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JURISTENRECHT AND CRIMINAL LAW: EUROPEAN IDENTITY AS A LIMIT TO THE MISTAKE ON THE PROHIBITION

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Introduction

Female Genital Mutilation (FGM) is a serious problem of multiculturalism with regard to criminal law having as its fundamental principle the principle of legality. Considering the mobility of people, culture has become a circumstance which can avoid the reproachability of an offender when there is a mistake of law.

Notwithstanding, FGM is a practice that has been object of a continuous movement of censorship by the European community as a violation of human rights.

Thus, we aim to assert to which extent the European identity revealed by the human rights principle and values' system can be as-

sumed by jurists' law as a limit to the irreproachability of an offender carrying out FGM.

1. The principle of legality in criminal law

The principle of legality (*NPL*) regarding criminal law is stated in article 29 of the Portuguese Constitution (*Constituição da República Portuguesa*, CRP), where all the main elements of the principle are considered.

In domestic substantive criminal law, the principle of legality is foreseen in article 1 of the Criminal Code (*Código Penal*, CP). This article encompasses both the *nullum crimen sine lege* and the *nullum poena sine lege* maxims.

This broad provision addresses several aspects of the legality principle. First, there is no criminal offence without a law. Second, there can be no penalty without a law. In short, these two aspects reflect *Feuerbach's* Latin maxim *nullum crimen, nulla poena sine lege*[1]. Third, this principle has a specific rule regarding interpretation (prohibition of analogy).

The formal element of the principle of legality requiring criminal provisions to be based on a law is stated in art. 1 (1) CP, together with the previously mentioned art. 29 (1) CRP. As for the requirement of reasonable clarity, this requirement is not explicitly foreseen in either the Criminal Code or in the Constitution; rather, it is inferred from the general principle of legality. In regard to the limits on interpretation (specifically the prohibition of analogy), this aspect of the principle of legality is expressly regulated in art. 1 (3) CP. Finally, the *nullum crimen sine lege praevia* element is defined, together with the *lex mitior* principle, both in the Constitution (art. 29 (4)) and in the Criminal Code (art. 2 (1, 2 and 4)).

Considering the teleology of the principle, it is important to emphasise that it applies to all situations involving the punishment of the offender, including the requirements (objective and subjective) of criminal liability, such as the definitional elements of a particular crime and its penalties. In this sense, the principle has different significance as to situations relating to the liberty or freedom of the offender, such as justification or excuse defences[2]. This has consequences

[1] José de Faria COSTA, *Direito Penal,* Lisboa: INCM, 2017, 243.

[2] Jorge de Figueiredo DIAS, *Direito Penal. Parte Geral, Tomo I,* Coimbra: Coimbra Editora, 2007, 183; Teresa Pizarro BELEZA, *Direito Penal,* vol. I, 2.ª ed., Lisboa: AAFDL, 1998, 48.

for all elements of the principle of legality[3].

Therefore, all dogmatic phrases have to respect the principle of legality as a fundamental principle in criminal law[4].

2. Jurists' law and criminal law in the context of the mistake of law

The term Jurists' law, taking its name from the secular Roman jurists of the classical era[5], reflects the importance of *interpretatio* as peg for the frame of a legal doctrine[6].

Legal science or dogmatic can have three dimensions, namely describing law (the descriptive-empirical dimension), systematizing law (the logical-analytical dimension) and criticising law (the normative-practical dimension)[7].

The normative-practical dimension is particularly relevant in criminal law, since aiming at proposing solutions for problematical cases[8], it reaches the core of a normative area which has as its main purpose the resolution of the most serious conflicts in society[9].

A dogmatic phrase, to be acceptable, must be verified. The main criterion of the systematic verification is if said phrase is not in contradiction with the accepted dogmatic phrases and with the legal norms in force[10]. Moreover, it should be possible to recourse to said phrase in a (judicial) decision.

As a rule, the ignorance of the law does not exclude punishment *(ignorantia legis non excusat).* But the relevance given to culpability in modern criminal law lead to a development in denying the perception that error of law and ignorance of law where the same thing,

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[3] Inês Godinho, "Principle of legality — Portugal", in Sieber / Jarvers / Silverman, ed., *National Criminal Law in a Comparative Legal Context,* Vol. 2.2, 53-67.

[4] Except when there is an express exception in the normative system.

[5] Roughly from 150 b.c. to 250 a.d. See A. Arthur Schiller, "Jurists' Law", *Columbia Law Review* 58, 1226-1238, p. 1226.

