinkled with kisses. In this case, we are mainly dealing with a cuddle, less connected to aspects of pride in the child's virility, although still reflecting a celebratory and joyful emotion.

On a verbal level, one can speak of a linguistic practice of 'penis homage' in Italy when parents appreciate the way the child urinates or make benevolent and laudatory comments about his sex. The fathers' pride in their newborn male child may manifest itself in the following phrases: 'what nice balls' (addressed to testicles), 'what a nice willy', even accompanied by caresses or tickling. The logic of this verbal practice, which is not recurrent with girls whose sex is rarely mentioned in a celebratory way, is the same as the other forms of 'homage to the penis' analysed here (expressing pride in virility in particular) and may, therefore, fall into this category in the strict sense.

On a visual level, the practice of 'penis homage' appears in Italy in various morphologies. Until the 1970s it was an established custom, when a male child was born, to send relatives and friends a photo announcing the birth of the baby. The baby, only a few months old, generally appeared lying down or sitting up, naked with his genitals clearly in view. This custom was a way of saying 'we had a baby boy' (source: Maria Teresa Mele, retired teacher, Modolo village, age 84). Even today, albeit without the same celebratory attitude towards the male, it is still customary in Italy to take and send photographs of the baby, just a few months old, naked after a bath or lying on the parents' bed to relatives and friends. With the advent of the Internet, this practice has been replaced by sending digital photos and videos.

Again on a visual level, in Italian family albums, and often also in photos placed in special tables in homes or on shelves in various rooms, it is usual in Italy to place photos of their young children naked or while, standing, peeing. The latter is a form of *ostentatio urinarum*,

comparable, *mutatis mutandis*, to the sculptural and pictorial genre of the *puer minguens*, which likewise contains a celebration of the child's penis devoid of any sexual component (Steinberg 1983).

Historically in Italy there are two forms of homage to the penis totally devoid of sexual intent. These are the *ostentio genitalium* and the *puer minguens* (see Anthropological Insights *below*), - two pictorique genra developped from the Renaissance to Baroque - which can still be observed today in major museums in Italy and around the world and which do not generate any reaction from the legal system.

9. Does the practice cause harm?

No. When the child is an infant he actually benefits from physical contact. When the child grows up he is able to understand from the context that the gesture made by his parents is harmless.

The practice could be harmful in those cases in which the child is no longer a baby, if the child, transferred to another culture such as the Italian one, were to acquire a different reading of the practice (e.g. knowing that children who are no longer babies and who are caressed or kissed on the genitals are the object of paedophile attention, the child might wonder if he were in such a situation): in this case, at the child's request, the parents should refrain from practising it. In any case, criminal prosecution of the behaviour should be ruled out and the resolution of the conflict arising from the child's new perception of the act should be resolved within the family and the school.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The practice can easily be confused with a paedophile act, especially in morphologies not common in Italy.

The practice, once its meaning is known, does not contravene the values and rights protected in Italy as it is not a sexual act and does not harm the child.

11. Does the practice perpetuate patriarchy?

Yes. In general, in the majority of groups the practice corresponds to a patriarchal logic that feminism criticises as 'phallocentrism', insofar as it emphasises the male child's genitals. The practice, in fact, is characterised by an over-celebration of the male child's genitals and a silencing of those of the girl's. However, it should be revealed that in some groups where the practices of kissing and caressing the children's genitals are symmetrical for boys and girls (see the entry Displays of affection concerning children's genitals) this connotation fades, even though kissing and caressing the girls' genitals are, in general,

performed to cuddle or to *gender the body*, rather than to pay homage to the girl. There are no attested forms of 'homage to the vagina'. This being said, the answer to this test question cannot be used as an argument to reject the cultural practice or prohibit it, as it is a **patriarchal practice with no immediate harm,** but rather reinforces the (male) child's self-esteem.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Minorities engage in the behaviour spontaneously, as a form of expressing enthusiasm and admiration for the male child. Since there is no harm to the child, minorities have good reason to claim the right to perpetuate their culture (Art. 27 International Covenant on Civil and Political Rights 1966) and to be able to freely express themselves in the forms of physicality and affection towards their children (Art. 30 of the Italian Constitution).

Proposed balancing act: since the practice does not cause any harm to the child and the results of the anthropological investigation show that it is not incompatible with constitutional values, it is considered that the practice can be accepted in the Italian legal system and the parents acquitted of the charges of sexual violence. Educational pluralism, referred to in Article 30 of the Italian Constitution, legitimises the continuation of the practice.

Legal Insights[113]

The term 'homage to the child's penis', even though it is a heteronym forged in medical-anthropological literature (Money, Prakasam, Joshi 1991), proves to be suitable to summarise under a common umbrella a series of behaviours that have already presented themselves and may in the future present themselves to Italian judges and that constitute a new challenge of multiculturalism. Since this practice is unknown on the Italian, European and Western cultural horizon in general - at least in the forms of kissing, hickeys and rubbing, since there are other forms of 'penis-praise' of children

[113] These legal and anthropological insights contain excerpts from Ruggiu 2019a and Dauth, Ruggiu 2020.

both in Italy and in Europe - it may give rise to multicultural disputes that have already turned into court cases in the United States, Germany and Italy. Several parents were arrested because the practice of 'penis-homage' they were performing was subsumed by judges under the crime of sexual abuse or sexual acts with a minor. Faced with this picture, this Guidebook aims to clarify the anthropological meaning of this custom with the objective of providing judges, prosecutors, lawyers, other operators involved in the process and, more generally, all those who come into contact with a foreign child and his or her family, with the cognitive tools to be able to provide a correct reading of behaviour that may otherwise be easily confused with paedophilic gestures.

The following is a brief description of Italian and comparative jurisprudence on the cultural practice of homage to the child's penis (Ruggiu 2019a). As the reader can appreciate, the opinion of judges diverge, and the hermeneutics of the facts are strongly influenced by whether the judge had the opportunity to acquire adequate anthropological knowledge on the practice:

Italy

Criminal Court of Reggio Emilia (judgement of 21 November 2012) acquits an Albanian father who kissed his son on the genitals as a gesture of paternal pride due to the absence of the subjective element since, although the act was apparently of a sexual nature, the man performed it with a cultural motive.

Court of Appeal of Bologna (judgement of 19 April 2017) confirms the acquittal, with a different reasoning, i.e. arguing that not only is the subjective element of malice not found, but that the objective element of the offence is also lacking since the kiss was a cuddle given for the purpose of reaffirming the pride of procreation.

Court of Cassation sec. III Criminal (Sent. no. 29613 of 29 January 2018,) annuls the previous two acquittal opinions with deferral to a new judge (a new section of the Court of Appeals of Bologna) by using these three main arguments: a) **the recognition of a cultural exemption meets the insurmountable limit of the inviolable rights of the person.** The Supreme Court affirms: "The right, also inviolable ... not to deny one's cultural, religious and social

traditions" (para. 3.4. right) must be balanced against the child's sexual freedom; (b) the latter was violated because the kissing involves an erogenous zone and, according to the Court's case law, this makes the act in itself invasive of the child's sexual sphere, beyond the subjective intentions of the father; c) the existence of the cultural practice is not certain since the cultural evidence adduced by the defence - a statement, moreover not authenticated, from the Prefecture of Vlore - does not mention kissing, but only caressing, and in this case we are dealing with real *fellatio.* Moreover, the existence of the practice is denied in Albania, since the Albanian penal code (Art. 100 ff.) provides for the crime of sexual abuse.

Court of Appeal of Bologna, in its capacity as referring judge, issued a new ruling on 16 May 2019 in which it sentenced the father for the offence under Article 609 quater - sexual acts with a minor - to two years and eight months' imprisonment and to compensation for damages to be paid in civil proceedings.

Germany

24 May 2020, Regional Court of Hamburg acquits a Bulgarian father of Roma origin who had fondled his child's penis in an internet video chat, recognising the lack of sexual intent following a cultural expert report presented by anthropologist Harika Dauth of the Max Planck Institute of Social Anthropology, Halle (Dauth, Ruggiu 2020).

Switzerland

In 2021, a public prosecutor in the Canton of Ticino (Switzerland) dismissed the case of a mother from the Dominican Republic who had touched her 10-year-old son's penis as a demonstration of maternal pride.

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

1. A note on the naming of behaviour.

The term 'penis homage' is a heteronym, i.e., it was created outside the cultural groups that practice this broad type of behaviour. Such groups do **not have a specific name for the behaviour,** which is generally part of a broader context of expressions of affection towards the child or of the process aimed at *gendering* the child to make him aware and proud of his masculinity. In some groups, behaviours such as kissing, caressing, rubbing are also directed at the genitals of girls, but do not have celebratory purposes as they are part of other types of kissing and caressing of the genitals (see the entry on Displays of affection concerning children's genitals in this Guidebook).

The coining of the term '*homage to the penis'* dates back to 1991 when transcultural psychologist John Money and physicians K. Swayam Prakasam and Venkat N. Joshi[114] used it, along with another term - '*genitals greetings*' - in a study devoted to the Telogu-speaking group living in the state of Andra Pradesh-India. The scholars, in describing the practice in detail (on which see *infra* section 2. Functions of the practice and groups where it is widespread), intended to show how, what in the United States was considered sexual abuse was, in other cultures, a gesture of affection or greeting towards the male child, which had to be read wearing the proper cultural lenses.

2. Functions of the practice and groups where it is widespread. Telogu (India), Roma peoples, Turkey, Albania, Bulgaria, Italy, Spain, Japan.

The practice of 'homage to a child's penis' consists of kissing, rubbing, tickling, touching, caressing, or even sucking a child's penis. The behaviour is a new culturally motivated offence in Italian law and in others.

Forms of homage to the child's penis are attested in Albania, Romania, Bulgaria, Pakistan, Turkey, Egypt and the Arab world in general, the Dominican Republic, the Philippines, Cambodia, Vietnam, Japan, Spain, Italy, particularly Southern Italy, and among numerous Roma minority groups. Nevertheless more studies on the practice are needed as the

[114] J. Money, K.S. Prakasam, V.N. Joshi, Transcultural Development Sexology: Genital Greeting Versus Child Molestation in IPT (Institute for Psychological Therapies), vol. 3, 1991.

only systematic ones so far published are yet incomplete in their surveys of countries analyzed (Ruggiu 2019a; Dauth, Ruggiu 2020).

The following will describe the morphological and semantic modalities that the practice takes on in certain cultural groups. The descriptions are extracted from anthropological studies or those of other sciences (psychology, medicine, sexology, history, art history), from cultural expert opinions rendered during trials in which accused parents defended themselves by resorting to *cultural defence*, from anthropologists interviewed, and from lay testimonies coming from a *quisque de populo* of the group in question, legitimised by the fact that, being a direct member of the group, he is able to explain the meaning of the practice. All of this data confirms, as we shall see, that certain gestures, in certain cultural contexts, have no sexual value.

Telogu (India)

The practice of 'homage to the child's penis' is manifested in this way among the Telogu-speaking group, a minority in India, which is a majority in the state of Andra Pradesh:

> "parents and close relatives cradle, hug, cuddle and kiss a child, male or female, insistently. Kisses are placed on every part of the child's body except the mouth and anal area. In children, the penis is excluded until the child turns one year old. From then on, the father, as well as any other adult relative, but not the mother or any female relative, snaps a kiss of approval on the child's penis by lifting it up at the level of his mouth. Until the age of six, children of both sexes continue to be affectionately held, rubbed and cuddled by their parents and relatives. Inclusion of the genitals continues to remain a prerogative of children and their male relatives. The gesture, however, changes (over time) from direct lip-penis contact to a two-step gesture. First, the adult male taps and pulls the child's foreskin with his thumb and the first three fingers of his right hand. Then, he brings his fingers to his mouth, makes a kissing sound and turns the kiss towards the penis. This gesture can be repeated two or three times. If the man is a guest, e.g. an uncle, the gesture serves as an act of greeting. The host approaches the child, puts his left hand around the child's arm and with his right hand makes the gesture towards the penis. This greeting is a gesture of homage that honours the superiority of the son over the daughter. As a male in a line of

patrilineal descent, a son is destined to ensure the spiritual well-being of his father after his death." [115]

The scholars Money, Prakasam and Joshi specify: 'the meaning of these costumes is neither erotic nor sexual.[116]

Roma peoples

Among various groups belonging to the broader Roma population, the practice of penile homage is a *species* of the broader *genus* of kissing and caressing (see the entry Displays of affection concerning children's genitals in this Guidebook) practised on both boys and girls with the aim of '*gendering the body*'. By this expression is meant that process aimed at preparing the child to fully assume its male or female gender and the reproductive functions associated with it.

Among the Jarana, a group of *gitanos* living near Madrid in Spain:

"From the moment of birth, adults emphasise and celebrate the child's genitals, particularly in the case of boys... their [adults'] attitude encourages children to become proud of their genitals and to develop their own identity within which genitals play a central role."[117]

The words defining the genitals (*pija* for male genitals and *chocho* for female genitals) are used as affectionate nicknames and often as nicknames to call the child:

"they [the words *pija* and *chocho*] are also used, in a metonymic way, to indicate the male or female child - thus pregnant mothers are often asked whether they are expecting a *pija* or a *chocho*. Along with other landmarks, these are among the first words a child learns.... Affection towards children up to the age of 5 or 6 is shown by

[115] J. Money, K.S. Prakasam, V.N. Joshi, *Transcultural Development Sexology,* cit., p. 3,1991.

[116] J. Money, K.S. Prakasam, V.N. Joshi, *Transcultural Development Sexology,* cit., p. 1,1991.

[117] P. Gay-Y-Blasco , *A 'different' body? Desire and virginity among Gitanos*, in *The Journal of the Royal Anthropological Institute* , 3(3) 1997, pp. 517-35, p. 520.

rubbing or cupping their genitals in your hands, or kissing them and giving them squeezes down there.'[118]

Although both sexes are treated with great affection,

> "children are most celebrated. Jarana mothers like to play with their little boys' penises, pictures of naked male children aged two or three hang on the wall of many gypsy homes, and children are very much encouraged to be proud of their penises.'[119]

Among the Cortorari, a Roma group from Romania, the use of touching and kissing the penis (and vulva) serves both to show affection and to make children aware that they have sexually different bodies (*gendering the body*). Again, the words *kar* (penis) and *miž* (vulva) are the first words children learn:

"For a child at a preverbal stage of development, being able to point to his genitals when asked by adults: 'where is your penis/where is your vulva? (*kaj lo kio kar/kaj la ki miž?*)' is considered a sign of his intelligence. It is common to rub and kiss both boys' and girls' genitals to show affection.'[120]

These gestures are accompanied, as the child speaks and grows, by practices designed to encourage a free relationship with one's sex and very much centred on the genitals:

"Phrases such as 'eat my penis/my vulva (*xa miri kar/miž*)', which normally amount to turpitude when uttered between adults, are taught to children whose ability to use them is highly valued. In infancy, during the process of language acquisition... children are exposed not only to sexually explicit language, which may have no meaning, but also to gestures that materialise these statements... After the age of two, children are teased by adults and already know how to defend themselves using phrases such as 'eat my penis/ vulva' to which adults reply 'why do you have a penis/

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[118] P. Gay-Y-Blasco, *A 'different' body? Desire and virginity among Gitanos*, 1997, cit., p. 521.

[119] P. Gay-Y-Blasco, *A 'different' body? Desire and virginity among Gitanos*, 1997, cit., p. 522.

[120] C. Tesăr, *Becoming Romani (male), becoming Romni (female) among Romanian Cortorari Roma: On body and gender*, in *Romani Studies* 5, Vol. 22, No. 2, 2012, pp. 113-140, p. 126.

vulva?' Having reached an age where they are more fearless, children begin to show their genitals without fear, or even on purpose.'[121]

Roma peoples, therefore, confirm the existence of the practice of paying homage to the child's penis without sexual intent on the part of adults.

Albania

While there are numerous scholarly studies on practices of 'penile homage' on a comparative and interdisciplinary level, in the case of Albania there are no written studies on the subject, at least in English. This absence is due not only to the intimate nature of the practice, but also to the fact that Albanian culture is still little studied and, as noted, 'remains little known to the Western world, even among ethnographers and anthropologists specialising in the Balkans.'[122]

The presence of the practice in the form of kissing with hickeys on the child's penis is, however, confirmed by the Albanian community. For example, Vladimir Kosturi, President of the Albanian association Illyria in an interview with the Italian radio *Radio Radicale*[123] in 2010 stated that the behaviour is absolutely normal and expresses pride in procreation as well as a more physical and natural relationship between the bodies of parents and children than in the western world, where this naturalness has been lost.

Anthropologist Harika Dauth also confirmed the existence of the practice in Albania, noting: 'Generally speaking, the parental practice of kissing the child's genitals is commonly practised in Europe among Kurds, Roma and Albanians. Although the majority of these groups are Muslim, among the Roma it is also commonly practised among Christians. There are other societies in the world that have similar practices. In Europe, this practice is linked to a sense of parental pride, joy, gratitude towards the child and has no sexual

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[121] C. Tesăr, *Becoming Rom (male), becoming Romni (female) among Romanian Cortorari Roma: On body and gender*, cit. p. 126.

[122] R. Elsie, *A dictionary of Albanian religion, mythology, and folk culture*, New York: New York University Press, 2001, p. VII.

[123] Interview with Vladimir Kosturi (6 december 2010) on the case of an Albanian citizen living in Italy accused of paedophilia and the demonstrations in Italy and Albania in his favour.

connotation. In a broader (linguistic) context, the practice should be seen as an emotional and psychological preparation for the future gender role of children in the sense that they are taught what biological and social gender belongs to them and what this implies. To this end, children are familiarised with their gender and encouraged to feel proud of their genitalia from an early age.'[124]

Bulgaria

In Bulgaria, the practice involves kissing, caressing and praising the child's penis. A recent court case in Germany saw a Bulgarian father charged with distribution of child pornography for showing in an internet community the child who, so it was claimed, was the object of his erotic attentions. The father had started to undress and change the child's nappy. While doing so, the child had picked up a beer bottle lying nearby, whereupon the community started to insult the father. As a reaction, the father took the child's genitals between his thumb and forefinger and swung the hand holding his penis up and down. According to the father, by exposing the child to the camera he intended to show his 'little lion' (Dauth, Ruggiu 2020).

The judge acquitted the defendant after hearing the cultural expert report by anthropologist Harika Dauth, which confirmed the existence of the cultural practice without any sexual intent.

Spain

In Andalusia, it is customary in all social groups to praise the child's penis with expressions such as '*que cojones*', '*que huevecitos*'. The child is called with a metonymy *pija* (penis) and the girl *chocho* (vulva) (informant: Susana Moya Espinosa, former foreign languages teacher, Sevilla, Spain, age 63). These expressions are attested among Roma peoples as well in Spain.

Japan

In Japan, on the islands of Okinawa archipelago, there is a visual form of homage to the baby's penis. When the baby is over 100 days old, and it is therefore certain that it will live, a photograph is taken

[124] Personal communication, December 2018 and, later, Dauth, Ruggiu 2020.

of the totally naked baby with its genitals in view. This photo, to which the gold imprint of the child's hand and foot is affixed, is hung in the family room in plain view, framed in a precious manner (informant: Yuki Asano, professor of philosophy of law, age: 53)

Italy

See question 8 of the cultural test, "The search for the cultural equivalent." The practice of the minority translates into a corresponding practice of the (Italian) majority' in the above test

3. The presence of practice in Europe. Anthropologist Philippe Ariès' study on childhood.

The practice of 'penis homage' of the child in its physical phenomenology consisting of caressing, tickling, rubbing and kissing, has long been part of European culture.

The most authoritative source on this point is the historian Phillipe Ariès who, in his classic book on childhood, *L'enfant et la vie familiale sous l'Ancien Régime* of 1960,[125] devotes an entire chapter - 'From immodesty to innocence' - to showing how the genitals of children, particularly boys, were, throughout Europe, the object of pampering and stimulation of various kinds, which came from the child's parents, relatives and various *care-givers* (Ruggiu 2019a, Dauth, Ruggiu 2020).

Ariès observes how the child, ignored during the Middle Ages, becomes, from the 15th century onwards, the object of a tenderness expressed without reserve or modesty. The historian states that it was common throughout Europe from 1400 to 1700 to play with a child's private parts. Ariès cites, among the sources attesting to the custom, the diary of the doctor Héroard who recounts the life of Louis XIII of France, from which it emerges that the little king, up to the age of seven, was given kisses on the penis and experienced various groping. In addition, Ariès cites engravings and paintings

[125] P. Ariès, *Centuries of Childhood. A social history of family life*, New York: Alfred A. Knopf, translated by R. Baldick in *L'enfant et la vie familiale sous l'Ancien Régime*, Libraire Plon, Paris 1960. In Italian *Padri e figli nell'Europa medievale e moderna*, Laterza, Bari 1994.

attesting to forms of playful manipulation of the child's penis and other sources reporting episodes from everyday life.

