



MATRIFOR PROJECT

ANALYSIS OF EU DIRECTIVE 2011/36/EU TRANSPOSITION - SPAIN

Antigona Group – November 2014



**Project “MATRIFOR - Approaching forced marriages as a new
form of trafficking in humans beings in Europa”
Co-financed to European Commission
DG Home Affairs
Directorate A – Internal security
Programme Prevention of and Fight against Crime**

INDEX

1. Objective of this document..... 3

2. How the EU Directive on trafficking in human beings has been transposed to the Spanish legal system?..... 3

3. How the EU Directive on rights, support and protection of victims of crime has been transposed to your national legal system? 6

4. Is there any specific legislation on forced marriage in your country, with binding effects (not only recommendation or public policies), for example, a specific law on trafficking on human beings including forced marriage? 10

5. Does your country collect specific statistics on trafficking in human beings? If so, does it distinguish the cases of forced marriages? 10

6. How many cases of forced marriages have arrived to the courts in your country? And if so, have they been defined as a trafficking of human beings, gender violence or slavery? 11

7. How is the latest GRETA report of your country assessment of the treatment of forced marriage as a form of trafficking of human beings?..... 12

8. Has your country signed the Palermo Protocol? What has been done so far to fulfill the commitments under this protocol in relation to forced marriages? 12

9. Does the latest CEDAW report of your country mention the legal treatment of forced marriage?..... 13

10. Conclusions 14

1. Objective of this document

The present document aims at studying how Spain has made the transposition of the EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Directive 2011/36/EU)

We have also taken into account the EU Directive 2011/36/EU together with the EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

For the purpose of this document we use the definition of Trafficking in human beings contained in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations (Palermo Convention), contained in article 3:

“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”

2. How the EU Directive on trafficking in human beings has been transposed to the Spanish legal system?

The EU Directive on trafficking on human beings explicitly recognized forced marriage as a new form of trafficking of human beings. The Directive recognized a broader concept of trafficking in human beings than the previous directive including additional forms of exploitation, but it only explicitly recognized forced marriages as a form of trafficking in human beings in the preamble point 11, and then it demands to fulfill the elements foreseen in the crime defined in article 2.

Preamble 11. In fine

“...forced marriages in so far as they fulfill the constitutive elements of trafficking in human beings”

The preambles of the laws do not have binding effects, but they have an important role in understanding and applying the articles of the law with binding effects.

According to this article 2, forced marriages should include the following behaviours:

***“The recruitment, the transportation, transfer, harbouring or reception of persons, including the exchange or transfer of control over those persons¹, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits² to achieve the consent of a person having control over another person, for the purpose of exploitation³.*”**

2.A position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved”.

In Spain forced marriages has been considered sometimes as a form of gender violence (see for example the art. 5.quart.e) of the Catalan Law 5/2008, of 24th April, on the right of women to eradicate sexist violence).

Forced marriage has recently become a crime under the Spanish Criminal Code (due to a reform that entered into force the 1st July 2015). Forced marriage is now included as a form of trafficking in human being in article 177 Bis of the Criminal Code and as an aggravated type of coercion in article 172 Bis of the Criminal Code.

This double criminalisation is confusing and it would be necessary to wait the application and interpretation of both article by the courts. The possible criminalisation of forced marriage under the article 177 as a form of trafficking in human beings, has a

¹ Forced marriages need at least one of these acts, not only when the girl or woman is forced to travel to another country to get married, or brought to Spain to get married, but also even if she already lives in Spain and she is going to be forced to marry someone already living in Spain, the control over her is passed from her parents or relatives to the husband.

² Forced marriage always need some of these means, or some of them at the same time. Important the definition done in the section 2 of the article to define which is a situation of vulnerability. Many women forced to get married against their will finally consent to do so, because they are in this situation of vulnerability where they do not have any alternative.