[6] A. Arthur Schiller, "Jurists' Law", 1227; A. Castanheira Neves, *Metodologia Jurídica. Problemas Fundamentais,* Coimbra, 1993, 142 f.; 184 f.

[7] Robert Alexy, *Theorie der juristischen Argumentation,* Frankfurt: Suhrkamp, 1996, 308.

[8] Robert Alexy, *Theorie der juristischen Argumentation,* 308.

[9] On purpose and function in criminal law, see Ast, Stephan, "Überlegungen zum Verhältnis von Zweck und Funktion im Strafrecht", *zis-Online* 4 (2018) 115-118, 115 f.

[10] Robert Alexy, *Theorie der juristischen Argumentation,* 322.

so that the Criminal Code of 1982, differently to the one of 1886[11], takes into account the crescent mobility of persons together with the expansion of criminal law, and establishes a rule regarding the mistake of law.

In the context of the mistake of law, more specifically of the mistake on the prohibition, there are two possible dogmatic phrases, P_1 and P_2.

P_1 is the recognized dogmatic phrase regarding the legal norm N_1. For a dogmatic phrase to be included as an acceptable dogmatic phrase in the context of the legal norms in force, it is paramount that neither this dogmatic phrase nor it together with the accepted phrases and formulations of the legal norms in force contradict this dogmatic phrase[12].

P_2 is the new dogmatic phrase. So, for P_2 to be recognized and accepted as a dogmatic phrase, it must be compatible with the accepted dogmatic phrases and with the legal norms in force, in our case, N_1. N_1 is art. 17 (1) of the Portuguese Criminal Code (CP). P_1 is the dogmatic phrase under which the mistake on the prohibition is to be asserted as censurable or not under a personal-objective criterion of censurability[13].

P_2 is the dogmatic phrase under which the criterion is the one of the vencibility (avoidability) of the mistake, but adding a limit — a "definitional stop" — to the criterion on the censurability of the mistake of law[14]. Under P_2, when the non-censurability signifies the erosion of the deepest values of the legal community where the mistake occurred, there must be set a limit and said mistake must be deemed censurable[15]. P_2 thus sets a limit to the manifestation of tolerance N_1 represents.

FGM is a very relevant case on the impact — regarding the punishability of the offender — of the different dogmatic solutions represented by P_1 and P_2, since, as a problem of multiculturalism, it is inscribed in the core thematic that the mistake of law represents.

Some situations of FGM, especially those conducted by a person

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[11] Jorge de Figueiredo Dias, *Direito Penal,* 532.

[12] Robert Alexy, *Theorie der juristischen Argumentation,* 322.

[13] Jorge de Figueiredo Dias, *Direito Penal,* 640, requiring a general attitude of fidelity to the demands of the law. This general formulation of the criterion encompasses other similar ones expressing the same idea. See, however, José de Faria Costa, *Direito Penal,* 446-447; Maria Fernanda Palma, *O Princípio da Desculpa em Direito Penal,* Coimbra: Almedina, 2005, 210 f.

[14] Limit proposed by José de Faria Costa, *Direito Penal,* 450.

[15] José de Faria Costa, *Direito Penal,* 450-451.

who has just arrived from his or her country of origin, where FGM is a strong tradition, can be cases of mistake of law[16]. It is thus important to attain if this mistake should be deemed censurable or not censurable. Under the above mentioned criterion, represented by P_1, this mistake should be deemed as non-censurable[17], which would mean that the offender would not be punished for FGM. The problem under analysis, with reference to FGM, is weather P_1 and N_1 could lead to a different decision regarding the punishability of the offender in a specific case *X* than P_2 and N_1.

Before proceeding with said analysis it is important to note that the P_1 phrase enables a proposition considering a case-based censurability, based upon the indifference (coldness of character) of the offender towards the legal system of prohibitions (P_{1a}). Amongst the relevant cases for P_{1a} is FGM [18]. Reporting to the dogmatic phrase P_1 with the coldness of character element (P_{1a}), an offender having committed FGM would be punished. However said use of the phrase P_1 — as P_{1a} — is not compatible with the principle of legality (*NPL*) nor with the criminal law legal system (*NS*), because it presumes coldness of character of the offender who carries out FGM. Secondly, P_{1a} does not respect *NPL* since it enlarges the cases of punishability of the offender beyond the scope of art. 17 (1) CP (N_1). Furthermore, P_{1a} does not have in consideration that *NS* does not allow for presumptions of censurability (under the principle of culpability) and *NS* is based upon a system of a criminal law of the act and not of the offender[19]. Therefore, not to excuse the offender for FGM based on P_{1a} is not possible, since it is in contradiction with legal norms in force.