The custom of playing with a child's private parts should, according to Ariès, be analysed through the cultural lens of the culture of the time:

"This lack of confidentiality with respect to children surprises us; we are astonished to hear such uncensored talk and even more so in the face of such bold gestures, such physical contact about which it is easy to imagine what a contemporary psychoanalyst would say. The psychoanalyst would be wrong. Attitudes towards sex, and certainly sex itself, change depending on the environment and consequently on the period and mentality. Nowadays, the physical contacts described by Héroard would impress us as bordering on sexual perversion and no one would dare practise them in public. But this was not the case at the beginning of the 17th century.'[126]

Ariès explains how the gradual discontinuation of the custom was due to a moral reform that led to a new conception of the child and its body:

"the practice of playing with a child's private parts formed part of a widespread tradition that is still operative today among Muslim groups. The latter remained isolated... from the great moral reform, first Christian, then secular, that governed society in the 18th and particularly 19th century in England and France. This is why we find in Muslim society characteristics that strike us as peculiar, but which would not have surprised good Héroard.'[127]

4. The *ostentatio genitalium* of the infant Jesus as a pictorial genre in Renaissance Europe.

Other sources showing the spread of the practice in Europe are canvases and pictorial engravings.[128] The practice of penis homage, in fact, took on the guise of a veritable pictorial genre between the end of the Middle Ages and the entire Renaissance, up to the

[126] P. Ariès, *Centuries of Childhood,* cit., p. 103.

[127] P. Ariès, *Centuries of Childhood,* cit., p. 103.

[128] Thanks to Michele Graziadei, professor of comparative law at the University of Turin suggested to explore the European cultural equivalent of paintings of Madonnas with Child.

Counter-Reformation, defined by art critic Leo Steinberg[129] as *ostentatio genitalium,* which manifests itself in the following iconographies: Madonna uncovering, showing, caressing the penis of the infant Jesus; St Anne playing with it, tickling it, touching it; other characters such as the Magi, saints or patrons peering at it in wonder, tenderness and veneration; angels celebrating the genitals of the Child with cascades of flowers.

This pictorial genre was studied by Leo Steinberg in particular in Chapter IV - 'On the Practice of Caressing the Genitals of the Male Child' - of his book *The Sexuality of Christ in Renaissance Art and its Oblivion in the Modern Age* (Steinberg 1983). According to Steinberg:

> "Renaissance art, both north and south of the Alps, produced a large number of devotional images in which the genitals of the Christ child... receive such demonstrative emphasis that the viewer must recognise in them an *ostentatio genitalium*, comparable to the canonical *ostentatio vulnerum*, i.e. the flaunting of wounds [in paintings of the passion of Christ to show his body suffering and paintings of resurrection in which Christ show his bodily wounds to skeptical Saint Thomas]. In many hundreds of pious and religious works, from before 1400 until after the middle of the 16th century, the ostentatious unveiling of the Child's sex, or the fact of touching, protecting or presenting it, is the main action."[130]

We invite the reader to look at the images, easily available on the Internet, of the following works that confirm Steinberg's findings. They are only an illustrative sample of hundreds of canvases. The *Madonna and Child between St. Agnes and a Holy Bishop* (16th cent.) from the school of Antoniazzo Romano, now in the main chapel of the Almo Collegio Capranica, Rome, uncovers the genitals of the child Jesus and caresses them. In Domenico Ghirlandaio's *Adoration of the Magi Tornabuoni* (1487), now in the Uffizi Gallery in Florence, we see the type of 'presentation' of the child's penis in which one of the Magi stares in amazement at the genitals of Jesus. In Francesco Botticini's

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[129] L. Steinberg, *The sexuality of Christ in Renaissance Art and its modern oblivion*, Chicago: University of Chicago Press 1983, ebook, transl. it. *La sessualità di Cristo nell'arte rinascimentale e il suo oblivion nell'età moderna,* Milan: Il Saggiatore, 1986.

[130] L. Steinberg, *The sexuality of Christ,* cit.

painting, *Madonna and Angels Adoring the Child* (c. 1490), the practice of penis presentation is performed by adoring angels who sprinkle flowers on the genitals of the baby Jesus. In the painting *Madonna and Child, St. Anne, Mary Magdalene and St. John the Baptist* by Cavaliere D'Arpino (1592-3), it is St. Anne who points with her finger to point at and then touches the genitals of the Child. In the engraving, made in 1511 by the artist Hans Baldung Grien, entitled *Holy Family*, St. Anne touches and tickles the penis of Jesus, while Joseph looks on a little apart.

Steinberg's conclusion in analysing these iconographies is a theological reading of the gesture: *ostentatio genitalium* served, similarly to *ostentatio vulnerum,* to prove Christ's humanity, his having become incarnate and made man. For the purposes of our investigation, here we are faced with a visual phenomenology of the practice of 'homage to the penis' performed for theological purposes, to convey a dogma of faith: the divine incarnation. The fact that the images did not arouse any scandal among the public of the time and were even approved by the Church, suggests that the painters also represented, with the theological message, a widespread practice among the population.

The practice could, in certain contexts, also be a magical rite of protection for the child. For example, Carl Kock, a scholar of the painter Baldung Grien and the above-mentioned painting *Holy Family*, dated 1511, with St. Anne tickling Jesus' penis, "has interpreted St. Anne's gesture in the light of (the painter's) interest in popular superstition"[131] believing it to be an apotropaic gesture, linked to customs that were believed to possess magical power. In this way, "under the pretext of representing the pious group of the Holy Family, the painter dares to make the miraculous spell pronounced on a child the subject of his engraving,"[132] saving himself, behind the cloak of the religious subject of *ostentatio genitalium*, from any possible accusation of witchcraft or heresy.

Steinberg also notes that "Philippe Ariès cites Baldung's engraving to document what was once a 'widespread tradition' of playing with the child's private parts."[133] According to Ariès, in fact, the choice of

[131] L. Steinberg, *The sexuality of Christ,* cit.

[132] L. Steinberg, *The sexuality of Christ,* cit.

[133] L. Steinberg, *The sexuality of Christ,* cit.

subject matter reflected the Renaissance naturalism attentive to scenes of everyday life.

Another piece of evidence from art history on the existence of the practice of 'homage to the child's penis' in Europe is the pictorial and sculptural genre that we could define, along Steinberg's lines, as *ostentatio urinarum.* Indeed, the genre is more technically defined as that of the *puer minguens* of the urinating child. This is the representation of the male child while, standing, with his hand on his penis, he performs urination. The most famous representative statue of the genre is *L'enfant qui pisse* (1619), which has become the symbol of Brussels. Various representations of *puer minguens can be* found in the history of European art.

This art-historical analysis based on the studies of Ariès and Steinberg shows that, far from belonging to exotic cultures far removed in time and space, various manifestations of 'homage to the penis' of the child also existed in Europe. And, on closer inspection, they still exist.

Below are a few pictures that show how the practice of homage to the child's penis is present in our culture and goes completely unnoticed, as it has never occurred to anyone to report museum directors for exhibiting child pornography:

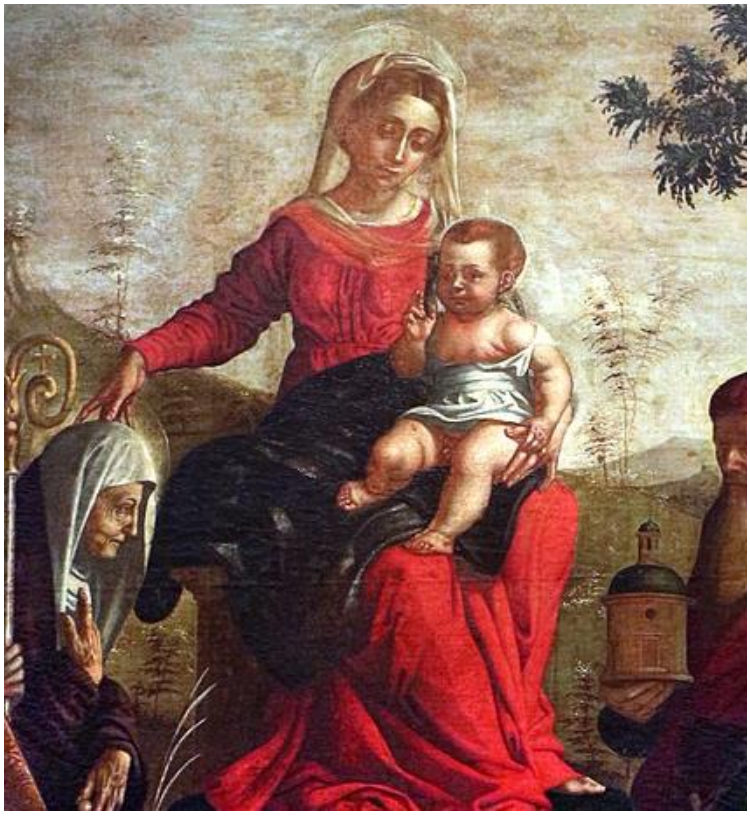

Figura 1 Giovan Francesco Caroto, Madonna and Child, 1540, Francesco Caroto, Public domain, from Wikimedia Commons

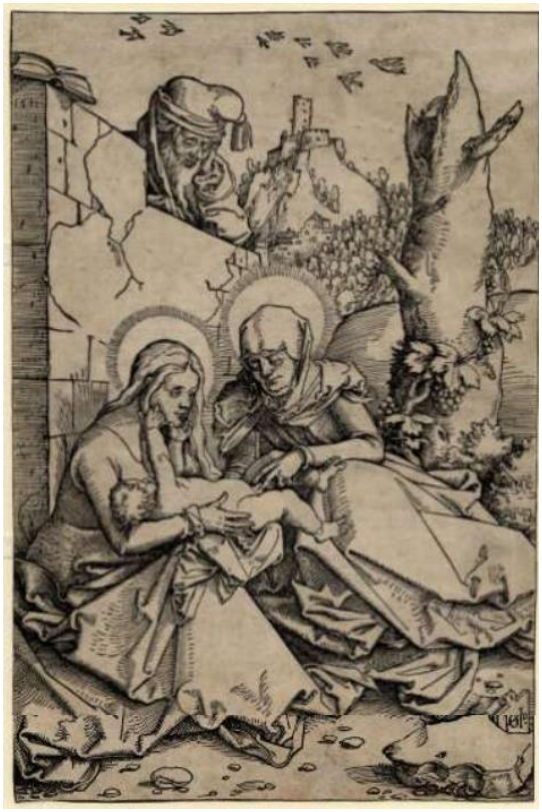

Figure 2 *Holy Family, 1511, Hans Baldung Grien, St Anne tickling the genitals of Jesus (with faithful contemplating the mystery of the incarnation) © The Trustees of the British Museum. Shared under a Creative*

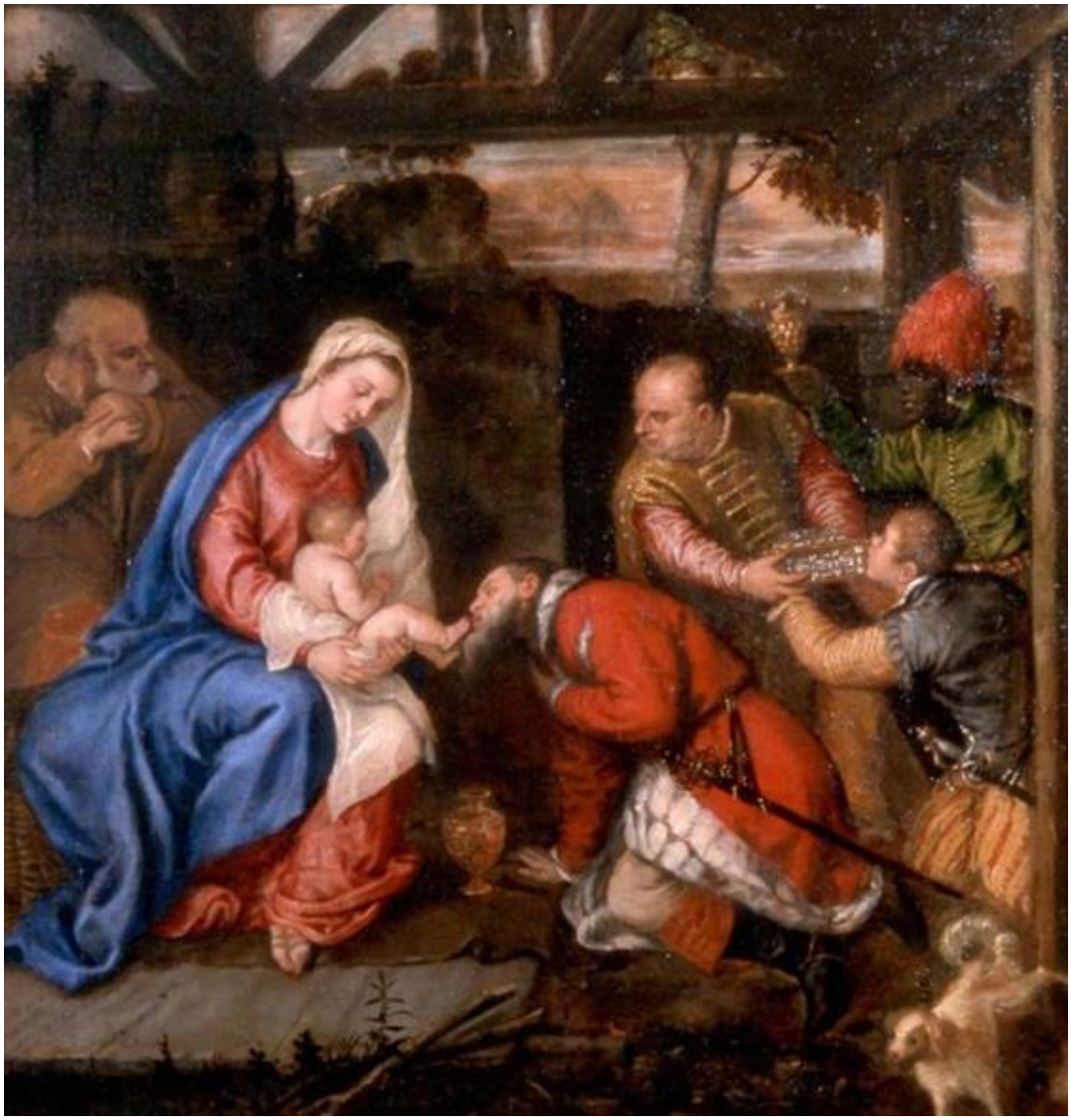

Figure 3. *Adoration of the Magi, Titian Vecellio, 1550, Magician King looking between Jesus' legs to confirm that he is incarnate (detail, the painting is at the Pinacoteque of Brera, Milan).*

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This work describes the pictorial genre of the *ostentatio genitalium of* Christ and explains its dogmatic significance: to show the miracle of God's incarnation in a human body. The genitals of the infant Jesus are contemplated in an ecstatic manner by saints, patrons, magi, and Madonnas, and sometimes caressed and uncovered to be highlighted.

13. Bride price

Cases: father of the bride receives a monetary payment for the marriage from the groom's family (criminal law)

Cultural test

1. Can the category 'culture' be used?

Yes. The culture category can be used if it refers to the payment of a sum of money (or material gifts) by the groom's family to the bride's family in order to achieve certain socio-relational goals.

2. Description of the cultural practice and the group.

'Bride price' refers to a payment with a **strong symbolic character** that is made by the husband, and/or his relatives, to the bride's family, in order to have the consent to formalise the marriage. These payments usually have a very important social value, which varies according to the context in which they occur: they often define relationships between clans, families or other social groups, while at other times they serve to demonstrate access to economic resources, so as to guarantee the bride's family a good life for their daughter in the new family. Traditionally, payments were made in the form of valuables, though nowadays they may consist of cash or basic necessities, but also luxury goods.

Payments between families at the time of marriage have existed in various cultures on all continents, and are currently still widespread in many social groups in different areas of the planet, including some rural areas in China, in various urban contexts in Thailand, in several African countries and in many Arab contexts in Syria, Zaire, Uganda and Iran. In Europe, on the other hand, it is most widespread among Roma cultures. Among the latter, the bride price is generally paid in cash, and the amount varies according to the customs of each group, the economic situation and previous family relationships. For instance, among the Korturare Roma of Transylvania, the bride price may consist of an economic payment of between EUR 2,000 and 5,000, whereas among the Spoitori Roma of the Danube area, this amount is greatly reduced to between EUR 30 and 300 and may be supplemented by other goods, such as livestock for food production. This price is meant as a sign of respect for the girl's family, a form of appreciation for the hard work done to raise her; but it is also intended as a form of compensation for the loss of work, both productive and reproductive, that the bride's

family suffers when the daughter marries and moves away. In fact, in the new married life, the bride's work benefits her husband and the husband's family, giving access to a transfer of rights over the wife's sexuality, labour services, residence and fertility.

It is important to consider, therefore, the symbolic value that the 'price' may take on in the attentive eyes of relatives and the community, just as it is important to take into account the fact that women are proud of the high amount they receive and, on the contrary, are ashamed if the amount received is low compared to the custom.

3. Embedding the individual practice in the broader cultural system.

The 'bride price' is a determining element of the wider institution of marriage. It is a compulsory step in proper matrimonial practice that serves to 'formalise' new social ties between different groups, to open kinship lines between the bride's and groom's families, and/or to formalise a new alliance between different clans.

In many *Roma* groups, the transition from childhood to adulthood is not determined by reaching a certain age, as is the case in our legal system, but by the onset of menstruation. It is upon reaching this condition that women are considered fit to begin the journey towards marriage, which not only represents the formalisation of the transition from youth to adulthood, but is also decisive in defining membership of the social group.

In these contexts, one can clearly see that marriage is accompanied by a well-defined rituality linked to tradition, which follows socially established practices - among which the bride price is one of the most important - that are therefore binding for a successful marriage.

4. Is the practice essential (to the survival of the group), compulsory or optional?

Although that of Roma marriages is a dynamic and potentially changing ritual, the "bride price" continues to be a decisive moment, an indispensable step for the marriage to be recognised by the community. The "price" plays a key role in the personal and social identification of individuals and families, and is an indispensable part of the marriage rite, thus being obligatory in some circumstances.

5. Is the practice shared by the group or is it contested?

The practice is beginning to be challenged by younger generations who adhere to the values of the dominant culture. It is noteworthy,

however, that the complaints of young Roma often do not seem to be about 'bride price' per se, but about the mistreatment associated with married life.

Although it is quite evident that there are no similarities with the 'selling of daughters', the practice of 'bride price' is often criticised by the dominant culture for the alleged personal and social impact it has on women. In fact, although quite distinct, it happens that the practice is associated with early marriages and forced marriages, a phenomenon that fosters domestic violence and is an obstacle to women's rights. These discursive practices of the majority, as is easily understood, are often reproduced by those Roma women who, unhappy with their marital life, want to distance themselves from it, and who use the arguments of the dominant culture in doing so.

6. How would the average person from that culture behave?

Generally speaking, it can be said that the practice is closely linked to the attainment of a social 'status' not only of the bride and groom, but also of the families; therefore, it is presumable that there are often social and family pressures that drive people to perpetuate the practice. Indeed, 'bride price' is a mediating tool between families, and is central in establishing bonds between family groups.

7. Is the subject sincere?

In order to ascertain the sincerity of the adherence to the cultural practice of 'bride price' as a simple traditional gesture, and to avoid an instrumental use of the cultural defence in trafficking incidents, it might be useful to carry out some factual investigations concerning:

- the existence of a kinship link between the defendants and the young woman involved in the proceedings. These are in fact situations involving not close family groups (parents of the spouses) but also wider ones (grandparents and aunts and uncles);
- the content of the communications and agreements between the families involved, whether they reveal a mere willingness to conclude the marriage rite or whether there are other factual circumstances that may be symptomatic of trafficking and/or exploitation;
- adherence to the cultural practice by the bride herself and the family unit in general;
- verification of the person who reported the facts - whether it was a person involved in the case (e.g. the young bride) or a person

external to the facts (social service workers, teachers, etc.) - and the reasons for the complaint (especially in the case of young brides who reported the facts, checking whether the action was due to a momentary disagreement with the shared life project or whether it was linked to other facts symptomatic of mistreatment and abuse);
- the family context in which the alleged victim is placed, whether psychologically healthy or abusive.

8. The search for the cultural equivalent: the translation of the minority practice into a corresponding (Italian) majority practice.

While it's difficult to pinpoint defined and ritualized practices of the conjoining of the groom's family and the bride's family in the current Italian culture, we can find similarities in the recent past. In fact, in past generations, marital alliances between two families was certainly more ritualized than it is today, and it was customary, especially in southern Italy, for the groom's family to visit the bride's family to ask for the daughter's hand in marriage. Often they would augment the request with attempts to demonstrate possession of a wealthy or at least sustainable economic condition for the new family unit.

Even more ritualized, especially in southern Italy, was the practice of the dowry (abolished in 1975), which was the set of goods that the bride's family provided to the groom's family for the marriage with the aim of contributing to the establishment of the new family unit. Often characterized by household items such as furniture or general furnishings, as well as jewelry or luxury goods, the dowry, like the "bride price", served the function of formalizing the bond between the two families; that is, of formalizing the new kinship created by the spouses through marriage.