³ A forced marriage is obviously a form of exploitation. Women are obligated to take care of their husband, their children, even their family in law relatives. Moreover a marriage means to have sexual relationships with someone you do not want.

more severe punishment (from 5 to 8 years of imprisonment) but it needs to fulfil the conditions to be qualified as trafficking in human beings (use of violence, intimidation or fraud; taking profit of a situation of superiority, or victim's necessity or vulnerability; the existence of a payment or profit). The victim of a crime of trafficking in human beings can receive special measures of support during and after the trial, according to the Spanish new law on the Status of the victim that will enter into force the 27th October 2015.

The EU Directive also states that the crime of trafficking in human beings should have a punishment of up to 5 years of imprisonment, and in aggravated cases: when the victim is someone especially vulnerable (for example minors); when committed within the framework of a criminal organization; when posing in danger the victim's life or when using serious violence or has caused serious harm to the victim, the imprisonment can be up to 10 years.

If forced marriage cannot be criminalised under this article of trafficking in human beings, there is the second option of article 172 Bis. A possible explanation of this double criminalisation is the commitments adopted by the Spanish State under the international and European legislation. First, the Spanish State had to include in the criminal code the EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Directive 2011/36/EU), and article 177 Bis is one of the consequences.

Secondly, the Spanish State had to include a new crime on forced marriage according to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention). The Istanbul Convention entered into force on 1st August 2014. In April 2014 Spain ratified it. Article 37.1 of the Istanbul Convention obliges Member States to criminalize forced marriage as a form of violence against women.

Nevertheless trafficking on human beings has been generally used for cases of sexual exploitation and linked to forced prostitution, but the EU Directive has a wider scope.

Although it is important to remember than the EU Directive definition of trafficking in human being includes when the person is brought from outside the country, or when it is already living in our country. Travelling is not an essential requirement to have trafficking in human beings. During the previous fieldwork carried out in Spain on the prevalence and factors influencing forced marriage, we have encountered cases of

forced marriages of women and girls who were brought from third countries to be married against their will, and also (and sometimes more frequently) they were already living in our countries, in fact, many of them were even born in our countries.

Moreover, there is a tendency to confuse trafficking in human beings with smuggling in the Spanish legislation, as for example the Circular v5/2011 about criteria for the specialized unit of foreign and migrant law of the Public Attorney, that requires intra territorial movement for both of them. But as stated in the EU Directive and in the Palermo protocol in article 3:

(a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

3. How the EU Directive on rights, support and protection of victims of crime has been transposed to your national legal system?

This Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/HJA (Directive 2012/29/EU) has mainly been transposed through the recently approved of law 4/2015, of 27 of April, on the status of the crime victims (to be entered into force the 27th October 2015).

This Directive 2012/29/EU recognizes forced marriage as a form of gender violence in the section 17 of the preamble:

"...Gender-based violence is understood to be a form of discrimination and a violation of the fundamental freedoms of the victim and includes violence in close relationships, sexual violence (including rape, sexual assault and harassment), trafficking in human

beings, slavery, and different forms of harmful practices, such as forced marriages, female genital mutilation and so-called 'honour crimes'.

Here, forced marriage appears as a different form of gender based violence than trafficking in human beings.

Once again, forced marriage only appears in the preamble, and never again during the development of the Directive.

In the transposition of the Directive 2012/29/EU to the Spanish national law, there is not any mention to victims of forced marriage, although since forced marriage is finally included as a specific crime in the Spanish criminal code, the wide definition of victim used in the law on the status of the victims will allow to include victims of any crime, Spanish or from other nationalities, living in Spain, their partners, children and direct relatives (article 1 of the Law 4/2015).

The law on the status of the victims recognizes:

- The right to understand and be understood (article 4);
- The right to receive information from the first contact with a competent authority (article 5);
- The right of the victim when making a complaint (article 6);
- The right to receive information about their case (article 7) with specific mention to the victims of gender violence, although according to the Spanish legislation, the only victims of gender violence are those women victims of violence within a relationship, see article 1 of the Organic Law 1/2004, of 28th December, of Measures for an Integral Protection against Gender Violence. Therefore victims of forced marriages are not included here.
- The right to interpretation and translation (article 9);
- The right to access victim support services (article 10) where women victims of gender violence and domestic violence and their children are specifically mentioned to receive all the previous rights and the rights connected to the

protection of the victim (from article 19-26). Once again forced marriage is not included in the legal definition of gender violence or domestic violence according to the Spanish law.