Bearing in mind that dogmatic can re-elaborate the jurisdictional realization of law[20], P_2 , by adding a limit, is both compatible with N_1 and with *NS*, though re-elaborating N_1 to include a limit therein.

P_2 does not presume a certain personality of the offender and works with the system of values of *NS*. In fact, under art. 29 (2) CRP *[t]he provisions of the previous paragraph do not preclude the punishment up to the limits laid down by domestic Portuguese law of an action or omission which was deemed criminal under the general principles of international law that were commonly recognized at the moment of its*

[16] Augusto Silva Dias, "Faz sentido punir o ritual do fanado?", *RPCC* 16 (2006) 187-238, p. 219.

[17] Augusto Silva Dias, "Faz sentido punir o ritual do fanado?", 227.

[18] Jorge de Figueiredo Dias, *Direito Penal,* 610-611 [note 21].

[19] José de Faria Costa, *Direito Penal,* 450-451.

[20] Castanheira Neves, "Fontes do Direito. Contributo para a revisão do seu problema", *BFD* 80 (1982) 169-285, p. 278.

commission. This means that this provision aims at safeguarding the possibility of punishment of offenders committing *delicta juris gentium*[21], *i.e.*, crimes against international law, as are crimes against peace or against human rights. But the statute itself only allows punishment within the limits of domestic law, safeguarding the principle of legality both on an international[22] and on a national level.

On the other hand, art. 17 (1) CP (N_1) only excludes culpability when the mistake is not censurable. This means that limiting the scope of the criterion of censurability is not against the possibility of the interpretation of the legal rule N_1 represents.

The reasons for P_2 have to be good enough to justify breaking the tradition of P_1 and P_{1a}[23].

The consistency of P_2 with *NS* and with N_1 has been indicated.

As such it is imperative to assert the reasons[24] of P_2, so that the burden of argumentation can be fulfilled.

This burden, subject to *disputatio* as in the long tradition of Jurists' Law[25] — thus hoping that the dogmatic phrase offered here becomes true jurists' law — is preceded by a brief overview on the legal regimen of the mistake of law in Portugal, so that the acceptability of P_2 is attained in its domestic legal system.

3. Mistakes of law

In order to analyse the acceptability of P_2 as a dogmatic phrase, it is important to make some general considerations on the mistakes of law.

The rule regarding the mistake of law, which is a manifestation of tolerance[26], is regulated under the already mentioned art. 17 CP.

Art. 17 CP *(Mistake about unlawfulness)*

1. Acts without culpability who acts without consciousness of unlawfulness of the act, if the mistake is not censurable.

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[21] G. Canotilho / V. Moreira, *CRP Anotada,* Vol. I, 4.ª ed., Coimbra: Coimbra Editora, 2007, 496.

[22] Considering the several Conventions and the Universal Declaration of Human Rights itself.

[23] Robert Alexy, *Theorie der juristischen Argumentation,* 327.

[24] Or the "values and reasons which unconditionally govern [the] thought" of the dogmatic phrase P2. See Joseph Raz, "On the Autonomy of Legal Reasoning", *Ratio Juris* 6 (1993) 1-15, p. 5.

[25] A. Arthur Schiller, "Jurists' Law", 1232.

[26] Augusto Silva Dias, "Faz sentido punir o ritual do fanado?", 226-7.

2. If the mistake is censurable, the offender is punished with the penalty applicable to the intended crime, which can be mitigated.

The mistake of law of art. 17 CP includes different types of mistakes. The first type is the case when the offender knowingly fulfils the definitional elements of the offence, however considers the act to be lawful.

Art. 17 CP also includes the so-called indirect mistake of law, i.e., when the offender, although knowing his conduct fulfils an offence description, is mistaken on the existence of a justification for his conduct which would render it lawful.

However, not all mistakes of law are comprised in art. 17 CP. In fact, art. 16 (1) includes an extension of the rule for the mistake of fact for some cases of the mistake of law[27].

In Portuguese criminal law, regarding the mistake of law, a distinction is made between a mistake on the prohibition *(erro sobre a proibição)* and a mistake on prohibitions *(erro sobre as proibições)*. This mistake on the prohibition, ruled under art. 17 (1) CP, entails the mistakes on those prohibitions punishing conducts worthless in themselves (*delicta in se*). The mistake on prohibitions comprises the prohibitions punishing conducts which are worthless only due to the prohibition (*delicta mere prohibita*), and is ruled under art. 16 (1) (3) CP [28].