It is also possible to find a similarity between the ritual of the bride price and the traditional escort of the bride to the altar by her father at the wedding. This gesture originated from certain types of Roman marriages (such as the *coemptio*), in which there was a real transfer of guardianship and other powers exercisable over the woman from her father to her husband. Born as an expression of powers typical of a patriarchal family structure, the practice survives to this day, albeit with different connotations, covering a symbolic and emotional, yet still ritualistic, significance. The practice of the father escorting the bride to the altar thus originated in ancient Rome in a context of transferring powers over the bride, but in the context of modern Italian marriage, no one interprets it in

that way anymore, and no one would think of suing a father for enslavement for performing this gesture, even though its original meaning is not far different from that of a sale or a denial of agency for the bride.

9. Does the practice cause harm?

'Bride price', established as a cultural practice, does not harm the person or legal assets. It is a traditional exchange of money between the groom's family and the bride's family, set in a consensual context and part of a specific rite, marriage.

It is therefore a ritual and collateral element that does not have a detrimental significance in its own right, nor is it capable of being unequivocally symptomatic of dysfunctionality or oppression of the newly constituted family unit into which the bride is welcomed. It is a necessary starting condition like other ritual and normative elements, which alone is not sufficient to be symptomatic of slavery or harmful situations.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

In the culture of the host group, the majority, the practice is divorced from the ritual context of which it is part and perceived in a detrimental way, as a real buying and selling of a person: a mere exchange of price between adult and prevaricating subjects, with the sole purpose of buying a human being, specifically a female and sometimes even a minor. The 'bride price' evokes in the common imagination the ancient practice of slavery, now rejected and abhorred by the majority culture, which is why it is considered a practice detrimental to certain core values of society: human dignity, freedom, and equality.

On a legal level, the practice is considered to infringe upon the fundamental rights of personal freedom and equality and to be contrary to criminal law. In fact, in the absence of an anthropological investigation into its function and its close link with the traditional Roma marriage rite or the culture of origin, it is currently traced by living law to the crime punishing enslavement, (Article 600 of the criminal code - Reduction or maintenance in slavery or servitude) and identified with the corresponding process of "reification" of the person envisaged in the case in point. In this sense, it is considered detrimental to the legal asset protected by the provision, the *"status libertatis"*, understood as the complex of manifestations that are summarised in this state and the denial of which entails the annihilation of the individual's very personality.

11. Does the practice perpetuate patriarchy?

The practice might be a symptom of a patriarchal system as understood in Western culture (systems of oppressive practices and institutions of women), but alone, it is not sufficient to integrate and perpetuate it.

Additional elements must be present, including: unequal family life conditions, mistreatment, lack of adherence to the ritual on the part of the victim, and other elements indicating the insincerity of the person invoking the practice in his or her defence.

The fact that the ritual has its origin in historically patriarchal family patterns, such as those, indeed, of the Italian tradition (think for instance of the ritual of the father accompanying the bride to the altar, mentioned above, or of the until recently widespread practice of carrying one's husband's surname), does not mean that it is a priori capable of perpetuating such patterns.

Moreover, as anthropological investigations have shown, the bride price ritual in the family and traditional system of the Roma family, far from aiming to realise a reification of women, is a ritual that in the multiplicity of its functions aims to enhance their social value for family building.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Traced back to the traditional rite, 'bride price' is not a practice that infringes on any fundamental right; on the contrary, it is the object of the protection of fundamental rights, namely cultural rights. Individuals have the right to perpetuate it, along with other traditions of their own culture, to choose the kind of rites associated with marriage. It is, in fact, a marriage ritual act, capable of assuming the different functions widely recalled above, which also vary according to the groups referred to.

In the past, the role of marriage and the family as the primary form of fulfillment of individuals' existence was also presented as a 'valid criterion of life' in Italian culture/society, although it has now been replaced by a vision of fulfillment understood in a more individualistic and professional sense.

It should be pointed out that within this framework of different views on the concept of "fulfillment" of the individual, one must necessarily include the fact that the prospects of professional and personal fulfillment offered by the Italian social context are not always the same

for the young generations of Roma ethnicity as for the Italian ones. This is why, also due to the different life perspectives offered, marriage continues to be an important point of social life for part of these minorities, a way of participating in the life of society from which derives the importance of preserving the rituals connected to it.

Proposed balancing act: the hermeneutics of the fact made in the light of the findings of anthropology excludes that bride price is a sale of person, therefore cultural law must prevail as no value protected by criminal law is violated.

Legal Insights

Italian jurisprudence[134] **has taken a condemnatory attitude towards the ritual we have here defined as 'bride price'**. The traditional exchange between the groom's father and the bride's father, objectivised and divorced from the marriage rite of which it is a part, seems superimposable on the description made in Article 600 of the penal code, which condemns 'anyone who exercises powers corresponding to the right of ownership over a person', without there being any need to assess the existence of further dysfunctional elements symptomatic of severe limitations on personal freedom.

Even recognising its cultural character and its potential protection under Article 2 of the Constitution as a cultural right, the bride price is always **excluded from protection in the balancing act with other fundamental rights**: considered in terms of typicality as a form of reification of the person, on the level of anti-juridicality it is considered devoid of the effectiveness of the offence, even if it is an inviolable right, because it damages fundamental goods for the individual.

[134] Corte assise di Napoli, sez. IV, 23/06/2015, no. 58; Cass. Pen.,, sez. V - 08/03/2019, no. 37315; Cass. Pen., sez. V - 13/05/2021, no. 30538.

The in-depth study proposed above offers an analysis of the rite of bride price from another point of view, the anthropological one, which brings out its symbolic value and its social functions.

The analysis of these elements, considered here in the abstract, could be used as a guide in the assessment of any concrete case and lead the judge out of the strictures of Article 600 of the Criminal Code through a consideration of typicality and offensiveness. In the absence of symptomatic elements of a situation of prevarication or abuse or of real human trafficking purposes, the conduct could be framed as a simple nuptial "gift."[135] In this case, the cultural connotation of the practice, ascertained in the concrete case, would lead out of the area of criminal relevance, not so much because the conduct is the expression of a cultural right and therefore endowed with a certain force of disqualification and prevalent in the balancing with other rights, but because it is not harmful. Indeed, it is the expression of values common to the majority culture: the freedom of the individual, in terms of choosing the rites by which to contract marriage, and the protection of the social value of the same.

The European Court of Human Rights seems to have moved in this direction**, which in *M and Others v. Italy and Bulgaria, 2012*, explicitly declares the impossibility of identifying the ritual in question** as a form of exercising powers typical of property over the person, but rather qualifies it as a simple exchange of gifts, like many others present in the matrimonial traditions of other cultures. Another element that is emphasised in this pronouncement is the young bride's consent to the ritual. While it is true that this element may not have particular relevance with respect to the unlawfulness of the act, it is nevertheless a useful argument to show how the rite is anchored to a shared cultural tradition, at the familial level, which **is not in itself considered harmful to fundamental rights** by the subjects directly involved in the rite.[136]

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[135] The use of the term 'gift' in the official text of the ruling of the Edu Court *M and others v. Italy and Bulgaria, 2012* ('*gift*' in the English version), is not only a linguistic translation but an attempt at cultural translation of the practice in the judicial vulgate by judges and interpreters. From an anthropological point of view, indeed, rather than the term gift, the translation as 'reward' would have been appropriate.

[136] This is the path taken also in Criminal Cass. sez. I - 27/05/2019 no. 28282, where after several degrees of judgement it was decided not to consider the ritual of the bride price as a typical fact and to proceed instead in a hermeneutics that

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

Nuptial marriages are those in which the groom, and often his relatives, make **a payment to the bride's family** to formalise the marriage. Typically, these payments balance a transfer of rights to the bride's sexuality, labour services, residence and fertility, and were traditionally made in the form of valuables; today, they may consist of money, basic necessities and utensils, as well as luxury goods.

Known as a **'bride price'**, **the practice of exchanging goods from the husband's family to the bride's family at the time of marriage has been practised since ancient times**. The Code of Hammurabi details this practice in ancient Mesopotamia, the books of Genesis and Exodus dictate rules for payment from the groom to the father of the bride, and passages from the Iliad and Odyssey suggest that bride payment was a custom in Homeric Greece.

Currently, the practice of nuptial payment retains cultural importance in several contemporary societies, where it persists not only in rural areas, but also in urban contexts, including middle- and upper-class marriages. The cost of the objects exchanged and the sums of money often required in nuptial exchanges is constantly increasing; this, in the lower classes, can create difficult situations, and some men are no longer able to marry because they do not have the necessary funds. The inflation of nuptial payments and the increasing monetarisation of the practice are often at the root of family debts. In some societies, this can lead young men to take out loans, often equivalent to several years' salary, and, in extreme cases, can lead to stealing to meet the demands of their brides' families.

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would take into consideration the legal values actually infringed in the case in point, namely public order and security, as regards the offence of unlawful introduction into the State.

The practice is still widespread in several Roma groups[137] where, as anthropologist Alexey Pamporov points out, bride price is perceived as

"a kind of **compensatory payment** that is given to the girl's family when she leaves the parental home because of marriage. [...] One of the main social functions of this practice is to [...] guarantee **patrilinearity**, regardless of the fate of the marriage. [...] In some Roma subgroups, bride price does not simply establish the young woman's place within her new family, [...] but also helps to maintain kinship wealth within the kinship itself.

In addition:

This practice often leads to exchanges of brides between two clans that are on the same economic level and thus has a stratifying function in *Romani* society. In other words, if clan A takes a girl from clan B, sooner or later clan A will try to give a suitable girl to clan B to recover the bride price paid.

As far as price is concerned, in no Roma group is there an explicit amount of the bride price to be paid, but there may be limits. In fact, price is always a subject of long and complicated bargaining. The factors that determine the price are:

(1) the bride's appearance;
(2) her practical skills;
(3) her family's reputation;

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[137] The Roma, more commonly known as Gypsies, are a cross-border ethnic minority living throughout Europe. According to various expert assessments, the size of the Roma population in the world varies between 8 and 10 million, about 70% of whom live in Central and Eastern Europe. The Roma population is not a homogeneous unit. There are several subdivisions, each of which contains numerous other subgroups that differ mainly in the *Romani* dialects spoken, but also in religious affiliation and traditional crafts. For all these reasons, it is complicated to give a general overview of how the practice of bride price is experienced and interpreted, since it changes not only according to the group to which it belongs, but also according to the context in which the group is established.

(4) the wealth and asset status of the family of origin and in-laws; and
(5) the level of acquaintance between the two families (distant relatives, friends, neighbours, countrymen and strangers).
Last but not least,
(6) the economic context.

Moreover, different *Roma* groups have different attitudes towards the limits imposed on the amount of the bride price. For instance, although the Kalaydjes consider sums up to EUR 1,000 low, one can find some cases of EUR 25 paid before consensual marriages.

The normal sum in this group is around 2,500 euro, but the highest price I know of is 12,500 euro.

The normal amount in the Kalderash community is about 10,000 euro. The lower limit in this group is about EUR 1,500, but the maximum is EUR 30,000. While the regular limits in the Horahane subgroups are set between 100 and 750 euros. (Pamporov, 2007, pp. 473-474)

The practice of bride price, along with other traditional marriage models, **is changing** and in fact **gradually disappearing**. Cheaper civil marriages and attempts at integration into the surrounding society by mostly urban Roma communities have played a significant role in this process. However, bride price still has a fundamental importance in many Roma communities, even in those settled in our Italian context for several generations, and continues to be an integral part of the social fabric of several groups.

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Anthropological bibliography (recommended reading):

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The article is fundamental to gaining an insight into the spread of the practice in various cultural contexts and the various meanings it can take on. It is a list of the social contexts in which the practice of bride-price is widespread, accompanied by an explanation of some of the symbolic values the practice has assumed and assumes today.

Tosi Cambini, S. (2015). Matrimoni romané e interpretazioni gagikané nello spazio pubblico, giuridico e scientifico dei gagé. *L'Uomo*, 2015(1), 55-76. Link.

The article is useful for understanding the symbolic value of marriage in Roma culture and for understanding the centrality of the family in defining social norms. In addition, the author accurately explains the case of an alleged forced marriage that, upon proper anthropological observation, proved not to be such.

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14. Ramadan

Cases: Muslim workers requesting special permits or special shift arrangements to facilitate observance of their fast and to save energy (labour law); Muslim adolescents wishing to observe Ramadan at school, in the family and in other social formations (family law).

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes. **Ramadan is a month-long ritual-festive process characterised by a strong religious sense**. For a Muslim, Ramadan is a necessary practice to publicly manifest one's membership of the Umma (Muslim community of believers), which is why this celebration also has a strong ludic-festive character for the community.

2. Description of the cultural (or religious) practice and group.

Ramadan is the ninth month of the lunar year, instituted as a period of obligatory fasting to commemorate the descent of revelation, i.e. the moment when the angel Gabriel revealed the Qur'an to Muhammad. Every adult Muslim, man or woman, is obliged to observe the fast of Ramadan; the Qur'an and Sunna stipulate its compulsoriness and set out its requirements, as well as exceptions and how to make up for missing days, and these rules are known to every Muslim.

Exempt from fasting are the sick, the elderly, children and women who are pregnant or breastfeeding and during their menstrual cycle, as well as those who are traveling, people engaged in heavy work, sick people whose health condition could be worsened by fasting, and people with severe hunger or thirst problems for whom fasting may have a negative impact on health. Those who miss a day of fasting for any of these reasons must make it up, if possible and if conditions permit, before the next Ramadan. Otherwise, the days will be accumulated.

The undue breaking of the fast requires strict compensation, which varies according to the situation and can even go as far as fasting for two months for each day missed, or paying for food for a certain number of poor people and for a period of time determined by the Sunna. There are, in fact, two types of 'missed fasts', fidya and kaffara: fidya is fasting missed out of necessity, i.e. for those who are unable to make up the days they have fasted; it can be covered through monetary

compensation for the needy, which can only be paid when the person is unable to make up the fast. Kaffara, meanwhile, is the avoidance of fasting without a valid and acknowledged reason, which may require a very long period of fasting, or a very high compensation, requirements which are often difficult for most believers to sustain.

During Ramadan, no solid or liquid substances may be ingested during daylight hours (from sunrise to sunset) and all forms of copulation must be avoided. In addition to strict daytime fasting, other religious practices are followed during this month, such as the daily reading of the Koran (carried out so that by the end of the month the entire Holy Book has been read), or the scrupulous observance of almsgiving (since hunger aims to make Muslims aware of the existence of the poor). During this period nothing may enter the body of an adult person during daylight hours, not even water, and one may not have sex or smoke. Some stricter beliefs also include the prohibition of perfuming oneself, showering and even **ingesting** saliva. Drugs, whether oral, injectable or topical, are also forbidden, although there may be different interpretations depending on which Islamic current one belongs to.

The first bite or sip a Muslim takes at the end of the day, the so-called breaking of the fast or **iftar**, is usually **dates and water or milk**. This fruit of paradise provides fibre, sugars, fats, proteins and vitamins whose properties are easily absorbed by the body, thus reducing the appetite in a shorter period of time.

The month of Ramadan begins with the appearance of the new moon and ends with the next moon; therefore, it **can last 29 or 30 days**. This celebration defines a clear opposition between day and night, and the breaking of the fast marks the change of rhythm, which in some countries takes place by eating an odd number of dates and a glass of milk. Prayer follows and then the first meal, often eaten with the family, at a friend's house or in a mosque; the latter is more frequent among singles and those whose family is in the country of origin.

Muslims recite five prayers a day and each prayer takes no more than a few minutes. Prayer in Islam is the direct link between God and the believer; there are no intermediaries between them. Prayers are performed at **dawn, noon, mid-afternoon, sunset and at night; the Muslim can perform the prayer in almost any place**, **such as fields, factories, offices, universities, etc.** Every Muslim is required to **absent himself from his business**, school or work to attend Friday prayer, the most important prayer of the week, which generally takes place from **1.30 pm to 4.30 pm.** Friday prayer is a religious obligation,

and every good Muslim is required to make an arrangement with his or her employer to find time to participate, for example by making up lost hours by working overtime during the week or staying late on Fridays.

At the end of Ramadan, a holiday is celebrated: **Eid al-Fit. Muslims celebrate this holiday by wearing new clothes,** and the whole day is celebrated by believers, who visit the homes of relatives and friends and eat special dishes cooked for the occasion. Traditionally, children receive gifts, presents and sweets from their loved ones as a symbol of love and festivity.

After the feast, life returns to normal for the Muslim, who gradually regains the practices abandoned during Ramadan, until the announcement of the next month of compulsory fasting restarts the cycle.

3. Embedding the individual practice in the broader cultural system.

Being a Muslim implies the acceptance of a certain system of life in which the Koran and the Sunna are the main points of reference, and which contain a set of rules that regulate and organise the individual and social life of the Muslim, constituting a project of social order. The **five pillars of Islam** are the very essence of a Muslim's life: the testimony of faith, prayer, the giving of *Zakat* (aid to the poor), fasting during the month of Ramadan and the once-in-a-lifetime pilgrimage to Mecca for those who have the means to do so.

Islam, like any religion, adapts and adjusts to different contexts and situations, which is why it is possible to find different expressions of Muslim religiosity, whether in its individual, collective or social dimensions. But there is one **recurring element for all Muslims** that takes place in all contexts, albeit with differences: Ramadan. It marks the social life of believers and is considered to be the highest expression of Muslim identity, as it is the time when several hundred million people around the world fast from dawn to dusk, in keeping with the fourth pillar of Islam.

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice is religiously obligatory, constituting one of the five pillars of Islam. In a context of emigration, Ramadan often becomes a necessary identity tool, a fundamental reference point for Muslims as a synthesis of beliefs and practices, of the way of understanding, explaining and facing reality, and which becomes necessary to express

in 'other' contexts to feel one's belonging. It has, in fact, an important symbolic efficacy, and is capable of intensifying social relations and 'building' a community and its sense of belonging.

5. Is the practice shared by the group or is it contested?

Since there is no strict social control in the countries of emigration that obliges Muslims to observe Ramadan, its observance becomes a personal choice to which, nevertheless, **most adhere; there are few who openly abstain from fasting, which would automatically take them out of the community.** There are, in fact, no structured debates within Islamic communities directed towards abandoning the practice, as it is one of the five fundamental pillars of the religion.

Ramadan is an important sign of group specificity; it is a fundamental means of identity production and reproduction. For the immigrant, the practice of Ramadan is the expression of a tradition and implies the re-production of cultural models, the strengthening of bonds of belonging to a particular social group.

For Muslims, the practice of Ramadan reflects their self-image on three levels: as individuals, as members of the group that constitutes their environment of interaction and, finally, as part of the Umma, the community of believers.

From an individual point of view, Ramadan reminds Muslims of the rules of behaviour that they must follow at all times as believers. These established rules govern all aspects of life and allow them to identify themselves in religious terms with the community in which they live and to establish their social identity. Moreover, through Ramadan, Muslims renew their membership of a community every year, so that those who are away from mosques during the year return during this month, which is a time of reunion and a time to encourage sociability and group solidarity.

6. How would the average person from that culture (or religion) behave?

Generally speaking, it can be said that there is wide conformity, partly because **Ramadan is an important time of conviviality and meeting people who only come together on festive occasions**.

It should be noted that **fasting during the working day** in a secular country **can cause problems, as it** inevitably has an **effect on productivity** and concentration levels. Although some Muslims try to absent themselves from work during Ramadan, it is likely that many continue to work during the month and frequently experience

problems in work contexts due to 'slowed productivity' caused by a lack of energy due to fasting and due to breaks from work to perform prayers.

7. Is the subject sincere?

It is highly probable that any **requests made by a person of the Islamic religion in employment or other areas, such as education, are symptomatic of a sincere adherence to the practice**:

- it is a **widespread practice among the faithful** of the Islamic religion, which often in migratory contexts accentuates its spiritual and convivial value, of community belonging and identity;
- it is surrounded by a **powerful sense of the sacred**, and thus any non-acceptance of this pillar of the Islamic religion would be more easily expressed by abstention from fasting than by its strategic, self-serving use, since a double violation of a divine nature would be committed;
- The **condition** in which a large proportion of Muslim workers in Italy, and immigrants in general, find themselves, is **precarious**, especially at the beginning of their stay; therefore, both those who find themselves in this precarious condition and those who have achieved a certain stability, would not question their achievements if not for a valid and profound reason such as the fulfillment of a **fundamental religious requirement**.

There are some indices that may be useful, in conjunction with these general considerations, to identify the sincerity of the subject in adhering to the practice for example:

- the origin of the subject and, in particular, his or her state of origin; there are in fact many countries of the Islamic religion in which, for example, the violation of fasting is considered a crime or in any case unlawful under divine and state law, a fact that could influence the subject's perception of the possible violation of what he or she has always considered a crime;
- a hearing of the subjects and the reasons for which they adhere to the practice, especially in cases where the practice involves minors whose parents (either both or only one of them), do not look favourably on the performance of the practice.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Italian cultural equivalents include the **Lenten fast and the health/purification fast**.