It is interesting to note that in the Directive, they mentioned “victims of sexual violence, victims of gender-based violence and victims of violence in closed relationships”. This concept is much wider than the one used in the Spanish law.

- The right to actively participate in the criminal proceedings (article 11)
- The right in the event of a decision not to prosecute (article 12)
- The right to participate in the sentence implementation, that includes a specific mention for the victims of trafficking in human beings (since now the Criminal Code includes forced marriage as a form of trafficking in human beings)
- The right to restorative justice services (article 15) that included mediation except the cases forbidden by law. According to the Spanish legislation, mediation is forbidden in cases of gender violence, but if forced marriage is not considered a forced marriage and it will only appear in the Spanish Criminal Code as a separate crime, or as a form of trafficking in human beings, mediation could be provided in cases of forced marriage!
- The right to legal aid (article 16). The access to free legal aid according to the Spanish legislation requires to apply and prove not enough economic resources to pay for a lawyer. Free and immediate legal aid is given to victims of gender violence, terrorism and trafficking in human beings once they have made a legal complaint⁴. Since forced marriage is not included in the legal definition of gender violence according to the Spanish legislation, only when forced marriage has been prosecuted as a form of trafficking in human beings, their victims could benefit from this possibility.
- The right to reimbursement of expenses (article 18)

⁴ See articles 2 of the Royal Decree Law 3/2013, of 22nd February, that modifies the taxes regime in the field of the Administration of Justice and the system of free legal aid, that modifies the Law 1/1996, of 10th January, about Free Legal Aid.

- The right to the return of property (article 18)
- The rights of victims resident in another Member States (article 17)
- The right to protection (article 19)
- The right to avoid contact between victim and offender (article 20)
- The right to protection of victims during the criminal investigations (article 21)
- The right to protection of privacy (article 22)
- The right to individual assessment of victims to identify specific protection needs (article 23). The Directive 2012/29/EU says:

“Particular attention shall be paid to victims of (...) human trafficking, gender-based violence, violence in a close relationship, sexual violence...”

The Spanish Law recognizes specially attention to victims of:

Art. 23.2.a.2º If the victim is a minor, or in need of special protection or vulnerability (that could be the case of victims of FM).

Art. 23.2.b. 3º Crimes committed by the spouse or person linked with an analogous affective link, even without cohabitation, or over children, parents or siblings

4º Crimes against the sexual freedom and indemnity

5º Crimes of trafficking in human beings

Once again, victims of forced marriage could be included here if they have received a sentence under its consideration of a form of trafficking in human beings.

- The right to protection of victims with specific protection needs during the criminal proceedings (article 25)

Again the Directive 2012/29/EU recognizes in article 23.2.d):

“All interviews with victims of sexual violence, gender-based violence or violence in a close relationship, unless conducted by a prosecutor or a judge, being conducted by a person of the same sex as the victim, if the victim so wishes”

But the Spanish Law only recognizes specially attention to victims of crimes committed by the spouse or person linked with an analogous affective link, even without cohabitation, or over children, parents or siblings and crimes against the sexual freedom and indemnity (not included victims of trafficking in human beings or victims of forced marriage).

- The right to protection of child victims during criminal proceedings (article 26)
- The Special Offices to attend Victims (article 27)
- Specific training on victims’ protection (article 30) to judges, public attorneys, legal secretaries, police forces, forensics, staff of the administration of justice, staff of the victims’ offices, lawyers

4. Is there any specific legislation on forced marriage in your country, with binding effects (not only recommendation or public policies), for example, a specific law on trafficking on human beings including forced marriage?

There is not such a law in Spain with binding effects. There is not such a specific law on trafficking in human beings, apart from the applicable crimes of the Criminal Law.

5. Does your country collect specifics statistics on trafficking in human beings? If so, does it distinguish the cases of forced marriages?