For art. 17 CP to apply, the offender must not have had consciousness of unlawfulness. For that to be the case, the offender cannot be aware, even if slightly, that his conduct could be unlawful.

However, the exclusion of culpability as a favourable consequence to the offender does not take place if the mistake is considered censurable. Under P_2 it is considered that the mistake is censurable if there was a possibility of avoiding said mistake. In other words, if applying the required duty of care, the offender could have acquired the necessary knowledge of the unlawfulness of his conduct (art. 17 (1) CP).

The standard for the required duty of care is that of the average citizen placed in the offender's (social and existential) context and situation[29].

If the mistake is considered censurable, culpability will not be excluded, and the offender will be punished with the penalty applicable to the offence committed with intent. However, this penalty can be

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[27] José António VELOSO, *Erro em Direito Penal,* 2.ª ed., Lisboa: AAFDL, 1999, 24.

[28] José de Faria COSTA, *Direito Penal,* 452; Ac. TRP, 25 June 2014.

[29] Ac. TRP, 25 Feb. 2015.

mitigated (art. 17 (2) CP).

The characteristic trait of P_2 is the fact that if the mistake is against core values, such as human rights, the mistake cannot be tolerated and is deemed to be censurable, because not possible to enshrine a tolerable act. Regarding art. 17 (1) CP, we dare say, with Forst, "[t]he demand is to tolerate those beliefs and practices with which one disagrees but which themselves do not violate the criteria or the 'threshold' of reciprocity and generality, i.e., practices of individuals and groups who do not deny basic of respect to others (…)"[30].

The question under analysis is, then, if FGM is included in the concept of an offence against the deepest values of the legal order, and consequently if a mistake of law thereon is to be deemed censurable.

4. Mistake of law and female genital mutilation (FGM)

1. *The identity of Europe through its instruments: FGM as a violation of human rights*

i. *European Instruments*

Female Genital Mutilation (FGM) has been a concern of Europe for over 15 years.

In 2001, the European Parliament Resolution A5-0285/2001 on FGM[31] condemned it as "an act of violence against women, which constitutes a violation of their fundamental rights, particularly the right to personal integrity and physical and mental health, and of their sexual and reproductive rights; whereas such violations can under no circumstance be justified by respect for cultural traditions of various kinds of initiation ceremonies". This Resolution moreover urged the Member States to enact legislation specifically banning this practice. It also called on the Commission for the drawing up of a strategy to eliminate this practice in the European Union.

In 2004, the European Parliament Resolution on the Current Situation in Combating Violence against Women and Any Future Action (2004/2220(INI))[32] urged, once again, the European Commis-

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[30] Rainer FORST, "The Limits of Toleration", *Constellations*, 11/3 (2004) 312-325, p. 317.

[31] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2002:077E:0126:01-33:EN:PDF>.

[32] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0038+0+DOC+XML+V0//EN>.

sion to create "a comprehensive strategic approach at EU level, with the aim of putting an end to the FGM in the EU." Five years thereafter, the European Parliament Resolution of 24 March 2009 on combating female genital mutilation in the EU (2008/2071(INI))[33] continued condemning any form or degree of FGM and reiterated that "such violations can under no circumstances be justified by respect for cultural traditions". This was reinforced in the European Parliament Resolution of 26 November 2009 on the elimination of violence against women[34] *which* urged Member States to "reject any reference to cultural, traditional or religious practices or traditions as a mitigating factor in cases of violence against women, including so-called 'crimes of honour' and female genital mutilation."

In June 2012, the European Parliament Resolution of 14 June 2012 on ending female genital mutilation (2012/2684(RSP)[35] called on "Member States to continue to ratify international instruments and implement them through comprehensive legislation that prohibits all forms of female genital mutilation and provides effective sanctions against the perpetrators of this practice." In addition to legislation, the Resolution also called on "the relevant UN entities and civil society, through the allocation of appropriate financial resources, actively to support targeted, innovative programmes and to disseminate best practices that address the needs and priorities of girls in vulnerable situations, including those subjected to female genital mutilation, who have difficulty accessing services and programmes."