Reference to the forms of fasting during Lent, typical of the Catholic cult, as a form of cultural equivalent, may not be sufficiently illustrative as it is not considered equally meaningful and representative by all believers. Objectively speaking, the Lenten fast is similar to Ramadan, albeit with different time intervals, however, it is not a highly widespread practice among the population, even among the more 'observant' ones, and is contested by some, considered obsolete, lacking in utility and spiritual value. Lenten fasting, moreover, has a more penitential purpose and does not have the convivial characteristics that Ramadan has, which becomes an occasion for prolonged sharing of fasting and prayer, but also celebration.

More significant might be the reference to those forms of fasting that are implemented by some individuals in the belief that they generate a purifying function and bodily well-being, as well as a guarantee of health over time. Often these forms of prolonged abstention from food, albeit conditional on certain modalities, are endorsed by wellness professionals, nutritionists or health professionals who identify their benefits from a physiological point of view. Despite the fact that such fasts cannot boast a religious foundation as in the Islamic case, those who adhere to them almost always recognise their bodily and spiritual purifying value, associating them with a condition of physical and mental wellbeing, a condition of balance, and forms of independence of the spirit with respect to materiality. Some religious aspects, moreover, are permeated in the vision of fasting by nutritionists from other cultures (e.g. Japanese, Indian, Chinese) who operate in Italy and who, in their courses and suggestions, convey the religious/philosophical background of, for example, Indian yoga, Chinese Qi, etc. Among such religious/spiritual backgrounds, consider the fact that semi-fasting is believed to produce purification of the blood and, as such, invite the emergence of new thoughts. Furthermore, semi-fasting, by encouraging defecation, would help one to get rid of one's past and create the conditions to change one's destiny (on the mystical significance of the act of eating and fasting, see Omraam Mikhael Aivanhov, *The Yoga of Nutrition,* Prosveta editions 2014).

9. Does the practice cause harm?

The practice could cause physical harm (fatigue, chronic tiredness, weakness, fainting, lack of concentration) **as it involves the deprivation of water and food for prolonged periods of the day and**

especially for the total duration of about 30 days. However, it is Islamic law itself that provides for abstention from religious prescription in the presence of pathologies, for the elderly, for women (during pregnancy or during their periods), and for travelers. In general, **the religious precept** is organised according to a pattern that allows the **fast to be disregarded for justified reasons** and then remedied. This is not a fast in itself, but an abstention carried out with a strong will and motivation on the part of the faithful, and this strongly modifies the perception of physical harm, the endurance of which is the means for the faithful to achieve a greater good, salvation, the care of their spirituality and identity, in community. The 'physical harm' of the normal debilitation that fasting can bring is an integral part of the practice.

The damage can, however, increase and mutate into more serious forms of debilitation, for example, when the subject finds himself living the religious life far from his country of origin, in a context that does not adapt social life to the practice, in work contexts that concentrate activities precisely at the time of fasting, that is, during the day, in sectors that test physical endurance even under normal conditions of hydration and nutrition, such as agriculture and construction, especially in the summer months. In this case, debilitation can lead to more serious work accidents, heat stroke or dehydration. **Reconciling the needs of the employer with those of the religious freedom of Muslim workers is the only way to mitigate the dangers**.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The practice of Ramadan is distant from the majority culture: partly because of the sacrifice it entails, and that when viewed from the outside it appears to be an over-emphasised and disabling deprivation, especially with respect to the demands of contemporary society, such as work productivity, efficiency, and the care of physical well-being; partly because it is difficult to understand on a spiritual level, since in secularised Western societies, outward religious practices linked to religious precepts are diminishing or are seen as retrograde and obsolete ways that limit the freedom of individuals and damage their physical and psychological well-being.

For the majority culture, the practice could have an impact on individual freedom, because it is seen as a religious imposition, which together with other similar prescriptions, limits the ability of individuals to choose in relation to the commonly understood lifestyle:

where there are no particular externally imposed limitations, those of a religious nature are no longer felt. It may also impact on the health value of adults, e.g. workers, but also of minors with respect, for example, to those cases in which young Muslims choose to practice complete or partial forms of fasting to follow their parents' beliefs. In the work and school context, the practice would be considered detrimental to the value of efficiency and productivity because it could lead either to the inability to perform certain tasks/tasks or to poorer performance in terms of physical strength and mental concentration.

On the other hand, however, the practice fits fully into the exercise of religious freedom and confessional pluralism, which are values shared by the majority culture.

In the majority culture, the exercise of the practice could affect the right to health of the worker in the workplace, who in the absence of an adjustment of work performance to practice could face greater difficulties, especially in certain sectors such as agriculture or construction, giving rise to more or less serious illnesses or indirectly leading to more serious accidents. In schools, the practice by adolescents, in the majority view, could always interfere with the right to health and to some extent with the right to education.

In the employment law sector, the right of employees to religious freedom (art. 19 Const.) and the state's duty to implement positive actions to guarantee confessional pluralism (Const. Court 203/1989) grant substantial equality in the exercise of rights that lead to the development of the personality of the individual and in social formations (art. 3 paragraph II Const.; art. 2 Const.). This certainly clashes with the freedom of economic initiative of employers (art. 41 Const.) who often do not have sufficient means to implement forms of corporate integration or are often not sensitive to the problem.

The law provides only a partial and principled solution to this contrast, through the **transposition not only of constitutional principles on religious discrimination, but also of EU provisions (directive 78/2000, transposed by Legislative Decree 216/2003;),** affirming the **prohibition of discrimination in the workplace on religious grounds,** at all stages of the employment relationship (access, access to training, employment and working conditions, pay and dismissal). A concrete contribution to solving these problems has been made by many businesses, which, interfacing with a large number of workers of the Islamic religion, have drawn up agreements with the main trade unions to facilitate moments of prayer during working hours, the enjoyment of extended weekday periods for visits to

countries of origin or other needs related to worship. The difficulty in coordinating the rights and values at stake is not only due to a difficulty in intercultural understanding of the need for the practice, but also to the lack of economic means that Italian businesses, mostly represented by small and medium-sized enterprises, often find in applying reasonable accommodations in the area of employees' religious freedom.

11. Does the practice perpetuate patriarchy?
No.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.
The minority presents innumerable good reasons to continue the practice and to do so even in places other than private places such as one's home or religious places such as the mosque. First of all, it is one of the five pillars of the Islamic religion, which means that a practising believer cannot exempt himself from it.
Ramadan has a very high spiritual value, as it represents a way for the faithful to empathise with the poorest, most unfortunate and those without means; it represents a time for the community to come together, especially when, after the long hours of fasting, people gather with family or other faithful to pray and refresh themselves, and, therefore, it is a way to keep alive a sense of belonging and identity.
Moreover, among the good reasons for the practice also in the workplace or in contexts other than private or closely related to the cult of origin, is the fact that from a social point of view, work, in today's society, is assuming a preponderant role in the lives of individuals, absorbing many spaces of daily life in terms not only of quantity and number of hours, but also of quality. Therefore, it is legitimate that part of the care of the spirit is also performed during that part of the day that is dedicated to work performance.

Proposed balancing act: given its compulsoriness for the Islamic religion, the consent of those who practice it, and the absence of harm, the practice should be recognised and should be deemed to override the demands of labour productivity by affecting a fundamental constitutional right such as religious freedom.

Legal Insights

In the Italian public debate, Ramadan has often been linked to a reduction in productivity and/or work performance, but also to issues related to the health and safety of workers in the workplace.

In the field of sport, for example, the choice of some Muslim professionals to observe the practice at certain times during competitions, especially football competitions, has often been the subject of concern by clubs.[138] Even greater problems have arisen in the field of agricultural or construction work, especially in relation to workers' refusal to hydrate during the hottest daylight hours, in deference to the practice.[139]

In other cases, questions have been raised as to whether or not the practice can be observed by adolescents and its compatibility with school and study commitments.[140]

On a legal level, therefore, the practice of Ramadan may call into question the right to religious freedom along its public 'dimension', i.e. its impact on the work, school and productivity environment. The practice of Ramadan is an intense time of spirituality and sacrifice that involves the daily life of Muslim believers throughout its duration. This religious practice, however, is confronted with a lifestyle, that of the majority culture, which is often over-performing and in which moments dedicated to spirituality take up little space, being mostly relegated to private life, only scarcely externalised in the workplace or study.

It is not possible to draw solutions from any specific case law on the subject since it is rather scarce in both the international and domestic spheres.[141] Especially as regards the labour sphere, it is, in fact, very

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[138] In https://www.gazzetta.it/Calcio/Champions-League/06-05-2019/champions-cominciato-ramadan-bel-problema-l-ajax-3301359937775_amp.shtml. The topic is discussed in doctrine in Biasi M., Negri A. (2019).

[139] The issue led INAIL to issue an information booklet for employers in the event that some employees observed the practice, especially if it coincided with the hottest months.

[140] In https://www.ilrestodelcarlino.it/ancona/cronaca/ramadan-ragazzino-13-anni-1.7586625 https://www.orizzontescuola.it/ramadan-a-scuola-e-salute-alimentare-cosa-dice-la-norma-quali-i-poteri-dei-sindaci-servono-linee-guida-per-aiutare-i-dirigenti/

[141] The pronouncement of the Court sez. I - Florence, 20/06/2017, no. 2482 deals with a criminal proceeding in which the criminal liability of three defendants,

likely that this type of problem is dealt with and resolved out of court, that it remains a private affair between the employee and the employer, or even that the employee tries to resolve it individually, without raising any objections, for fear that any claims may compromise the employment relationship.

However, from a regulatory point of view, several fixed points can be identified to guide the interpreter in the attempt to reconcile the religious requirements linked to Ramadan and work. In the Italian legal system, one of these is certainly represented by religious freedom, guaranteed by Article 19 of the Constitution, but above all by the principle of the secular nature of the State, which according to constitutional jurisprudence has its foundation in Articles 2, 3, 7, 8, 19 and 20 of the Constitution and has a 'positive' nature that does not envisage the State's indifference with respect to religious affairs, but requires its activation to guarantee effective religious freedom in its collective, individual, private or public manifestations, and especially with a view to implementing confessional and cultural pluralism (Constitutional Court no. 203 of 1989).

The provisions on the prohibition of discrimination in the workplace also provide useful pointers to the debate. Italian legislation on the subject is enriched by European legislation. Particularly significant is framework directive 78/2000 on combating discrimination in the workplace, including in religious matters (transposed by legislative

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who are the owners of a company, is established, for violation of occupational safety regulations, on the occasion of an injury caused to an employee Z., of Muslim religion. The cultural element does not play a central role in the trial, but a witness very close to one of the defendants recalls Ramadan to justify how on those days the employee was not in the best physical condition, having also had sugar drops while carrying out work at height, due to fasting. The remark is disregarded and the defendants are convicted. The use of cultural data is specious in this case; in Tribunal sez. lav. - Milan, 30/07/2014, no. 2519, a person suffers an accident while transporting baskets of bread for the company he works for in a van and obtains compensation for the damage from Inail. The cultural element is also marginal in this case. The facts reported in the judgement show that the accident occurred at the end of Ramadan and therefore an albeit indirect connection could be hypothesised between the prolonged fatigue from the practice and the accident, lacking any adaptation of working conditions to fasting, although this element is not dealt with in the judgement. In Tribunale Ancona, 20 April 2022, the judge ordered by relative interim order that the decision on whether a teenage girl could observe Ramadan was up to her mother, who is not a Muslim. Treated in https://www.ilrestodelcarlino.it/ancona/cronaca/ramadan-ragazzino-13-anni-1.7586625

decree 216/2003). Here the concept of indirect discrimination is explained, referring to all those actions or provisions that, although not directly aimed at discriminating against a worker on the grounds of his or her religious faith, indirectly determine a position of disadvantage; the applicability is also sanctioned to persons who are not European citizens; the concept of 'positive action' of States aimed at effectively guaranteeing non-discrimination is recalled. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms regulates certain limits to religious freedom, reaffirming that these are within the scope of proportionality.

The regulation of Ramadan-related needs is made more complicated by the fact that unlike other systems, such as the Spanish one (Royal Decree 1384/2011, of 14 October, which develops Article 1 of the State Cooperation Agreement with the Islamic Commission of Spain, approved by Law 26/1992, of 10 November), there is still no agreement between the Muslim representation and the Italian State. However, especially in those realities where there is a high presence of Muslim workers, companies, employers and workers themselves have found efficient solutions even in the absence of specific legislation, regulating work organisation through internal agreements and adapting it as far as possible to religious needs, providing special leave on holidays, making working hours more flexible, providing special breaks for daily Islamic prayer and setting up spaces dedicated to worship in workplaces.[142]

The sensitivity of the social partners and above all of employers remains one of the most efficient solutions to date: on the one hand, it makes it possible to guarantee the safety and health protection standards that the law imposes on company owners, preventing accidents or incidents due to fasting or the practice of prayer in makeshift and dangerous places; on the other hand, it builds the loyalty

[142] Many of these agreements and practices are highlighted in a number of articles, available online: https://st.ilsole24ore.com/art/SoleOnLine4/Mondo/2009/08/ramadan-nel-contratto_PRN.shtml ; https://st.ilsole24ore.com/art/economia/2010-08-10/affari-sprint-ramadan-080106.shtml ; https://www.ilgiornale.it/news/i-contratti-lavoro-allah-cosa-pretendono-islamici-1386779.html In doctrine, see Ricciardi Celsi (2015). In https://www.linkiesta.it/2012/07/la-fabbrica-veneta-con-moschea-aziendale/, an article of 25 July 2012, a company in Castelfranco Veneto, province of Treviso, specialising in the production of garden tools, is cited as having set up a mosque on its company premises.

of workers, avoiding discontent and preserving the smooth running of work. These are good practices that fully realise the conditions of positive secularism and implement true forms of confessional pluralism, which extend their effects even outside the workplace.

However, these are issues that would need to be institutionalised, especially since the Italian economic reality is mostly made up of small and medium-sized enterprises and these often lack the economic and organisational resources to guarantee the necessary accommodations for the exercise of religious freedom.

Anthropological insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

Ramadan generates a complex network of reciprocal relationships between individuals who, despite their heterogeneity, recognise themselves as interdependent. In fact, through Ramadan, Muslims strengthen their bonds and reaffirm their specific identity, drawing a symbolic boundary between themselves and the society in which they live as immigrants, thus making Ramadan a clear expression of social identity.

Ramadan is a complex religious-festive ritual with a characterisation similar to that of a rite of passage. The break with the previous time occurs with 'the night of doubt', the initial moment of Ramadan. This is followed by a long and marked liminal period, corresponding to the whole month, which ends with the integration into normal time, through a festival marking the end of this process and the return to daily life.

This long liminal period, which gives its name to the entire process, is composed of a series of successive phases in which homogeneity and equality (in fasting) alternate with diversity and inequality (at night). It is a period in which community is emphasised and the individual has meaning only as a member of the group. Ramadan forms a cycle in which society is structured and de-structured in succession over the course of an entire month, and which aims to re-establish social order through definition, restructuring and cohesion within the community.

Ramadan is, therefore, also an important pedagogical system, a synthesis of Islamic practices and beliefs; it teaches and trains both the individual and society as a whole in the practice of religion; but it is

also, and above all, a time apart from daily life, an exercise in social life in which the entire community participates and in which the alternation of the ideal order and the transgression of that order affects both the individual and the group; it is a time of celebration that Muslims look forward to and welcome with great joy every year.

Fasting is also perceived as a purification process (physical and spiritual) that strengthens self-esteem, self-control and discipline, reinforces faith and instills a sense of group belonging. In addition, the completion of Ramadan is followed by one of the most important festivals in Islam (Eid al-Fitr), which involves large celebrations in the company of family and friends.

In Spain, in order to protect both the Muslim community on the peninsula and employers with Muslim employees, an agreement has been reached between the Spanish state and the Islamic Community. The agreement allows members of Islamic communities who wish to do so, to request a break from work on Friday of each week, the day of obligatory and solemn collective prayer for Muslims, from 1.30 p.m. to 4.30 p.m., as well as the end of the working day one hour before sunset, during the month of fasting. In both cases, a prior agreement between the parties is required, and the hours lost will be made up without compensation; it is therefore a right subject to negotiation, which seeks to reconcile fasting and work.

There is also another right, not included in the agreement, that of not being discriminated against. In fact, an employer cannot dismiss an employee or force him to take forced leave because he fasts during Ramadan; such dismissal would be null and void as it is based on personal beliefs.

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Anthropological bibliography (recommended reading)

Bowen, J. (2012). *A New Anthropology of Islam*. Cambridge: Cambridge University Press.

In this study, John Bowen draws on a wide range of work in social anthropology to present Islam in a way that emphasises its constitutive practices, from prayer to learning, from judgement to political organisation. Bowen shows how Muslims have adapted Islamic texts and traditions to the ideas and conditions of the societies in which they live, and depicts the constitutive importance of certain practices (including Ramadan) in defining identity. It is essential reading for anyone interested in the study of Islam in the present day.

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15. Scarification

Cases: children with scars on the face or other parts of the body (criminal and family law).

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes. Scarification is a ritual activity during which the body is incised for decorative purposes. It is a practice charged with symbolic value, in which cultural symbols are constructed and deconstructed on the body for reasons that vary depending on the context in which they are practised. Often scarifications are used to mark members of a social group, for religious reasons (signaling conversion to a new religion), to cure illnesses or as ritual elements in rites of passage or initiation, or to show that one has passed through certain important phases of the life cycle.

2. Description of the cultural (or religious) practice and group.

The term scarification refers to the making of **shallow cuts in the skin for ritual purposes.** This practice has been used for many centuries, especially in parts of Africa (including present-day Benin, Sudan and Nigeria) as well as on the American continent (among the Maya) and in Australia, to indicate a person's membership of a social group, or to mark a rite of passage to adulthood, or to project signs of social and family identity, so as to distinguish oneself from other social groups.

Scarifications can be performed with different instruments such as a knife, a piece of glass or a sharp stone, and can be 'flat' or with relief, the latter obtained by lifting pieces of skin with a hook. Sometimes scarifications are left to heal without further intervention or filled with irritating substances such as salt, vinegar, ash, clay or gunpowder, to leave deep and permanent scars; or, to change the natural colouring of the skin, pigments may sometimes be introduced into the wounds, so as to highlight the pattern more.

Generally speaking, on a technical level, three modes can be distinguished:

(1) One is performed with **superficial cuts** in the first layer of the skin two to three millimetres deep; the pattern is traced and then the cuts are made with a scalpel.

(2) Another, the technique known as branding, involves a **burn** that can be done with red-hot metal blades, which leaves a thinner wound because it is a kind of pencil with a 'u' point that burns the skin.
(3) The other technique consists of **removing pieces of skin with a scalpel**. Often, after the practice, one tries not to overdo the wound care, because it could erase part of it and the result of the scar would not be as desired.

Scarification is a tradition that has become less common today, but is still present in several African contexts, including Benin and Nigeria, and in most cases it is a sign of social identity made for identification purposes, easily recognisable by the intricate designs and details with which it is made. An example can be found in some groups of the Dinka people in Southern Sudan: when the Dinka (male or female) pass from infancy to childhood, the 'smith' forges a small blade and makes a series of lines on the child's forehead and cheeks that will forever mark the exact membership of the group. When the child grows up, the same 'smith' forges a new blade and makes new incisions, this time on the child's abdomen. In this way it becomes clear, through the dripping of blood and the stoic endurance of pain, that he is no longer a child, and that from that day on he has bravely entered adult life. In the case of women, these scars are drawn on the breast, immediately after the first menstruation.

There is also much evidence of scarification in the past: for example, the ancient Maya scarified the body to beautify it, and this procedure was also used among the Bubi people of Bioko Island (Equatorial Guinea), before it was banned by the colonial authorities. On the island, it was common to make more or less deep cuts in parallel lines on the face of children between the ages of three and five, cuts that were then treated in such a way as to cause large scars, so that members of the same group could not only beautify their bodies, but also recognise each other in case of exile or slavery.

In Ethiopia, on the other hand, due to religious heterogeneity and the widespread presence of Christianity, Islam and local religions, there is a wide variety of body modification and decoration practices, including the scarification of the cross, performed through the representation of a cross on the forehead and used to demonstrate one's faith after conversion to Christianity.

Among the Houedas of the Republic of Benin, scarification of children is believed to create a bond with ancestors. After having their faces

scarred, individuals are given new names and their hair shaved off, before being brought before an oracle whose task is to help them communicate with previous generations.

3. Embedding the individual practice in the broader cultural system.

To understand the social value of scarring, it is important to bear in mind that they not only represent **the identity of the group** to which they belong, but also characterise the **identity of the individual** within the group. To be clearer, it can be argued that the individual belongs to a group through the scars, and that the group recognises the individual through the scars; this process of identification is key and allows us to understand the social value acquired by the scarifications, which are therefore presented as a means of fusion between the social group and the individual, and vice versa.

For instance, in most West African social groups that adopt this practice, scars play an important role in the **gender identity and sexual expression of the individual**. They can, in fact, be seen as elements of attraction, and are believed to help enhance the ability to stimulate potential sexual partners, as is the case among Tivs in Nigeria. These peoples also believe that simply touching scars can induce powerful erotic sensations in both men and women, and can awaken a strong sexual desire.

Other types of scarring, however, have **curative purposes**. Following the medicinal tradition of some groups on the African continent, which combine medicine with magical remedies, scarring can be seen as a very important remedy. If the family of a sick person or the healer of the group realise that the ailment is caused by an evil spirit that has entered the body of the sick person, it is believed that a series of scarifications performed with the necessary rituals will expel the harmful spirit. In some tribes in Equatorial Guinea, marks are made even before the illness, in a kind of preventive medicinal magic; small, almost imperceptible incisions on the temples and limbs (made when the individual is a child) are thought **to protect the individual from attacks by possible evil spirits** that contaminate people's health.

Whatever the social purpose of scarification, it seems quite clear that it is a symbolic activity related to identity. One must, in fact, consider that the public presentation of the body occurs according to three parameters that are inherent in human nature as a social being: identity, social hierarchy, and the need for interaction with other social groups. For this reason, identity - both personal and social - is what

defines us within a community or collective, and which delimits us in relation to others, and cannot be understood without the performativity of social presentations, which also pass through the social presentation of the body. Social logic requires that we know who we are within the collective, what place we occupy within the different hierarchical situations, what and with whom we exchange benefits; such logic also makes it easier to understand the reasons for bodily modifications.

4. Is the practice essential (to the survival of the group), compulsory or optional?

It depends. In some contexts, **where there are scarifications with defensive motives, the practice is certainly decisive for the survival of the group**. For example, among some pastoralist populations on the African continent, where there may be a close relationship between livestock rearing and warfare (defending livestock by force or stealing them by violence when they are scarce are common practices), these marks serve as a warning to outsiders and as a sign of respect between members of the same group. Male members of the Suri (Ethiopia), for example, mark their right arm with a horseshoe if they have killed another male member of an enemy group, while they mark a horseshoe on their left arm if the victim is a woman.

Whether to signal that one is a great warrior or to indicate the passage from childhood to puberty or from puberty to adulthood, each sign indicates a degree of pain that the individual must overcome with the required courage. In populations in which such practices are still performed, a man who has not performed the scarification ritual may be branded a coward and cast aside by the rest of the group; therefore, in such a case, the practice could be considered obligatory.

5. Is the practice shared by the group or is it contested?

It depends. **In many urban contexts, scarification may have lost its values and the way it is perceived.** Modern methods of cosmetic modification (creams, lotions, makeovers in the operating room) and new globalised beauty standards have in some contexts led to a dissipation of the aesthetic purpose of scarification, and in some cases a prohibition of it. Especially in African urban contexts, people prefer a new haircut or a new brand of lipstick to the pain of skin-cuts, which in many cities are perceived as rural, old-fashioned or even the fruit of ignorance.

In the cities, a kind of stigma has developed around scarifications, which causes embarrassment or low self-esteem in those who bear them. Some women cover the marks with make-up, others go so far as to undergo cosmetic surgery to remove them. It happens in all the

nations of the world: as cities become more crowded, inter-ethnic coexistence is accentuated, removing traces of ancestral rites and customs that poorly fit the dominant social models of the West.

6. How would the average person from that culture (or religion) behave?

These are often **voluntary choices or dictated by the need for identification within the group**. In general, a person socialised within a group that practises scarification and has preserved its value system, even if they urbanise or emigrate to another country, follows the ritual and has it practised on their children. In other cases, urbanisation or emigration may lead to a spontaneous abandonment of the practice.

7. Is the subject sincere?

As is the case when other cultural practices interfere with physical integrity (See in this Guidebook entries Male Circumcision, Female Genital Mutilation), the sincerity of the subject is to be ascertained on the level of non-existence of a harmful intention towards minors or unjustified forms of violence. It would be useful to investigate this aspect:

- on the **type** of scarification carried out, on its outward appearance: the scarifications have particular, almost patterned shapes, they respond to structured patterns (certain number of lines or other signs in certain points of the body, such as cheeks, forehead, abdomen). The structured and 'patterned' component is indicative of a ritual sign rather than of injuries inflicted randomly for the sole purpose of inflicting pain on the child or torturing him;
- on the **function** of the practice in the subject's cultural or religious system;

on the **child's perception** of ritual signs, especially since some of them are performed during adolescence when the child is capable of expressing consent.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

Tattoos, piercings and other types of body modification, such as plastic surgery, have become a global phenomenon that has rapidly spread and become part of society over the last thirty years (since 1990 a phenomenon that has been on the rise). In identification processes, appearance plays an important role and modern Western society is, therefore, becoming more and more accustomed to these modifications, even if some continue to be more accepted than others.

It is therefore not difficult for the majority society to understand how

body modification is a clear social phenomenon, linked to aesthetic canons that are more or less transient, but always linked to socially defined norms and values.

One author (Korbin 1980) referred to a further cultural equivalent of scarification: **orthodontic procedures and implants** performed on minors. The author does not distinguish between those forms of intervention that are necessary for the health of minors and those that have a purely aesthetic reason, such as correcting 'crooked teeth'. Rather, the author emphasises the fact that in both cases these are **painful**, potentially **traumatic**, **imposed interventions aimed at fulfilling a social function**: **ensuring the acceptance** and **identification of the individual in the group** (if you have crooked teeth, or if you do not have scarification in your face, you do not conform to the group).

9. Does the practice cause harm?

The practice causes (physical) harm because it permanently diminishes the physical integrity of the individual. As described above, the procedures are painful and take a long time to heal. However, once the wound has healed, the only thing that remains is the ritual mark; in this sense, scarifications are often comparable in pain and 'permanence' on the body to other forms of body modification such as those performed through tattoos.

The 'damage' is aesthetic, according to the majority's perception and not to those who adhere to the practice and who seek precisely this end result. There are no other complications following wound healing, unlike, for example, some forms of FGM (see Item Female Genital Mutilation in this Guidebook).

In relation to the functions explicated by such ritual signs, one must not underestimate the social damage and marginalisation that could be generated towards the individual belonging to a given community if he or she does not submit to such interventions, especially in cases in which he or she is firmly convinced of adhering to them. A similar argument can also be made when the same signs take on a 'curative' value with regard to minors and are carried out in the belief that they protect against illnesses, such as those that occur during childhood.

The harm can be analysed by the practitioner of the majority culture according to two perspectives (as, moreover, can happen for other practices that concern the physical integrity of minors): from the point of view of **the group that performs the practice** (called the 'emic' perspective in anthropology); or from the **point of view of the group that does not perform the practice** and attributes profoundly

different meanings to it, in response to its own cultural and value context. In the perspective of the minority group emerges the social harm, procured to the subject who is in fact prevented from exercising the practice, on himself or on his own children, who thus must renounce the functions of identification, initiation and care typical of the practice in question. The perspective of the majority group, on the other hand, claims physical harm (which, however, in a perspective of adherence to the practice is destined to vanish with the healing of wounds), looks at ritual signs solely and exclusively from an internal perspective, as injuries inflicted, and therefore punishable beyond the functions assumed by them.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

For the majority culture, the practice of scarification has a strongly negative and disfiguring meaning, lacking justification, especially when it concerns particularly exposed areas of the body such as the face.

The constitutional values on which the cultural practice impacts are: a) that of physical integrity, which becomes intangible for minors, especially in relation to bodily modifications that affect parts of the body such as the face; b) that of the self-determination and freedom of minors with respect to their identity, given that these signs are often seen as a form of imposition. In a more general context, the practice also seems to be detrimental to the concept of 'public order' (this value has sometimes appeared in English judgments that generally concern body modifications defined as 'extreme'; the discourse also concerns public health and the fact that society should not have to bear the burden of illnesses and complications resulting from these unjustified interventions), the signs cause a certain discomfort for individuals who are unfamiliar with them, especially in a strongly homologated society where individuals find it difficult to accept the physically 'different'.

In the criminal field, the practice could be relevant, as happened for instance in the area of female genital mutilation, in relation to a specific provision, Article **583-quinquies** of the Criminal Code (*Deformation of the appearance of the person by means of permanent facial injuries*), a specification of the case of grievous bodily harm. However, it should be pointed out that this provision was introduced by Law No. 69/2019, referred to as the 'Code Red', in **reference to the sadly well-known phenomenon of attempted disfigurement through acids thrown on the face of victims, usually women**. The reference to this

phenomenon shows how, despite the fact that there may apparently be a coincidence, one moves within **conducts that have nothing in common**. The intent to scar, disfigure and maim the subject is excluded in the case of ritual marks on the face (as well as in the case of tattoos on the face that no judge today would subsume within such a theory, given the familiarity with the practice in Western culture).

In the civil law sphere, the fact could primarily be relevant in the sphere of family law, with regard to the adequacy of parental capacity and in relation to the regulation of the disposition of the acts of one's own body (or the body of one's children). Generally speaking, in addition to the **child's right to physical integrity**, the parents' right and duty to **bring up their children according to their own system of values, as well** as the self-determination of the individual and thus also of the child, are also involved. The latter should, however, operate in a twofold sense, both to protect the same from practices that are not shared and in an authorising sense in relation to particularly heartfelt practices.

11. Does the practice perpetuate patriarchy?

The practice does not perpetrate patriarchy. It is performed indifferently by and on individuals of both sexes. It could, if associated with pain and suffering be traced by the majority culture to a form of patriarchy, understood as authoritarianism, subjection and control by adults over minors or as a form of imposition.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Behind the bodily modifications is a clear **search for identity**, carried out individually or in a group, with the intention of creatively expressing one's preferences, tastes, beliefs and perceptions. Often the modifications are the expression of non-conformity and/or resistance to socially established norms and standards, the expression of dreams, ideals, fears, stories, memories, ideologies and/or subaltern beliefs, which are implemented out of an identity need, or are useful to distinguish oneself from the majority.

It is **a form of communication through the body**, in which interests and perceptions of beauty and/or aesthetics are rewritten and transformed for functional matters. Scarification has a great communicative capacity because, for those who practise it, it continues to preserve their ancestry or belief, and to manifest it continuously.

Proposed balancing act: unless there is opposition on the part of the child, the right to cultural identity is considered to prevail over the right to physical integrity for the following reasons: a) the aesthetic damage is mitigated by the fact that even the majority culture now knows of particularly conspicuous forms of signs on the body (tattoos and piercings also on the face); b) the physical damage is mitigated because the functionality of the body does not appear to be impaired in any case (the same reason why the legal system allows male circumcision).

Legal Insights

There are no reported cases in Italy, although, with the increase in migration flows also due to climate change, there may be cases of minors arriving with scarification or of families practising it on their children in Italy.

In comparative jurisprudence, there is a well-known case that occurred in England in 1974 (*R. v. Adesanya*) concerning a Nigerian mother of the Yoruba group, who had emigrated to England and was tried for some injuries she had caused to her two children aged 9 and 14, by making ritual marks with a penknife on their faces, in order to perform a ritual of entry into the community to which she belonged. The judge's decision in this case implements a logic of leniency with respect to the woman, by ordering the suspension of the entire sentence, but it is also inspired by an assimilationist logic: for the judge, in fact, the woman is justified only because she has only recently arrived in England and is not familiar with many of the English laws, her non-punishability being only an exception. The ruling is really a warning to all migrants,[143] who are obliged to comply with the laws of the host state. The acknowledgement of cultural diversity is temporary, and does not focus on the value significance of the ritual signs for those directly concerned, or on the consent and sharing of the practice by the minors, who had taken pride in the ritual. In the ruling, the judge

[143] "you and others who come to this country must realise that the law must be obeyed... It cannot be questioned any further, so other such offences intended to fulfil tribal traditions of Nigeria or other parts of Africa... will only result in conviction. Since this is the first such case ... I will operate with the utmost leniency. But no one else should expect to receive extenuating circumstances. The others (migrants) are now warned."

reiterates that the (English) law must be respected and cannot be further challenged in the future. Looking at the Italian legal system, specifically, one could certainly identify laws with the same scope as those indicated by the English judge, i.e. capable of incriminating the practice in the abstract: the discipline on the protection of physical integrity provided for by art. 5 of the Italian Civil Code does not admit bodily modifications that cause permanent diminution; in the criminal sphere, in addition to the offence of injury provided for by art. 582 of the Criminal Code. In addition to the criminal offence provided for in Article 582 of the Criminal Code, which can also be applied on an aggravated basis if the 'victims' are minors, the new Article 583 quinquies of the Criminal Code (*deformation of the appearance of the person through permanent facial injuries)* could also be called into play. However, among the laws that should not be 'further' called into question are certain fundamental principles that protect cultural rights and regulate, above all, the application of criminal law as a last resort. On closer inspection, in a hypothetical concrete case, the abstract overlap between the execution of ritual signs on one's children's faces and the violation of these norms may no longer be so obvious once the functionality of the family context of origin has been ascertained, so that light is shed on the identity functions of ritual signs and their meaning in the cultures that practise them, which certainly does not include the desire to injure, maim or 'scar' one's children's faces but rather that of making them part of a community and 'beautifying' them. The 'diminution' of the permanent physical integrity not admitted by Article 5 of the Civil Code is such only if seen from the perspective of the majority groups, who do not practise these signs, certainly not for those who aspire to have them in order to identify themselves in a certain cultural group, sometimes even before adulthood, such as the Yoruba minors of the English case. In fact, in the majority culture, marks on the face have always been seen as an impairment, a disgrace, an element that undermines beauty and are not linked to sacred or beauty elements. Also missing would be the intentionality to injure and therefore the intent required by criminal law. In particular, it is worth making some clarifications on the recently introduced case of Article 583 quinquies. The circumstances in which it was enacted (Law No. 69 of 2019, known as the "Code Red"), make one of the main purposes of the provision to combat acts of disfigurement, perpetrated with a purely malicious purpose and unfortunately very frequent, especially against the female gender (e.g. the phenomenon of vitriolage). The recent case law on the rule in question (G.U.P. Parma, sentence no. 786

of 7 December 2021) has specified the notions of 'disfigurement' and 'deformation' contained in the rule: **permanent disfigurement** is a sign capable of altering the physiognomy of the person, even if minor in size, with respect to the natural features of the face, excluding their harmony with an unpleasant effect or hilarity, even if not necessarily repugnant, and compromising the image in an aesthetic sense. **Permanent deformation**, by contrast, is an anatomical alteration of the face, which profoundly changes its symmetry, so as to cause a ridiculing and unpleasant disfigurement (e.g. mutilation of the nostrils or facial paresis). Both cases refer to real acts of wounding, characterised by an exclusively injurious intent and determining the modification of the harmony of the face, which is why they have nothing to do with ritual marks, affixed on adults or minors for a question of identity and in most cases with their consent. The traits generated by this ritual are not 'accidental' but measured and precisely aimed at placing themselves in harmony with the subjects' faces rather than determining their imbalance, precisely because they are capable of manifesting precise meanings and likely to be understood by other members of the community. Even if one were to fear a violation of public order, morality and public health, as happened, for example, in England - not in relation to ritual scarification but in relation to other extreme bodily modifications (Pegg, 2019) - identity rights could still prevail: ritual marks are not usual to generate serious pathologies like other bodily modifications on minors even permitted by the legal systems (e.g. ritual male circumcision in some cases; see the entry Male Circumcision in this Guidebook) and their impact on morality or public order would be no different from that generated by other accepted bodily modification practices, even towards minors, such as plastic surgery and the various types of piercings and tattoos. This is certainly a cultural practice that is difficult to accept in the view of the majority culture, in which all bodily modifications, especially when performed on very exposed parts of the body such as the face, have always had a negative connotation. This difficulty cannot, however, by itself justify the punishability of this conduct or be used to question the suitability of some foreign parents, especially once it has been ascertained that they not only lack any harmful intent but, on the contrary, hold to the conviction of acting as a good parent, in the exercise of the right and duty of education and of passing on one's cultural heritage to one's offspring.

Anthropological insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

In Western society, tattoos are generally personal choices, while we are very aware of the need to cover nudity in public and see it as a cultural imperative. Conversely, in other contexts, covering nudity is not considered necessary, and certain types of body markings, such as scarifications or tattoos, are cultural imperatives and one does not conceive of a person without these marks.

Being aware of the existence of 'cultural imperatives' allows us to understand how any management of the body is culturally defined and closely linked to its public presentation. Indeed, the body is a language, a sign, a means of expression that reveals different messages. These messages implicitly convey the social and cultural interaction of societies and the individual, and the presentation of the body takes the form of a procedure for the manifestation of information, the most important of which are personal identity, social identity and ascription and membership of certain groups.

The human body is, therefore, a situs of representation of the social and cultural events that take place around it, and is a biologically changeable unit that, in contact with its environment, is subject to different meanings that are important for social communication. In this sense, sexual differences between men and women themselves are not only due to predetermined biological factors, but also to the influence of social and cultural factors. If biology explains sex singularities, social and cultural reality explains the construction of gender identity through the manifestations of the body.

Bodies tell stories, and all the concerns, desires, beliefs, hopes and fears of social groups are managed in it. For this very reason, the body changes shape, undergoes a change of identity during its existence - sometimes almost a complete metamorphosis, like that of the men of the Borana, Mursi and Bume populations, who have as many scarifications on their skin as the number of men they have killed in battle or the number of dangerous animals they have slaughtered. In the body, therefore, everything is placed in terms of identity, with a greater or lesser degree of symbolism, but nevertheless with an important social value.

The body thus functions as a symbol of society, and most of the prejudices that exist around body modification practices are often

rooted in society's conception of the body: used only for functional or practical purposes, such as reproduction, or for the expression of defined aesthetic canons. One of the reasons why in our Western culture there is prejudice against people with bodily modifications is because there is a prototype of what is included in the concept of beauty, and these practices are far removed from the models of behaviour and aesthetics that have been socially established as adequate. At the same time, however, in Western society and culture, one can observe certain types of body modifications that are collectively accepted, such as cosmetic surgeries, which are viewed by the majority of the population without any kind of repudiation or threat, showing that some modifications are socially accepted and others are not.

Many cultures in Africa show us that individual identity is a social identity; therefore, these modification practices go beyond the mere transformation of the body, but have something deeper, such as the fact that the subject is able to find his or her identity, and thus his or her position in society, through changes made to his or her body. Moreover, carrying out these practices is another way for the subject to feel good about himself: just as some people undergo cosmetic surgery to feel beautiful, the same applies to those who practice body modification.

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Anthropological bibliography (recommended reading)

Schildkrout, E. (2004). "Inscribing the body." *Annual Review of Anthropology*, 33, 319-344.

This article reviews recent literature from anthropology and related disciplines concerning the cultural construction of the body. It is an interesting read that explains how anthropologists have focused on the observation of the body as a marker of identity in terms of gender, age and political status, and more recently on questions of modernity, authenticity and representation.

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16. Islamic veil

Cases: women covering their head and/or face with a headscarf, chador, niqāb or burqa.

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes. The veil is a type of religious/cultural head covering or cloak that women in certain social contexts use to cover their heads and, in some cases, their faces. Today, the term 'veil' is mainly associated with the use of headgear by women of the Muslim religion.

2. Description of the cultural (or religious) practice and group.

In the various contexts of Islamic countries, women adopt a wide range of garments that serve to cover both the body and the face, making these an integral part of their cultural traditions and religious beliefs. These garments are a fundamental part of Muslim women's identity, and have considerable variations depending on local tradition and individual preferences.

One of the most popular garments is the *hijab*, a headscarf that covers women's hair and neck, leaving the face uncovered. This garment is widely adopted throughout the Islamic world and often fulfills a minimum form of coverage required by the *shari'a* for women.

The *abaya,* on the other hand, is a long dress that wraps the body from head to toe, and is often combined with the *niqab*, which covers the face, allowing only the eyes to remain visible; this combination of garments is typical of many Islamic communities in the Middle East and North Africa.

In Iran, the *chador* is a common covering that can be either a veil covering the head or a cloak completely enveloping the body, usually in black.

In Afghanistan, on the other hand, the *burqa* is known for its distinctive blue colour and includes a kind of shielding for the eyes, completely hiding the women's bodies.

In general, these different garments are worn by Muslim women as an expression of religious devotion, respect for culture and modesty. However, it is important to emphasise that preferences and practices may vary considerably from one place to another and from one person to another, and there is no single dress code of Islam.

3. Embedding the individual practice in the broader cultural system.

The practice of wearing the veil must be linked to other cultural profiles such as those related to dress standards and the religious system as a whole.