Finally, the Council of Europe Parliamentary Assembly Recommendation 1903 (2010) Fifteen years since the International Conference on Population and Development Programme of Action[36] acknowledged that "harmful practices meant to control women's sexuality lead to great suffering. Among them is the practice of female genital mutilation, which is a violation of basic rights and a major lifelong risk to women's health."

More recently was adopted a fundamental instrument on this subject, namely the Convention of Istanbul (Convention on preven-

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[33] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0161+0+DOC+XML+V0//EN>.

[34] <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2009-0098+0+DOC+XML+V0//EN>.

[35] <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-20120261&langua-ge=EN&ring=B7-2012-0304>.

[36] <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?document-Id=090000168046064a#search=Council%20of%20Europe%20Parliamentary%20Assembly%20Recommendation%201903%20>.

ting and combating violence against women and domestic violence[37]), adopted by the Council of Europe and opened for signature in May 2011. Under this Convention, States must involve all relevant actors in the implementation of the Istanbul Convention, including national parliaments and institutions and non-governmental and civil society organizations.

The Convention, recognising, with grave concern, that women and girls are often exposed to serious forms of violence such as domestic violence, sexual harassment, rape, forced marriage, crimes committed in the name of so-called "honour" and genital mutilation, which constitute a serious violation of the human rights of women and girls and a major obstacle to the achievement of equality between women and men, establishes in its art. 38 that Parties shall take the necessary legislative or other measures to ensure that conducts consisting in FGM are criminalised.

ii. *The ECHR*

Regarding the jurisprudence of the European Court of Human Rights, there have been mainly five relevant decisions regarding Feminine Genital Mutilation (FGM)[38].

Three of them, although be it ruled as decisions on the admissibility (Collins and Akaziebie v. Sweden [2007], Izevbekhai v. Ireland [2011] and Omeredo v. Austria [2011]), recognized FGM was contrary to the European Convention on Human Rights. In Collins and Akaziebie v. Sweden, the Court declared that subjecting a woman to FGM amounted to ill-treatment contrary to Article 3 (prohibition of inhuman or degrading treatment) of the Convention. This was also the understanding of the Court in Izevbekhai v. Ireland and Omeredo v. Austria, to which "subjecting any person, child or adult, to FGM would amount to ill-treatment contrary to Article 3 of the Convention".

The case Sow v. Belgium refers to an asylum claim of a national of Guinea on the grounds of risking a re-excision upon return to Guinea. Having failed to substantiate a real risk, the Court held there would be no violation of Article 3.

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[37] <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>.

[38] *Collins and Akaziebie v. Sweden,* 8 March 2007 (decision on the admissibility); *Izevbekhai v. Ireland,* 17 May 2011 (decision on the admissibility); *Omeredo v. Austria,* 20 September 2011 (decision on the admissibility); *Sow v. Belgium,* 19 January 2016; *Bangura v. Belgium,* 14 June 2016 (strike-out decision).

Finally, the case Bengura v. Belgium, since the applicant had received a residence permit, the Court decided to strike out the case of the list, since there was no more risk for the applicant of FGM if returned to Sierra Leone.

From this case list, it is unquestionable that the Court considers FGM to be a violation (at least) of Article 3 of the Convention.

The ECHR can also be considered to contributing, though its decisions, to the construction of a European dogmatic on human rights[39].

In this sense, both the European Instruments and the ECHR consider FGM offensive of human rights, which should not be considered justified under no circumstance by the respect for cultural traditions.

2. ***and human rights as the European identity heritage***

The importance of human rights in Europe, notwithstanding its long development, is patent in the European Convention for the Protection of Human Rights and Fundamental Freedoms[40] and, more recently, in the EU Charter of Fundamental Rights[41].

The principle of legality is also foreseen in this Convention, namely in art. 7, under which number 1 states that *no one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense under national or international law at the time when it was committed.* However, the ECHR limits this principle in number 2 of article 7 [42], in the sense that the punishment of the offender can exist without previous law if the *act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations*. The importance of this rule is that it recognizes a conflict of interests, namely between the prohibition of retroactive application of criminal law and the impunity of offenses against core values recognized as such by the international community.

The specific European identity, especially after WW II, has as its core values human rights, democracy and the rule of law (which translates onto the principle of legality in criminal law). Particularly regarding human rights, this is shown by instruments such as the European

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[39] Regarding the methodological interest of the European Courts, from the perspective of the European Court of Justice, see Karl-Heinz LADEUR, "Richterrecht und Dogmatik — eine verfehlte Konfrontation?", *KritV* 79 (1996) 77-98, p. 81.