There is a widespread prejudice based on the idea that the wearing of the veil is intrinsic to Islam. However, the wearing of a veil that covers part of a woman's body is a tradition that has existed since before Islam and, of course, is not exclusive to Islam or the countries that follow this religion today. In ancient Rome, for example, this type of garment was worn by women of high social status, or in some contexts in North Africa and the Middle East it was used as protection against wind and sand; only later did it acquire religious significance and was adopted by women belonging to the first community founded by the prophet Muhammad. Today, as is well known, its use is rooted in the religious beliefs and practices, as well as the cultural traditions, of many Islamic communities around the world.

The veil may vary in style and degree of coverage, and these differences reflect both individual preferences and different interpretations of modesty and religious devotion within the various currents of Islam. Indeed, the wearing of the veil is influenced by the cultural context and social norms in a given region or community: in some places the wearing of the veil may be compulsory or highly recommended by religious authorities, while in others it may be more of a personal choice.

It is also important to note that in the Qur'an there is no explicit obligation for women to cover themselves with the veil, but rather it is recommended, for both women and men, to adopt a decorous dress code, preserving modesty and concealing parts of the body considered sacred. This is why it is important, in order to be able to make a correct interpretation, to consider that the motivations that lead one to wear the veil can be very diverse and can include religious, cultural, personal and social/identity factors (e.g. in an immigration context one may choose to wear the veil as a connection to one's roots).

4. Is the practice essential (to the survival of the group), compulsory or optional?

The practice of wearing the veil is not a religious obligation of Islam; it is not part of the five precepts nor is it imposed by the Koran. In those orders such as Iran and Afghanistan that have imposed the wearing of the veil, the choice is not related to religion or culture, but to political regimes.

The practice has a strong identity character, even more so in migratory contexts. This is why it plays a key role in the personal and social identification of individuals and families, and is an indispensable part of the process of identity signification.

5. Is the practice shared by the group or is it contested?

The practice is widespread among members of the Muslim religion and accepted, even in migratory contexts, by new generations.

6. How would the average person from that culture (or religion) behave?

In migratory contexts, the wearing of the veil is increasingly left to the discretion of the individual.

7. Is the subject sincere?

Since the use of these garments is not forbidden by Italian law, the evaluation of the subject's sincerity with respect to the practice could only be relevant where situations symptomatic of relationships of oppression and domination between men and women emerge, perhaps within the same family group (father/mother/brother-daughter or wife-husband) or in general community. In these contexts, the sincerity to be assessed would relate to several subjects: not only the woman wearing the garment, but also the subject who is suspected of forcing her to wear it.

In this case, however, it would be worth checking:

- the existence of the woman's will/choice to use that garment for certain religious or identity reasons;
- the level of the possible imposition within the family and/or community group, specifically whether it is an attempt to transmit certain cultural values that may generate physiological generational clashes (e.g. imposition on young second-generation immigrants who perceive certain values differently from their parents and wish to conform to the host society) or whether it is a matter of real, dysfunctional relationships of domination that generate oppression of women in other areas of life, in addition to the choice of clothing;
- the intentions of the persons imposing the veil, whether educational with respect to certain values, possibly to be taken into account in the assessment of the concrete case, or merely oppressive and aimed at establishing a climate of prevarication.

8. The search for the cultural equivalent. The translation of

minority practice into a corresponding (Italian) majority practice.

There are various western contexts in which the veil is used: nuns and sisters in Christianity are accustomed to cover their heads with veils of various shapes and colours that also indicate membership of the religious order; in some southern European contexts, including Italy, the tradition persists of using the black veil during funeral ceremonies or on the way to church or as an element of clothing in use by elderly people, particularly in rural areas.

It is also important to point out that according to St Paul's Christian teaching, women should wear the veil as a sign of God's glory, that is, as an outward sign of recognition and submission to the authority of God and the spouses (or parents, as the case may be) and of respect for the presence of the Holy Angels in the Divine Liturgy. The use of the veil according to St Paul is clearly presented as a prescription and not a recommendation as in the case of the Koran.

9. Does the practice cause harm?

The practice causes harm to women if it is not shared by them as it restricts their personal freedom and expression. When wearing these garments is, on the other hand, a choice, it may cause harm to prohibit their use, especially in relation to the religious and cultural meanings they take on in one's value system.

In reality, the ban on wearing these specific garments is likely to cause harm to women in both cases reported: in the case where the woman is the victim of an imposition, the ban could lead the imposing party (family, community, etc.) to directly prevent the woman from participating in public life and relationships, placing her in a state of segregation, marginalisation and isolation; in the case where it is a choice, it would lead the woman herself to a forced choice between wanting to maintain and express values and spirituality in her daily life and at the same time, expressing herself in the society in which she lives. Women might be embarrassed to show themselves without such garments, just as it might be uncomfortable, for example, to have to wear a bikini rather than a burkini to go to the beach.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

The perception of majority culture varies depending on the specific garments referred to. In general, however, it must be pointed out that, also due to the evolution of the public and media debate on the subject, there is a common underlying distrust.

The hijab, the chador or even the simple headscarf could be

understood as a limitation with respect to the expressiveness of a woman's femininity, because they leave the hair completely covered, which in western culture is very much connoted in this sense, at other times being interpreted as an element of religious fanaticism. One could speak in this regard of a purely aesthetic issue, linked to a different conception of vanity or elegance. With regard to the burqa and niqab, on the other hand, there is more mistrust because these garments are not only associated with forms of oppression of women's bodies, but also sometimes generate fear, due to the fact that they occlude the subjects' faces. This is partly due to the climate of suspicion generated towards the Islamic religion in the aftermath of various terrorist attacks and the spread of Islamic fundamentalism.

Above all, the chador, the niqab and the burqa impact for some on the values of gender equality, the dignity of women and their freedom of self-determination also with regard to the way they dress, as well as, as already mentioned, also involving values such as collective security.

When one starts from the assumption that women are forced to wear them, especially the burqa and niqab represent a condition of discrimination and oppression of women in Muslim culture, or a means to marginalise them from society. When, on the other hand, it is considered that wearing such garments is a woman's choice, then it is interpreted as a lack of will with respect to emancipation, freedom and integration.

The practice would, according to some, impact women's fundamental rights (personal freedom, inviolable individual rights, equality).

Some European countries have, with this in mind and with a view to protecting the value of security, banned the partial or total covering of the face (niqab and burqa) in public spaces (France, Belgium, Bulgaria, with the exception of places of worship; Austria and Denmark); others only in certain public places (such as schools, government offices, hospitals, public transport, courtrooms, etc.; this is the case of Holland, Norway, Luxembourg). This is the case in the Netherlands, Norway and Luxembourg); still others have taken action through the application of local bans (some cantons in Switzerland, Spain and Italy; these have often been local decrees and ordinances that have sometimes been deemed illegitimate); other states have not made any provisions on the subject (this is the case in England and Germany, although here state law requires one to show one's face if one is a civil servant and if one is driving).

In Italy, although various proposals have been made on the subject, there is no law prohibiting the wearing of such clothing. Article 5 of

Law No. 152/1975 prohibits the wearing of protective helmets, or any other means likely to make it difficult to recognise a person, in a public place or a place open to the public, without a justified reason, and makes this prohibition absolute on the occasion of events taking place in a public place or a place open to the public, except for those of a sporting nature. At times, this provision has been the subject of exploitation, especially by local authorities, which have, however, been declared illegitimate when they referred to the use of such religious garments (Council of State, Sentence No. 3076/2008). According to this interpretation, the use would be legitimised by the existence of a justified religious motive and, on the other hand, the protection of security realised by the prohibition of use at demonstrations and the obligation for fully veiled women to undergo identification and removal of their veils where necessary.

In spite of this, some regional measures (Veneto and Lombardy), sanction a ban on entering regional public facilities with a covered face.

11. Does the practice perpetuate patriarchy?

It is well known how the practice is used in some fundamentalist countries to maintain a patriarchal system that keeps women on the margins of society; think of striking examples such as the Iranian or Afghan system. However, these are cases in which the religious element is purposely used as an instrument of power and control not only against women, and above all contexts in which the imposition of certain prohibitions on women in terms of clothing is accompanied by a whole other series of heavy restrictions such as the more serious ones restricting access to education, certain places of entertainment, or the like.

In European and generally Western countries, there may be cases where women are forced to wear these covering garments, perhaps under the influence of their family or community. Again, if adherence to this canon of dress were not voluntary or sincere, this could generate forms of power that facilitate relations of domination between the male and female genders. However, these would always be dysfunctional contexts and also accompanied by other limitations of personal freedom and in this sense easily detectable by observers.

A large number of Muslim women in European states voluntarily and devoutly wear the veil and other forms of religious clothing, lead a life free of oppression and are part of balanced and functional family and emotional relationships. In these cases, the simple choice of a more opaque garment than another, due to a religious sense or simply to

different cultural conceptions inherent to a sense of modesty about one's own body, cannot be considered as symptomatic of a lack of self-determination or as a form of oppression.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

Being an element with a strong identity character, the use of the veil is seen as a necessary tool to affirm one's contact with one's country and culture of origin. The reasons that prompt its use are, therefore, mainly related to identity affirmation in migratory contexts. Added to this is the religious component for devout Muslim women.

Proposed balancing act: The wearing of the veil should not be opposed and banned because, especially in countries where it is not imposed by totalitarian regimes, it is often a woman's choice, expressive of her religious freedom and cultural identity, i.e. a way of expressing her individuality. Even in cases where wearing it was not a free choice of women but an imposition, bans on its use would not guarantee their protection, but may rather sanction the opposite effect of further curtailing personal freedom and freedom of movement, as they might be directly prohibited from leaving the community or family. Nor should the veil be feared and considered detrimental to a sense of security as it is not a tool used by women for the commission of crimes, like other garments often used for this purpose, nor does it prevent their identification if necessary. Since the choice of clothing is directly related to habeas corpus, it does not seem justified for the state to intervene in the choices of how to dress.

Legal Insights

1. Italian legislation on religious clothing

1.1.The reference legislation at national level.

In Italy, there is no state regulation explicitly prohibiting the wearing of the veil or other types of religious clothing. In particular, the wearing of garments such as the niqāb or burqa in public spaces is not forbidden, even if they make it difficult to identify the person wearing them.

Article 5 of Law No. 152 of 22 May 1975[144] prohibits the use of protective helmets or devices that may obstruct the recognition of a person in public places or places open to the public, unless there is a justified reason. This provision was originally designed to deal with the politically motivated terrorism of the 1970s in Italy, but some municipalities proposed an interpretation to also prohibit the use of the 'veil covering the face'. However, the Council of State issued a ruling in 2008 (ruling no. 3076/2008) clarifying that the burqa and niqāb are generally not intended to avoid recognition, but rather to follow a religious tradition. Consequently, Article 5 cannot be used as a legal basis to prohibit the wearing of the full veil for religious or cultural reasons. According to the ruling, "An absolute prohibition exists only on the occasion of events taking place in a public place or open to the public, except for those of a sporting nature involving such use. In other cases, the use of means potentially capable of making recognition difficult is prohibited only if it occurs 'without justified reason.' With reference to the 'veil covering the face', or in particular the *burqa,* this *is* a use that is generally not intended to prevent recognition, but constitutes the implementation of a tradition of certain populations and cultures."

"It is without prejudice to the fact that - still according to the Council of State - this interpretation does not exclude that in certain places or by specific orders different rules of conduct, incompatible with the aforesaid use, may be provided for, also by administrative

[144] In 2010, an amendment was proposed to Article 5 of the law of 22 May 1975 (Bill No. 3205 tabled on 11 February 2010) aimed at specifically including "female clothing associated with women of the Islamic faith known as burqa and niqab". (See Mancini 2015).

means, provided of course that they find a reasonable and legitimate justification on the basis of specific and sectorial requirements."

In Lombardy, a ban on access to regional public facilities has been introduced for those who conceal their faces, including for religious reasons. This ban was established by the Deliberation of the Regional Council (D.g.r.) of 10 December 2015, no. X/4553. The Court of Milan confirmed the legitimacy of this restriction in 2017, rejecting an appeal filed by some associations. The Court considered the prohibition justified by the need to ensure the identification of individuals accessing regional facilities for reasons of public safety. The Court of Appeal concurred with these reasons in ruling No. 4330/2019, arguing that the resolution is not discriminatory, but is intended to solve problems of public order and security in certain public places.

In the case of Veneto, a similar regional regulation (No 2 of 2017) was issued prohibiting entry into regional public facilities for those who cover their faces, even if for religious reasons. Again, the restrictions were justified by the need for identification and control for public security.

The use of communication signs prohibiting entry with a covered face, containing images of people wearing helmets, balaclavas and burqas, was criticised by the courts, as was the unwillingness of the regions to reach a conciliatory solution. However, both courts concluded that the ban on fully veiled Muslim women was proportionate and reasonable, as it is limited in time, location and motivated by security reasons (see Salem 2020: 385).

1.2. Local authorities

Cultural practices related to the wearing of the veil have been the subject of several attempts to restrict it by some local authority representatives. These attempts continue to this day. However, in Italy, in the light of existing case law and regulations, the scope for imposing a general ban on wearing the veil or other types of clothing related to specific religious and cultural practices that do not conform to Western fashion (e.g. the burkini) in a public place or open to the public is extremely limited, if not non-existent.

In particular, the route of trade union ordinances is precluded mainly because, in the light of the case law of the Council of State and the Constitutional Court (Constitutional Court ruling no. 115 of 2011), it is not considered a legally adequate basis. More precisely, the possibility of introducing such prohibitions by means of contingent and urgent ordinances (pursuant to Article 54(4) of the TUEL) had been envisaged

by some mayors. However, in order to adopt a contingent and urgent ordinance, the mayor must demonstrate the presence of local emergency situations requiring an immediate response. This condition makes the scope for introducing a full veil ban extremely limited.

Even if a contingent and urgent measure were adopted by the mayor, it would still have to comply with the fundamental principles of the legal system (principles of equality, reasonableness and non-discrimination).

Moreover, any measure must be proportionate to the objective it is intended to achieve. A general ban on wearing the full veil would have to be seen as an extreme measure and it would be necessary to demonstrate that there are no less invasive alternatives to address the problem. (On this topic, see Cavaggion 2016).

2. Court of Justice

In the European legal landscape, a number of rulings of the Court of Justice of the European Union (CJEU) regarding the Islamic headscarf have been the subject of debate in issues related to religious freedom and workers' rights in the workplace. The CJEU, in a judgment of 14 March 2017 (Case C-157/15, Achbita v G4S Secure Solutions NV), ruled that an employer, in a private company, does not necessarily engage in direct discrimination based on religion or belief if it prohibits employees from visibly wearing political, philosophical or religious signs in the workplace. At the most, its conduct may constitute indirect discrimination if it can be shown that this apparently neutral prohibition creates a particular disadvantage for persons with a specific religion or ideology.

More precisely, such an attitude can only be justified if the employer has a legitimate reason, such as the promotion of an attitude of political, philosophical or religious neutrality towards customers, and if it uses appropriate and necessary means to achieve that objective. The same court (Case C188/15 *Bougnaoui* v. *Micropole* SA) had made it clear that a customer's wish not to be served by an employee wearing an Islamic headscarf cannot be regarded as an essential and determining requirement for the employer's work,[145] since such a requirement had

[145] Cf. Sent. civil cassation sez. un., 09/09/2021, (ud. 06/07/2021, dep. 09/09/2021), no. 24414. On this topic see also (Ruggiu 2018)

to be objectively dictated by the nature of the professional activities in question or the context in which they are carried out, not by subjective considerations.

In a judgment of 15 July 2021 (Joined Cases C-804/18 Wabe and C-341/19 Müller Handels), the Court of Justice also ruled that the notion of 'religion' according to Article 1 of Directive 2000/78 encompasses both internal religious convictions and the public manifestation of religious belief. Wearing symbols or clothing to express one's religion or belief falls within the freedom of thought, conscience and religion guaranteed by Article 10 of the Charter of Fundamental Rights.

Moreover, the right to freedom of conscience and religion under Article 10 of the Charter is equivalent to the right guaranteed by Article 9 of the European Convention on Human Rights (ECHR).

However, the July 2021 ruling allows employers to prohibit employees from wearing religious and other symbols, although it specifies the conditions under which the employer may exercise this power. In short, **an employer may only prohibit employees from wearing religious headscarves if it can demonstrate that such a prohibition is strictly necessary for reasons of neutrality and that it is applied in a consistent and non-discriminatory manner**. (See Howard 2022, 2023).

3. The Islamic veil and religious freedom in the European Court of Human Rights

The jurisprudence of the European Court of Human Rights has linked the wearing of the Islamic headscarf to the exercise of the right to religious freedom enshrined in Article 9 of the European Convention on Human Rights. Numerous religious freedom-related cases addressed by the European Court of Human Rights (ECtHR) concern the wearing of religious clothing or symbols, with a particular emphasis on the Islamic hijab. Most of these cases occurred in France, Turkey and, to a lesser extent, Switzerland, countries with constitutional traditions of state secularism and restrictive rules on religious symbols and clothing. The decisions of the plaintiffs in these cases depend mainly on the context in which such symbols or clothing were worn.

- With regard to civil servants, the ECHR has generally upheld the right of states to prohibit religious dress in the name of secularism.

- With regard to students, the ECHR confirmed the right of state school systems to prohibit religious clothing in order to preserve secularism.
- In general, the ECHR has upheld the right of states to ban the niqāb in public spaces in the name of coexistence and the protection of the rights of others.
- However, in some situations, the ECHR has found a violation of the Convention when sanctions were imposed on groups of protesters wearing religious clothing in public places.
- Regarding religious dress in the courts, the ECHR has recognised violations of Article 9 of the Convention in some cases when restrictions on religious dress seemed unjustified.

Overall, the ECHR has shown flexibility in the application of the principles of religious freedom and secularism, attempting to balance these rights according to the specific circumstances of each case. (See, on this issue, Mose 2023:59-60)

4. Anti-veil laws in Europe

In Europe, regulatory references concerning the prohibition or regulation of the use of the burqa and similar garments vary from state to state. Examples of regulatory references in some European countries are given below:

France: France is one of the European countries best known for having introduced Law No. 2004-228 of 15 March 2004, which regulates, in application of the principle of secularism, the use of signs or clothing manifesting religious affiliation in schools, high schools and public colleges.

The law affirms the principle of secularism, which is one of the fundamental principles of the French Republic, and aims to preserve religious neutrality in public schools. Accordingly, it prohibits the use of visible religious symbols, such as the Islamic veil, Sikh turban, Christian cross, yarmulke and other religious symbols, in public schools.

Law No. 2010-1192 of 11 October 2010 prohibits covering the face in public spaces. Specifically, according to Article 1 '*Nul ne peut, dans l'espace public, porter une tenue destinée à dissimuler son visage*' 'No one may, in public space, wear clothing intended to conceal his or her face'. In fact, this rule prohibits the full veil or any other covering of the face in public places. The Grande Chambre of the European Court of Human Rights, in July 2014, ruled that the general prohibition of covering one's

face in public places, as set out in French Law No. 2010-1192, does not constitute a violation of Articles 8 and 9 of the European Convention on Human Rights. (S.A.S. v. France GC - 43835/11) In the context of the judgment GC - 43835/11, the position of the French Government is interesting, according to which, Law No. 2010-1192 is aimed at both the protection of public security and respect for the "*socle minimal des valeurs d'une société démocratique et ouverte",* which translates into respect for gender equality, human dignity and the maintenance of the minimum requirements necessary for harmonious coexistence, known as "vivre ensemble". Of these values, only the last one is linked by the European Court of Human Rights to the 'protection of the rights and freedoms of others', as stipulated in Articles 8 and 9 of the European Convention on Human Rights, and is therefore recognised as a legitimate aim of the law in question (Olivito 2014).

In 2021, measures were introduced to prevent indoctrination by Islamist groups with the aim of limiting the public visibility of Islam (Law No. 2021-1109 of 24 August 2021). While previous laws had banned religious symbols, the 2021 law attempted to distinguish more clearly between the right of Muslims to practise their religion and the need to prevent Islamist indoctrination. However, the law did not adequately address the inequalities and discrimination suffered by post-colonial minorities, leaving many Muslims in a disadvantaged position and fueling discontent that Islamists can leverage (Hargreaves 2023).

In anticipation of the reopening of public schools in France in 2023, Education Minister Gabriel Attal issued a circular banning the wearing in class of **the abaya**, a long dress that completely covers the body and is widely used by women in the Middle East, as well as increasingly by young French Muslim women. The abaya is originally a traditional garment, but in some contexts it can be interpreted as a sign of religious affiliation, although its meaning may vary. France is the first western country to impose a ban on the wearing of the abaya at school. The French decision raises questions about secularity and the perception of religious symbols in educational institutions, as well as the challenge of balancing cultural diversity with the promotion of the secularity of the State (Audureau 2023). The Council of Muslim Worship (CFCM) took a position on the issue and pointed out that this legislation increases the potential risk of discrimination. According to the CFCM, the abaya is considered a traditional and not a religious garment. This controversy is of great relevance, considering that approximately 10% of the French population is of the Islamic faith (Usan 2023).

Belgium: In Belgium, individual freedom is fundamental in both private and public space, unless one commits a crime or incites hatred, discrimination or violence. However, in public spaces such as streets, squares and train stations, it is forbidden to wear clothing that completely covers the face. This law is known as the 'anti-burqa law' because it applies to women who wish to wear the burqa or niqāb, which cover the face. Women who violate this law are liable to fines and/or imprisonment. The anti-burqa law has been the subject of controversy and conflicting judgments by international courts. The Constitutional Court and the European Court of Human Rights have ruled that the Belgian law does not violate human rights, as it is justified by the need to facilitate social coexistence and communication between people. However, the UN Human Rights Committee considered that this regulation was excessively strict, especially for women who wear such clothing for religious reasons.

The issue of the religious veil has also been addressed in Belgian state schools. The Constitutional Court (Cour const., 4 juin 2020, no 81/2020) legitimised the prohibition of religious signs, such as the Islamic veil, in educational institutions on the basis of a 'total' concept of neutrality.

Furthermore, with regard to identity cards and passports, headgear may only be worn for religious or medical reasons and if the face is fully visible (Vanbellingen 2022).

Austria: In Austria, "Bundesgesetz über das Verbot der Verhüllung des Gesichts in der Öffentlichkeit" ["Federal Law prohibiting the covering of the face in public places."] (abbreviated Anti-Gesichtsverhüllungsgesetz, AGesVG [Anti-Face Covering Law]), which came into force on 1 October 2017, prohibits the covering of the face in public places. This law is part of an 'integration package' aimed at promoting participation in society and peaceful coexistence in Austria. The debate on the law started with the idea of banning the burqa in Austria, but later the focus shifted to a general ban on face covering. This development was influenced by the arguments of conservative politicians and far-right parties, who supported the ban as a measure against an alleged threat to national security. The ban on facial covering is based on the argument of the need for face-to-face communication in social interactions. This argument was also supported by the European Court of Human Rights in the case of the face-covering ban in France.

However, this argument has been criticised by some feminist observers, who see this as a restriction of individual freedoms.

The law has been applied in controversial ways, such as the request to remove clown masks or the cases of people wearing protective masks during the pandemic. These examples raise questions about the interpretation of the law and its consistent application. The legislation has not been without public criticism. Some citizens reacted to the ban by paying the fines imposed on Muslim women, claiming that they wanted to uphold religious freedom (Holzleithner 2018).

Denmark: On 1 August 2018, a ban on wearing the niqāb or burka in public places came into force in Denmark. The law has been the subject of controversy and discussion regarding religious freedom.

The wording of this law provides for a general ban on covering one's face in order to ensure the protection of public order. However, this ban was understood to be specifically aimed at Muslim women. Indeed, in the parliamentary debate, the discussion was mainly about the position of Muslim women and their oppressed status. According to some members of the Danish Islamic community, this debate was based on a stereotypical representation of Islam. Among the reactions to this measure, an interesting one seems to be the one made by a group of women who founded the organisation 'Kvinder i Dialog' (Women in Dialogue) to defend their right to religious freedom and, specifically, their right to practise their religion by wearing the niqāb and covering their faces in public places (See Daverkosen 2019).

Switzerland: In Switzerland, a partial ban on the full veil was approved in a referendum in 2021. The law prohibits the wearing of the burqa and niqāb in public places. This initiative introduced a new provision in Article 10 of the Swiss Constitution. This provision states that no one may conceal his or her face in public spaces or in places that are accessible to the public or in which services are provided that are in principle accessible to the public. Furthermore, no one may force a person to conceal their face because of their gender. The prohibition does not apply to places of worship. Deviating behaviour can only be justified on grounds of health, safety, climatic conditions and local customs.

Despite the fact that the Federal Council and Parliament had recommended the rejection of the initiative, it was approved. The new regulation is not immediately applicable. It will primarily be the

responsibility of the cantons, which are responsible for the use of public space, to determine how to implement this provision (on this topic see Ceffa and Grasso 2021).

Germany: In Germany, the wearing of the veil is considered an expression of freedom of faith. In this sense, there is no general ban on the wearing of the full veil, since it would be contrary to the freedom of religion guaranteed by the German Basic Law [*Grundgesetz*]. More precisely, it falls within the protection guaranteed by the freedom of religion enshrined in Article 4(1) and (2) of the German Basic Law (GG) (see in this sense Urteil vom 24. September 2003 - 2 BvR 1436/02).

However, civil servants cannot cover their faces and some *Bundesländer* (e.g. Bavaria and Lower Saxony)[146] have banned the full veil in public schools.

The Bundesregierung (federal government) banned covering the face in certain public contexts in 2017. For example, it is forbidden to cover the face when driving a vehicle or for public employees such as teachers, female soldiers and judges while performing their duties. In addition, women wearing full veils are required to show their faces in specific situations.

5. Six distinct positions on the use of the veil in Western contexts

The issue of the use of the Islamic headscarf is the subject of a long-standing debate. We can outline in this respect six distinct positions on the use of the (Islamic) veil in Western contexts.

1. **Supporters of religious freedom.** This position defends the fundamental right to freedom of religion, which includes the right to wear the veil as an expression of one's faith. Supporters of this perspective consider that regulations restricting or prohibiting the wearing of the veil are a violation of this constitutional right.

[146] Anon. 2020. "Drei Bundesländer wollen Vollverschleierung an Schulen verbieten". domradio.de. Retrieved 25 September 2023 (https://www.domradio.de/artikel/debatte-um-burka-und-nikab-drei-bundeslaender-wollen-vollverschleierung-schulen-verbieten).

2. **Supporters of public safety.** Some regulations restricting the wearing of headscarves have been enacted with the aim of preserving public safety. Those who support this position believe that the headscarf may hinder recognition of people and create identification problems, especially in sensitive contexts such as airports or government facilities.
3. **Supporters of gender equality.** This perspective focuses on the issue of gender equality, arguing that the veil, particularly the niqab or burqa, is a symbol of women's oppression and can limit their participation in society. Anti-veil laws are seen from this perspective as a means to combat gender discrimination.
4. **Supporters of secularism.** In some nations, such as France, secularism is a fundamental principle and laws banning the veil in some public institutions are justified by the need to maintain the separation between religion and state. Supporters of this perspective believe that the veil may undermine the religious neutrality of the state.
5. **Advocates of moderate regulation.** Some jurisdictions try to find a compromise between religious freedom and other fundamental rights, adopting laws that regulate the wearing of the veil in certain contexts, such as schools or courts, but allow its freedom in other places. This position seeks a balance between different rights and interests at stake.
6. **Supporters of cultural tolerance.** This perspective promotes cultural tolerance and recognises that people should be free to express their cultural and religious identity through clothing, as long as this does not pose a danger to public health or safety.

Criticism of the wearing of the veil or other religious garments by women is often based on the idea that it represents a symbol of oppression and discrimination of Muslim women. However, it is important to recognise that the situation varies greatly between Muslim and European countries. While in some Muslim countries a certain type of clothing is imposed on women by law, in Europe women may wear it by personal choice or be pressured to do so for family, religious or cultural reasons. Absolute bans on the wearing of certain types of religious clothing may lead to the isolation of women who wear it,

rather than to their liberation. It is essential to address the issue of headscarf wearing by adopting an open attitude, assessing different situations on a case-by-case basis, and providing support to women who denounce a situation of oppression, suffering and prevarication, regardless of their belonging to a particular cultural context (Mancini 2015).

Anthropological Insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

The Islamic veil often represents, especially in migratory contexts, an attempt by Muslim women to manifest their religious and cultural identity, and can therefore have very important identity values depending on the context. The *hiyab,* for example, is interpreted by women as connecting them to their roots and providing them with a sense of belonging to the Muslim community. However, due to the increase in fear in the West caused by the rise of Islamic fundamentalist movements, as well as in line with the growth of xenophobic and anti-immigration parties, several governments in Europe have enacted laws to ban Islamic clothing in certain public places. For many of these women, often belonging to the second or third generation of immigrants, wearing these veils therefore becomes an act of affirmation of their right to freedom of religion and worship.

In some migratory contexts, any attempt at Western prohibition is interpreted as an attack on what is Islamic from what is not, causing Islamic norms to conflict with European social norms in most cases, and clothing is included in these fundamental aspects that determine what is permissible from what is illicit.

Some Western legislation, therefore, puts women in a position of social vulnerability, and these restrictive laws, intended to limit the wearing of the *burka* or *niqab*, contribute on the contrary to fomenting a greater determination to wear them in an attempt at identity assertion.

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Anthropological bibliography (recommended reading)

Floya, A. (2008). "Thinking Through the Lens of Translocational Positionality: An Intersectionality Frame for Understanding Identity and Belonging." *Translocations: Migrations and Social Change*, Vol. 4, pp. 5-20.

Interesting reading that allows us to understand identity construction processes in migratory contexts. This reading is important in order to understand which identity mechanisms are activated among migrants and to what extent the use of certain symbols is essential for an affirmation of identity that is not only social but also personal.

Anthropological bibliography (for further reading)

Hejazi, S. (2008). *L'Iran (s)velato. Antropologia dell'intreccio tra identità e velo*, Roma, Aracne Editrice.
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17. Voodoo (rituals)

Cases: trafficked women linked to exploiters by voodoo rituals (criminal law) and asylum applications to escape the effects of voodoo rituals (asylum, international protection)

Cultural test

1. Can the category 'culture' (or religion) be used?

Yes. Voodoo rites are ritual activities related to voodoo**, a religion with clear syncretic characteristics that incorporates elements of Catholicism and animism**. The voodoo religion is considered the modern derivation of one of the world's oldest religions, traditional African animism.

2. Description of the cultural (or religious) practice and group.

The voodoo religion (or voodoo, meaning 'spirit' in the African languages Fon and Ewe) with its syncretic characteristics as we know it today, **originated between the 17th and 18th centuries following colonialism in Africa**, and in the Americas following the arrival of slaves from West Africa. It is a religion deriving from traditional African animism, widespread especially in present-day Benin and centred on the worship of nature divinities; today it is practised not only in Benin, but especially in Nigeria, Togo and Ghana by various social groups such as the Ewe, the Fon, the Mina or the Kabye, and has also spread to Central America (especially Haiti and Cuba) and South America following the trade of African slaves deported to this continent during the Spanish and Portuguese colonial period.

Various rituals of the voodoo cult are currently performed in the practising communities; these include **initiation** (or baptism) rituals, **funeral rituals**, **healing** and **curing rituals**, **consecration** rituals, **protection rituals and** rituals of **sacrifice** and **celebration to the loa** (spirits), characterised by the trance of possession.

The expression used to refer to the trance of possession, i.e. the communication between the *loa* (spirits) and the worshippers, is very graphic: the *loa is* said to 'ride' the possessed person like a horse. This is understandable if we consider that **the purpose of the voodoo religion is communication between the divine world and the human world,** and that every ceremony and celebration is structured around the goal of divine manifestation in the human world through the *loa* (spirits). **During trance, in fact, a loa takes up residence in** an

individual's **head** after driving out the 'great good angel', one of the two souls they carry inside; this is the part of the soul on which intellectual and emotional life depend according to the voodoo religion. The sudden departure of this soul causes the characteristic shivers and jolts at the beginning of the trance, and once the 'good angel' has departed, the possessed person has the impression of total emptiness, as if losing consciousness. The head spins and the legs tremble: it is at this stage that **the believer becomes not only the receptacle of the god, but** also **his instrument**. It is the god's personality and not his own that is expressed in his behaviour and words; his expressions, gestures and even the tone of his voice reflect the character and temperament of the deity that has descended upon him.

Some of these rituals are used, in certain contexts characterised by **violent dynamics such as some areas of Nigeria** (e.g. the state of Edo), to ensure **control over women**. In particular, we refer to the ritual oaths in which the bond is sealed between a self-styled benefactor, who charms young women with promises of work in Italy; the women are bound to repay the trip with a ritual oath, pledging to pay the acquired debt under the agreed conditions. If this pact is broken, the consequences, depending on beliefs, can be different: death, illness, madness, etc. The ritual oath thus becomes an **intimidating and silencing means** for young women who are trafficked.

The ritual oath is taken in various ways, including, according to testimonies collected: young women who take the pact are made to drink a solution of alcohol and blood, have locks of hair cut off and small cuts made, with the use of razor blades, in various parts of the body, under the collarbones, on the hands, feet and behind the back.

The experiential dimension of the ritual, the social pressure exerted by it and the belief in its undesirable consequences, leads to a psycho-physical state of constant alarm, often characterised by bodily sensations of discomfort, by dreams in which one suffers or risks suffering harm, to thoughts in which one conceives of harming oneself or others if one does not respect the bond. It is an experience based on the relationship between shared meanings, embedded in a social universe of values, gestures and cultural meanings learnt through **social relations,** and which therefore constitute vehicles of communication through which social life as a whole is managed.

3. Embedding the individual practice in the broader cultural

system.

Voodoo religion is directed towards the worship of nature's deities, and can be understood if one frames it within animism. A religion is animist when it is believed that non-human entities are divine beings or spirits, or at least participate in and possess divine principles and potentialities. The animist, in fact, believes that there is no separation between the material and transcendent worlds, so that rocks, mountains, plants, animals, atmospheric phenomena and other material entities have souls, and represent deities and spirits of different categories.

Because of its **animist nature**, there has been much debate as to whether voodoo can be considered a religion or simply a set of beliefs; it is believed that these prejudices have been created by the conflict with the Catholic religion, which has always sought to condemn voodoo practices.

For many centuries, the voodoo religion was therefore presented as the embodiment of evil, or even a scapegoat that served to explain natural disasters, or perceived as synonymous with ritual murder, anthropophagy and witchcraft, thus an expression of superstition to be condemned. Consequently, the Catholic Church conducted several anti-superstition campaigns to eradicate the syncretism between voodoo and Catholicism, only to absorb and mix with it over the centuries, creating clear dynamics of syncretism and coming to manifest itself in a widespread manner in various voodoo cult contexts, especially in Latin America.

Voodoo is **characterised by many ritual activities that take place in the practising communities**; these include initiation (or baptism) rituals, funeral rituals, healing and healing rituals, consecration rituals, protection rituals and rituals of sacrifice and celebration to the *loa* (spirits). These rituals **play a very important role in the social context where they occur**, to the point that they can be said to be a guide in the practitioner's life.

It is important to remember, moreover, that many of the violent implications of voodoo rituals, such as the trafficking of prostitutes, are directly linked to the **conditions of inequality** prevailing in the context of the practice's development, i.e. to the fact that people have limited access to the resources necessary for their livelihood, and therefore seek through this instrument to develop strategies to raise the family's social status. Sending a young woman to Europe by stipulating an 'agreement' for the repayment of debt through a voodoo ritual is almost always a choice conditioned by the pressure of the young woman's

family, which sees in this path a chance to improve its condition (it is rarely an individual choice); this creates a strong **social pressure** in the young woman, and turns voodoo rituals into clear ritual activities of **subjugation**.

According to the National Agency for Prohibition of Trafficking in Persons (Naptip), an estimated **90% of young Nigerian women migrating to Europe have been subjected to this ritual**.

4. Is the practice essential (to the survival of the group), compulsory or optional?

Voodoo rites are essential for communities of believers because they allow communication and interconnection with the spirits that dominate the forces of nature, i.e. the rocks, trees, waterways and animals, but also with individual people. Indeed, in some contexts, even the dead continue to live with and among the living, who can remain in contact with the dead and can ask them for favours.

The way in which the voodoo practitioner perceives the world around him and with which he lives, therefore, leads him to a continuous activity of intercession with the spirits; a constant relationship between nature, the human being and the spirits through which the believer finds reasons to live and an explanation for death, in a permanent relationship between the living and the dead, between believers and spirits.

5. Is the practice shared by the group or is it contested?

Voodoo is a **shared and coherent system in the eyes of its practitioners**, a worldview in which actions, speech, symbols and behaviour are of fundamental importance to the individual and the community to which he or she belongs, and rituals are one of the most important steps in this religious system.

Sometimes, the social pressures exerted by rituals, especially when they are binding, lead individuals to move away from their context of origin, lest there be harmful consequences for them and their family.

6. How would the average person from that culture (or religion) behave?

On the side of the voodoo rites of subjugation, the average person subjected to one of these voodoo rites believes in the capacity of this to bind and produce effects, to the point that '**voodoo** death' has been theorised in doctrine, caused by the physical alterations produced by stress (Cannon 1942; Lester 2008-9).

In some social contexts, the believers of this religion found themselves

in the need to hide their practices or rituals because the official institutional leadership decided to impose the Catholic religion and to persecute and punish any sign of religious practices that were outside or against their dogmas of faith.

7. Is the subject sincere?

Among the various and very numerous rituals linked to the voodoo cult, those capable of bringing about forms of subjugation of individuals, representing themselves in the eyes of the victims as real sources of danger, arrive in courtrooms, so much so that they are used as the basis for **applications for international protection**.

In such proceedings, the ascertainment of the subject's sincerity is guided by specific legal criteria and inevitably involves several levels: not only the credibility of the facts narrated by the applicant, but also **the potential for injury**.

In relation to the above-mentioned cultural context, it should also be borne in mind that: some elements may not be known to the applicant (e.g. in cases where the applicant is destined to be a voodoo priest) due to the secrecy of certain rituals, which only become known at the time of holding the position; it is plausible that monotheistic religions (especially Islam and Christianity) and traditional beliefs exist simultaneously, often in conflict with each other but also strongly influencing each other.

That said, for the purposes of a more rigorous configuration of the practice and the existence of symptomatic elements of its harmful scope, it might be useful to focus the investigation on certain elements:

- **the spatial location of the ritual**, which as we have seen is more widespread in some geographical areas than in others;
- **the function of the rite in the eyes of the applicant**, the social role of the practice and the 'ministers' associated with it in the community of origin;
- **other characteristics of the rite**, if known to the applicant.

8. The search for the cultural equivalent. The translation of minority practice into a corresponding (Italian) majority practice.

As complex as it is to identify, a cultural equivalent of the voodoo ritual, especially its use as an instrument of power and control over the lives of individuals, can actually also be found in the majority culture.

In the not too distant past, the life of Italian society was also strongly

permeated by religious sentiment, mainly the Catholic one. It was (and sometimes still is) very common for religion to improperly derive practices that went beyond merely spiritual and moral functions, establishing instead social hierarchies, powers, and control over the lifestyles and behaviour of the members of society, under the threat of sin and eternal damnation, also determining forms of subjugation with important repercussions on the lives of individuals.

It was, and sometimes still is, albeit to a lesser extent, a Christian morality that acted according to patterns similar to the rituals mentioned above, against anyone whose behaviour did not correspond to it, not only in order to defend it, in its value system, but to maintain **control over individuals**: the community's aversion towards women who carried unmarried pregnancies; towards divorcees, who were excluded from the sacrament of communion, for example; towards those who chose not to baptise their children; going even further back in time to the compulsory consecration in ecclesiastical orders of sons and daughters in order to acquire a higher social status; the problems that could occur in choosing to profess a different religion. Situations that are different but have one thing in common: **the weight of a religious morality or belief on daily life, on the perception of the individual, on relations with the community to which he or she belongs, and the choice, often made even in our society, to flee to other places where it is possible to exercise one's life in freedom**.

In addition to this type of pressure from the Catholic majority religion, there are also individuals in the majority culture who believe that certain rituals, spells, magic can condition reality and produce cures or illnesses in the body. Often branded as superstitious by mainstream rationalist positions, these beliefs are still widespread across various social classes and also see figures of magicians and other practitioners practising such rites.

9. Does the practice cause harm?

The voodoo cult as a whole would not appear to cause any harm except in those cases in which it lends itself to securing forms of subjugation over other individuals and as a form of manifestation of power. In this case, it is capable of profoundly influencing the quality of life. It is a greater 'damaging attitude' than that applicable to mere superstition precisely because it has its foundations in a structured, solid religious system, widespread among large sections of the population and permeating multiple aspects of earthly and otherworldly life.

It is obvious that such harm can only emerge when assessed in relation to a 'culturally oriented' agent and influenced not only by his own perception but also by that of the community to which he belongs, part of a culture in which the supernatural has a founding role with respect to everyday life because it merges with spirituality, religiosity and the management of relations between private individuals, especially in the case of Sub-Saharan Africa.

That is why the harm will not emerge if related to an agent outside these types of institutions.

From this point of view, such practices are capable in the abstract of generating two types of harm:

- the **psychic damage**, resulting from the strong conviction of the power of the ritual (state of strong awe, vulnerability, fear for one's own or one's loved ones' safety, conviction about the correlation between the death of loved ones and possible rites);
- the **physical harm**, both as an effect of the strong psychic pressures experienced and, albeit indirectly, in the possible/possible acts of violence exercised by the communities to which they belong in the event of refusal of the ritual.

Some scholars have studied the phenomenon of 'voodoo deaths', referring to those cases in which the belief in the power of such rituals was such that it psychosomatically conditioned individuals and caused their death.

Today, it is science itself that admits the link between certain psychic situations of the individual, linked to private events or to the socio-cultural context of origin, and certain purely physical pathologies or symptoms.