[40] Signed in Rome on November 4th, 1950.

[41] Entered into force by the signature of the Treaty of Lisbon, in 2009.

[42] G. DANNEKER, *Das intertemporale Strafrecht*, Tübingen: Mohr Siebeck, 1993, 180.

Instrument for Democracy and Human Rights (EIDHR), which is the "concrete expression of the EU commitment to support and promote democracy and human rights"[43], and the external action of the EU, whereas "the EU views all human rights as universal, indivisible and interdependent. It actively promotes and defends them both within its borders and when engaging in relation with non-EU countries"[44].

As such, at a European level, offenses against core values can constitute an exception to the principle of legality.

Thus, human rights are part of the core values of the European identity.

3. *FGM as non punishable mistake on the prohibition (Augusto Silva Dias)*

Considering N_1 and P_1, Silva Dias argues that it is not easy to consider censurable the lack of consciousness of wrongfulness of the offender in the situation of having just arrived from a country where FGM is culturally accepted and practiced[45]. In fact, the criterion P_1 recognizes does not seem to allow for another dogmatic solution.

However, the problem is that this solution means the overstretching of tolerance. In other words, the exclusion of culpability deriving from N_1 would regard the non punishability of an offense against human rights which mirror the core values of European identity.

5. European identity as a limit to the mistake on the prohibition

As far as known, in Portugal only Faria Costa adds a limit to N_1, giving as an example the case of female genital mutilation as a case where limit P_2 adds to N_1 results in a different solution of censurability, punishing an offender of FGM. In fact, if one would apply said standard to a person who had just arrived from a country where such practice is legal, the mistake could be considered as not being censurable, as, in coherence with N_1, Silva Dias does.

However, under Faria Costa, the dismissal of censure cannot signify the denial of the deepest values of the community where the mistake takes place. As such, one must admit a "definitional stop" and, in those

[43] <http://www.eidhr.eu/whatis-eidhr>.

[44] <https://eeas.europa.eu/headquarters/headquarters-homepage/414/human-rights-democracy_en>.

[45] Augusto Silva DIAS, "Faz sentido punir o ritual do fanado?", 227.

cases where said denial occurs, the favourable consequence to the offender does not take place and, therefore, the mistake is to be deemed as censurable [46]. Said deepest values, enshrined in the European legal instruments referred to above, are also aligned with the Universal Declaration of Human Rights (UDHR). This Declaration, available today in several hundred languages[47], is a global testament to the value of human dignity, or, as in the Preamble, "the inherent dignity and (…) the equal and inalienable rights of all members of the human family". Article 5 of the Declaration foresees the prohibition of inhuman or degrading treatment, regarding all members of the "human family". This global principle, embodied in Article 3 of the ECHR, is thus applicable to the identity of dignity Europe is based on, notwithstanding being it of a global reach[48].

Consisting in an objective limit to the scope of art. 17 CP (N_1), P_2 respects the principle of legality (*NPL*) and is consistent with the criminal law legal system (*NS*). P_2 brings forth an argument deriving from the European identity, limiting the scope of the mistake on the prohibition when it affronts that identity. In fact, even if accepting the view of the relative autonomy of doctrine in law, that should give way when conflicting with moral reasoning, the limit P_2 imposes is also morally justified, since it aims at protecting the core values that human rights represent. As Raz puts it, "[l]egal doctrines are justified only if they are morally justified, and they should be followed only if it is morally right to follow them"[49].

P_2 is then a dogmatic phrase supported by the European identity, fulfilling the conditions to breaking the tradition of P_1.

Conclusions

Human rights are a most significant part of the European identity and both the European legal instruments and the decisions of the ECHR establish FGM as an offense against human rights.

Accepting FGM as a non censurable mistake of law is accepting that an offense against human rights can be irreproachable. This conception, though dogmatically sustainable, leads to an oversized understanding of tolerance.

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[46] José de Faria COSTA, *Direito Penal,* 450-451.

[47] <http://www.un.org/en/universal-declaration-human-rights/>.

[48] Which means that an offender of FGM could not claim an absolute ignorance of said principle or even cultural reasons against the mentioned principle. Such a claim, under P_2 would always be censurable.

[49] Joseph RAZ, "On the Autonomy of Legal Reasoning", 15.

As such, the respect for the core values of European identity — aligned with the global values of human dignity — should implicate a limit to the mistake of law, as by P_2, being considered as an acceptable dogmatic phrase, as we have tried to show.