In criminal law, for instance, in relation to the case of Nigerian trafficked women, who are forced to pay enormous amounts of money and prostitute themselves to the 'madams' in order not to break the oaths of allegiance taken in their homeland through such rituals, the damage is widely acknowledged: the ritual leads the individual to place himself in a state of vulnerability and psychological subjection, typical of the phenomena of slavery. **The devastating impact of such oaths has in fact had international prominence and led King Ewuare II**, the traditional supreme figure of Benin City (Edo State, south-eastern Nigeria), also known as 'Oba' to issue, in March 2018, a **specific edict to dissolve all voodoo rites performed for the purpose of perpetrating trafficking, granting forgiveness for past rites to the ministers who had performed them but condemning future ones**.

Such an absorbing context of beliefs cannot condition only one section

of the population (women, victims of trafficking); it has deep roots in a cultural and institutional system, pervades educational models and is therefore likely to recreate in the abstract the same feelings of subjection and limitation of self-determination in other individuals who have lived in such a context even if they are male and not victims of trafficking.

10. What impact does the minority practice have on the culture, constitutional values, rights of the (Italian) majority?

In the majority culture, voodoo rites have an imaginary and fanciful connotation, sometimes assimilated to the concept of macumba or often associated with the image of 'dolls' or various puppets that, pierced by pins by a persecutor, are supposed to generate excruciating pain in the victim at the parts of the body being inflicted. It is not at all common for them to be associated with more complex and structured forms of ancestral spirituality that can also express themselves in beneficial forms. The term voodoo always has a negative connotation, but whose irrationality and harmlessness seems obvious.

The fear associated with this type of ritual is considered to be either the result of naive credulity, stemming from minimal social, economic and cultural conditions, or a form of invention used by the alleged victim for opportunistic purposes only.

When its detrimental impact on the individual's existence is recognised, as for instance in the case of trafficking victims, the ritual appears as a traditional constraint that subjugates the individual, devoid of any beneficial nature, and thus in conflict with the individual's freedom and dignity, especially when the individual feels compelled by it to perform acts against his or her will and detrimental to dignity.

On the one hand, **voodoo practices must be traced back to a much broader spiritual and religious system**, from whence they do not necessarily take on a negative connotation and therefore could fall under the protection of the religiosity, spirituality of the individual, as with other beliefs. However, when they lead to the escape of the same from the communities to which they belong or become instruments to limit self-determination and reinforce mechanisms of slavery, they are capable of harming fundamental goods of the individual such as life, physical and psychic safety. From the criminal point of view, in the case of trafficking victims, they could reinforce the bond of slavery (Art. 600 of the criminal code. *Reduction or maintenance in slavery*; Art. 601 of the Penal Code _ Trafficking *in human beings*) and accentuate the victim's state of vulnerability.

In the context of international protection, it is rare for such rituals to be recognised as harmful enough to justify the granting of protection measures. They are **not considered to harm the individual's freedom** or physical integrity **except in cases where they are associated with human trafficking**. In this case, they are deemed to violate fundamental rights and justify the recognition of a general right of asylum for foreigners who flee from them.

11. Does the practice perpetuate patriarchy?

The damaging effectiveness of rituals in cases of **enslavement** and trafficking determines a limitation of freedom for gender reasons, a greater vulnerability for women than for men. The problem takes on even broader dimensions in the area of patriarchy when, as repeatedly highlighted in the reports of some international organisations and by some governments in sub-Saharan Africa, **local state forces fail to guarantee trafficking victims adequate protection once they return home**. Even once the ritual bond is fulfilled and the debt paid, former prostitutes are not accepted by their communities. This is also why, albeit indirectly, the ritual has a discriminatory power against the female gender.

The Italian State more readily recognises the harmfulness of voodoo rites against trafficking victims, for criminal and international protection purposes, but is much **more reluctant** to recognise and investigate their actual harmful potential against **male** applicants, who flee for fear of rites perpetrated against them because of intra-family disputes or because they do not want to belong to the cultural group that professes them or become voodoo priests.

12. What good reasons does the minority present for continuing the practice? The criterion of an equally valid life choice.

In contexts where individuals seek protection from specific cultural practices that they do not share or that cause harm, the good reasons for carrying out the practice by those in the community who do share it should be highlighted in order to better understand its **diffusion in places of origin**, its pervasiveness and thus the inevitable risk to which those who shun it are subjected (see the entries Witch-hunting and Witchcraft; Female Genital Mutilation in this Guidebook).

In this case, it has been amply highlighted above how voodoo rites, even those of subjection, are part of a **structured, existential context with complex connotations because they are religious in nature**. It is therefore probable that as long as the cult as a whole remains, as the

religious expression of certain populations, the collateral aspects will also remain, including the problems of exclusion in the case of the choice of other cults, the use of rites in the function of subjection and the exercise of power. An awareness of these critical issues on the part of the practising communities themselves can bring about a change and a progressive restriction of them. Undoubtedly, the role of states is also important in this process, their ability to watch over and discourage such practices, or to promote a different and more personalistic awareness of the individual, but certainly this influence will affect to a far lesser extent than the changes that may come from the contestation of the practice by members within the community itself or even by traditional leaders, as happened in the case of the Oba decree in Nigeria in 2018.

Proposed balancing act: in view of the impact on the person, it is considered that the judge should consider the role of voodoo as relevant and therefore recognise that it could create a state of mental slavery which would merit follow up requests for international protection. With regard to criminal law, it is considered, as is already the case in Italian jurisprudence, to recognise the impact that voodoo ritual has in enslavement and trafficking.

Legal Insights

1. Voodoo and trafficking

The practice of voodoo rituals has assumed relevance in the Italian legal system primarily in the criminal sphere, where it has often played a role in the configuration of certain crimes such as enslavement (Article 600 of the Criminal Code) and trafficking in human beings (Article 601 of the Criminal Code). In these contexts, in fact, voodoo rituals are used to seal a real loyalty agreement between young women (usually Nigerian) and certain individuals who, with the false promise of procuring an honest and well-paid job in Europe, lure the young women into their sphere of subjection and then initiate them into prostitution once they arrive in Italy. The rituals in question are celebrated in the land of origin, before departure, and usually involve the removal of biological material (hair, hair, small parts of skin), the

ingestion of concoctions or raw meat, or even the execution of certain cuts on the body with the subsequent removal of drops of blood.[147] Often in these cases, judges have considered these rituals as elements capable of accentuating the victims' situation of vulnerability (indicated in the European Union's framework decision of 19 July 2002 on combating trafficking in human beings, implemented by Law no. 228 of 11 August 2003.), but also capable of implementing a real form of "mental slavery", an "inescapable and stringent condition of subjection" with respect to the exploiters, perfectly corresponding to the elements of the aforementioned cases of enslavement and trafficking, because they determine a significant impairment of the self-determination of the offended person. On the basis of the results of the psychological and anthropological investigations sometimes used in the proceedings, the rituals, inserted in the religious-spiritual context of origin of the victims, have the capacity to strengthen the position of dominion over them, both from a physical and psychological point of view, facilitating their coercion into prostitution: the ritual, by the manner in which it takes place, recalls the sensation of physical pain and in some way its threat; from a psychological point of view, possessing parts of one's body induces victims to fear a form of control over their whole person. For the judges, the bond of subjection, combined with the other conditions of destitution and the lack of resources, continues to determine a real conditioning of the will that resists even in the presence of a spatial distance actually existing between the victim and the exploiter, which does not affect the relationship of domination.[148]

2. ***Voodoo and international protection***.

In the field of international protection, indirectly, the voodoo ritual as an instrument of subjugation and coercion has assumed a role in the recognition of refugee status for victims of trafficking.[149] Outside of these hypotheses, the cases that usually come before the courts concern individuals who shy away from holding the position of voodoo priest

[147] Pronouncements describing the voodoo rituals of subjection: Cass. Pen. sez. I., 3/02/2022, no. 3796 (use of psychological and anthropological expertise); Tribunal sez. uff. indagini prel. - Turin, 12/08/2011, no. 1108.

[148] Cass. Pen. sez. I - 20/09/2021, no. 34858; Cass. Pen. sez. V, 12/01/2022, no. 690.

[149] Trafficking and slavery and international protection: Tribunale Bologna, 17/07/2019; Tribunale Lecce, 06/04/2021.

inherited from their father, being intimidated or persecuted by other members of the community, individuals who fear the physical or psychic repercussions of the same rituals, performed by other family members often because of disagreements and quarrels, or again, cases in which initiation into the practice is refused because they belong to other religions. In the latter cases, the applicants are mostly male. Apparently, there could be a greater harm potential of the ritual for female victims of trafficking than for male individuals. In this regard, however, it should be emphasised that the subjugating power of rites is rooted in the structure of society as a whole, in a social and cultural substratum that is the same for women and men, and this consideration could be useful to avoid differences, albeit without disregarding the assessment of the concrete case.

In both cases, in fact, individuals from the same cultural backgrounds require the host systems to operate forms of protection 'from culture'.

Although it is not possible to speak of a clear-cut majority position on the matter, it is possible to find in jurisprudence a form of recognition of such situations of 'subjection', at least as potentially damaging to the sphere of human rights. In fact, the jurisprudence of legitimacy has often identified subjection or fear of the rite as potentially falling within the figure of humanitarian protection, now abrogated and partly replaced by special protection, inviting the courts of merit to make the appropriate investigations.[150] In fact, in some rulings such elements are recognised as having the capacity to increase the individual's condition of vulnerability, especially in the event of repatriation. The Court of Cassation creates a thin thread of connection between these situations and the inviolable rights of the individual protected by the international protection system (art. 2 and art. 3 of the Constitution), and consequently also, with the protection of private and family life (art. 8 of the ECHR).

A particularly sensitive issue in the field of international protection is that of credibility. In cases concerning voodoo rites, applicants are often not considered credible because they are not able to report the exact configuration of the ritual they fear, the typical elements of that religious system, nor the powers that the figure of e.g. the 'priest' holds, nor do they indicate real 'persecutors'; moreover, they are not considered to be in real danger due to the fact that they have not

[150] Cass. Civ. Sec. I - 27/05/21, no. 14849; Cass. Civ., Sec. III - 5/10/21, no. 26983 and no. 26984; Cass. Civ. Sec. III - 14/12/21, no. 39906.

requested state protection.[151] In this regard, it is useful to recall a ruling by the Court of Cassation concerning the case of an individual who had requested international protection in Italy because he had been the victim of numerous acts of intimidation in his country of origin, due to his refusal to hold the position of voodoo priest, inherited from his father. In this ruling, the applicant's appeal is upheld. In fact, the Court of Cassation found a flaw in the procedure for assessing the credibility of the applicant, and in the case in question, it highlighted a violation of the duty to cooperate in the investigation (Legislative Decree No. 251 of 2007, Articles 3 and 5). For the Court of Cassation, the judges of the merit examined the applicant's case on the basis of an apodictic reconstruction based on their own subjective perception of the facts. In the present case, there is no direct recognition of the applicant's situation in one of the categories defined by international protection, but there is nevertheless an invitation to re-examine the issue on the merits, according to a different point of view, closer to the applicant's cultural context. As far as these events may be shown to be "far" from the perceptions of the majority culture, to which the judiciary practitioners themselves belong, a greater effort seems to be required in assessing them - no less than in the presence of other facts that seem more plausible and closer to the judge's cultural context - which goes beyond the mere lack of objective evidence, precisely because of the particularity of the context, but also takes into account "the individual situation and personal circumstances of the applicant."[152]

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[151] On this issue, it might be useful to consider what is pointed out in the section of Guidebook No. 7 on the "sincerity of the subject." See Decarli (2020) for a more in-depth discussion of the problems often encountered with regard to the knowability of the rites by potential affiliates themselves.

[152] Already cited. Cass. Civ. sez. I - 27/05/2021, no. 14849: "On the other hand, the assessment of the credibility of the applicant's statements is not entrusted to the mere opinion of the judge but is the result of a legal proceduralisation of the decision, to be made not on the basis of the mere lack of objective evidence but in accordance with the criteria indicated in Legislative Decree no. 251 of 2007, art. 3, paragraph 5, taking into account "the individual situation and personal circumstances of the applicant" referred to in paragraph 3 of the aforementioned article, without giving exclusive importance to the applicant's "personal circumstances" and the "individual situation and personal circumstances of the applicant" referred to in paragraph 3 of the aforementioned article.Decree no. 251 of 2007, art. 3, paragraph 5, taking into account "the individual situation and personal circumstances of the applicant" referred to in paragraph 3 of the

3. *Overlaps between voodoo and witchcraft*

An analysis of the case law containing references to voodoo rites, especially in the field of international protection, has also revealed another fact: especially in cases where subjects report fear of the physical or psychic consequences of the ritual or claim to have already suffered them, there is sometimes a conceptual overlap between voodoo and the different cultural phenomenon of witchcraft (see the entry in this Guidebook "Witch Hunting and Witchcraft").

Although they are two different phenomena with their own characteristics (which is why individual fact sheets are dedicated to the two phenomena in this Guidebook), it sometimes happens that in judgments reporting asylum seekers' applications they overlap or become interchangeable,[153] due to the fact that the communicative tool used is often English, a secondary language for both the speaker and the listener, which increases the instability of the linguistic data. The fact that the boundary between the two phenomena often becomes blurred, however, should not be interpreted merely as a linguistic-lexical problem, but rather as a symptom that highlights how the two phenomena, although different, are at the same time intimately linked. If it is true that voodoo has a religious structure to all intents and purposes and on this it forges its capacity for awe with respect to the existence of individuals, witchcraft, understood as a spiritual force that governs human and natural events, insinuates itself into the faults that have in any case been created in that same spiritual substratum. Phenomena that are different, yes, but complementary, the result of a common interpretation of existence in which spirituality takes over and certain categorisations typical of western culture (life-death, man-nature, law-spirituality) are more nuanced.

The connection with witchcraft may be relevant to understand the real extent of subjugation, at times persecutory, that even the voodoo ritual is capable of having, giving rise to potential and multiple degradations of human rights.

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aforementioned article, without giving exclusive and decisive importance to mere discrepancies or contradictions on secondary or isolated aspects of the story".

[153] Pronouncements in which the voodoo-juju/witchcraft phenomena overlap: Civil cassation, sec. I - 23.11.2021, no. 36313; Civil cassation, sec. III - 20.04.2022, no. 12644; Civil cassation, sec. I - 03.08.2022, no. 24133; Civil cassation, sec. I - 15.12.2022, no. 36753.

Anthropological insights

[*Reading this in-depth study presupposes knowledge of the content presented in the cultural test relating to this practice*].

1. Detailed description of the practice. Rituals are often performed by priests and priestesses who summon spiritual entities to obtain healing, information and influence over natural forces, and frequently feature the performance of dances that accompany the moment of interaction with the spirits. It is believed that those who participate in the ritual can make contact with the *loa*, supernatural spirits with whom human beings can interact and who are particularly important to believers, while the supreme deity (Mawu) is too distant and unknowable. The *loa* play a very important role in the Voodoo religion in that, through continuous and constant interaction with them, believers can find their bearings, communicate with the divine and fulfill their destiny, to the extent that the *loa* can be said to direct the practitioner's life.

Rituals follow well-defined preparatory practices, which vary according to the social group where they occur, and are frequently accompanied by sacrifices, often of animals, that serve to appease the spirits and curry their favour. A ritual, for instance, may involve practitioners playing drums, singing and dancing to encourage a *loa* to possess one of their members and thus communicate with them. Offerings to the *loa* often include fruit, liquor and even animals. At the same time, offerings are also usually made to the spirits of the dead. Each voodoo ritual has a unique and at the same time similar character: in rituals, nothing is exactly the same because each ritual is seen as an unrepeatable experience, even if it is guided by a similar order, plot or pattern. From the moment a person, for various reasons, comes into contact with a priest for a ritual, they share an unprecedented space, full of different signs and materials, plants, sacred stones, new smells and flavours, in an atmosphere that is revealed little by little and where chants take centre stage. This spirituality does not only refer to the transcendent ideas, customs and worldviews commonly included in the rather ambiguous concept of religion, but also to a broad spectrum encompassing ethical and aesthetic value systems, models and stereotypes of various kinds, intuitive or emotional emotions and intelligence, specific worldviews, customs and habits.

Devotees who engage in this type of practice believe that it is necessary for the self to leave the body in order for the *loa* to possess the worshippers predisposed to possession, and during the practice the possessed are wont to acquire the motions and mannerisms of the *loa*, often remembering nothing of what they said or did once they come out of the trance.

In its initial phase, trance manifests itself with symptoms of a purely psychopathological nature, broadly reproducing the clinical picture of hysterical attacks. The possessed, at first, give the impression of having lost control of their motor system, but after being shaken by spasmodic convulsions, they are thrown forward, spin wildly, suddenly stiffen in place with their body stretched forward, falter, recover, lose their balance again and finally sink into a state of semi-fainting. Sometimes these attacks express themselves abruptly, sometimes they are heralded by precursor signs such as a distracted and anxious expression, a slight tremor, laboured breathing, sweat on the forehead or the face assuming a contorted and painful expression. The nature of the nervous attack also depends on the ritual condition of the possessed, and is usually more violent for the inexperienced. The rhythm of the drums and the intensity of the dance constitute the basic element of the ritual and the propitiatory framework for the 'descent' of the *loa* on their worshippers.

2. Voodoo death according to Walter B. Cannon.

In 1942, the physiologist Walter Bradford Cannon published an article entitled 'Voodoo Death'.[154] Although his paper was neither an ethnographic field report nor a discussion of anthropological hypotheses, it created a lively debate in anthropological and medical science, which may be of interest here to reflect on the role of fear in relation to voodoo rituals.

'Voodoo death' is a medical article, an investigation of physiology applied to an object of study in ethnography. Cannon, in fact, uses the accounts of anthropologists to refer to a phenomenon 'so extraordinary and so foreign to the experience of civilised people as to seem unbelievable':[155] men who are subjected to voodoo rites, witchcraft and other forms of black magic can die (and so much so that in almost all

[154] Cannon, W. B., 1942, 'Voodoo death', in *American Anthropologist*, vol. 44, no. 2.

[155] Ibid., p. 169

the cases he cites, they do die). Whether it is Hausa warriors who believe they have been victims of an evil spell, Maori women who have eaten forbidden fruit, Kanaka reed drivers who have fallen under a spell, or Australian aborigines injured with 'cursed' spears, they all meet the same fate: they die within a short time of the ritual.

The physiologist then asks himself whether these reports are reliable and whether there is an 'extra' factor that has not been taken into account in these deaths, for example whether these people were not in fact poisoned. Faced with this possibility, he momentarily discards the reports of anthropologists and focuses his attention on medically trained observers.

Epistolary communications with various doctors who worked in the area of these villages, however, confirm to him that the poisoning hypothesis must be discarded: death can only be attributed to a state of social pressure brought about by ritual, and this state would be characterised, according to Cannon, by fear, one of the most deeply rooted emotions in the organism and one that can be associated with very serious physiological disorders (a subject Cannon studied long and intensively).

Next, Cannon therefore refers to anthropologists. He cites Lucien Lévi-Bruhl and William Lloyd Warner, and from the latter he borrows his theory of the community's two attitudes towards the main actor in the voodoo ritual: radical exclusion from social life and subsequent acceptance as belonging to the 'sacred totemic world of the dead'. All these premises provide Cannon with the framework for the key question, the question that encapsulates his conviction and opens up the debate between the sciences: can fear kill?

From here on, Cannon enters his territory, that of the physiology and analysis of fear, emphasising the deleterious effects of the intense and persistent action of fear on emotional arousal, and referring to his experience as a military doctor in the First World War. In order to make the Western reader understand how fear can play a decisive role in the state of psycho-physical health, the article goes on to present cases of terrified soldiers in war situations and a case of post-surgical shock in soldiers, i.e. a series of the author's clinical indications not contextualised in 'other' territories but in the Western world. Cannon wants to show that the phenomenon is not an experience 'so foreign' to Western people, but that 'voodoo death can be real', and that it can be explained by the physiological impact of great emotional arousal, a state of intense and persistent fear that results in emotional arousal shock that resolves into a hypovolaemic condition that causes death.

None of this is demonstrable, according to the criteria of science, either medically or anthropologically. Cannon's is probably a provocation that still keeps an interesting debate on 'voodoo death' alive today. In our case, thinking about the conditioning of fear in relation to socially conditioned events can make us reflect on how much emotions and social pressures can only be understood by contextualising the place in which they occur, i.e. by trying to understand the 'other' in his or her way of thinking and acting and applying that relativistic anthropological gaze that allows us to enter into the 'other' mentality.

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Anthropological bibliography (recommended reading)

Blier, S. P. (1995). *African Vodun: Art, Psychology, and Power.* Chicago: University of Chicago Press.

Through the analysis of the artistic works of voodoo cultures, the author clearly succeeds in explaining the psychological and social dynamics that characterise these ritual activities, as well as the power games that come into play. A must-read for anyone wishing to delve deeper into the meaning of voodoo rituals and its significance.

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Index of Images