Not. Spain collects statistics of trafficking in human beings, but since forced marriage until very recently was not included as a form of it, there are not such statistics at national law.

There are only statistics on forced marriage at the Autonomous Community of Catalonia, because the Catalan law on sexist violences explicitly recognizes forced marriage as a form of community violence. Therefore the Catalan police forces are obliged to collect statistics on this problem.

The Inform of the Spanish Obudsman 2012 on “Trafficking in human beings in Spain. Invisible victims” denounces that the most documented form of trafficking in human beings is the one for sexual exploitation, since there are more legal complaints. The other forms of trafficking in human beings, are not sufficiently present in the official statistics: forced labour or servitude; domestic servitude; forced marriages; extraction of body organs; exploitation for begging and war.

The UN Report on trafficking in human beings of 2009, also shares the same denounce about the invisibility of all forms of trafficking in human beings within the official statistics, making some forms invisible, as it is the case of forced marriages.

6. How many cases of forced marriages have arrived to the courts in your country? And if so, have they been defined as a trafficking of human beings, gender violence or slavery?

There are not cases of forced marriages as such, because until the 1st of July 2015 when the reform of the Criminal Code entered into force, forced marriages did not constitute a crime. If any case of forced marriage has arrived to the Spanish courts, it has been as a crime of illegal detention, kidnapping, physical or sexual violence. Therefore it is impossible to have an exact number of cases arriving to the judicial system.

7. How is the latest GRETA report of your country assessment of the treatment of forced marriage as a form of trafficking of human beings?

The report presented by the Experts Group on the Fights Against Trafficking in Human Beings (GRETA) in relation to the Council of Europe Convention against Trafficking in Human beings⁵ recommends the Spanish State to improve its policies to prevent this crime and it demands an integral Law on Trafficking in Human Beings, including all forms of exploitation from a human rights, gender and minors' perspective. The report also recommends to take into account the needs of international, protection of some victims that could be granted the refugee status and not brought back to their countries of origin.

The report once again underlines that the advancements in trafficking in human beings in Spain have been directly exclusively to the trafficking in human beings for sexual exploitation, leaving out other forms of trafficking, as for example forced marriage.

8. Has your country signed the Palermo Protocol? What has been done so far to fulfill the commitments under this protocol in relation to forced marriages?

Spain signed the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Palermo protocol) the 13th December 2000 and ratified it the 1st May 2002. The Palermo Protocol entered into force the 25th December 2003. It is the first global legally binding instrument with an agreed definition on trafficking in persons. The intention behind this definition is to facilitate convergence in national approaches with regard to the establishment of domestic criminal offences that would support efficient international cooperation in investigating and prosecuting trafficking in person's cases. An additional objective of the Protocol is to protect and assist the victims of trafficking in persons with full respect for their human rights.

⁵ Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Spain (27 September 2013).

The definition of trafficking stated in article 3 of this Protocol is exactly the one used in the Directive 2011/36/EU. Therefore Spain has fulfilled these commitments with the recent reform of the Spanish Criminal Code and the new Law on the status of the crime's victims.

9. Does the latest CEDAW report of your country mention the legal treatment of forced marriage?

In two recommendations of the CEDAW convention (number 12 and 19), the Committee has demanded the State Parties to collect statistics on the different forms of gender violence. For this Committee, forced marriages constitute a form of gender violence.

The latest CEDAW report in Spain published 15th April 2003⁶. It is mainly focused on the Spanish developments of Spain in the field of trafficking in human beings for sexual exploitation and gender violence, limited to domestic violence and sexual harassment.

There is a shadow report made by a group of women's organizations, NGOs on the field of development and other organizations of the civil society published the 4th June 2014.

They underlined in the field of trafficking in human beings the lack of an integral approach, having only isolated and disconnected legal provisions on the subject. Moreover they emphasized the lack of transposition of the Directive 2011/36/UE, with deadline 13th April 2013.

The only existing approach on the field of trafficking in human beings has been through the approval of migrant and security policies. There is not an integral approach of trafficking in human beings taking into account the different specificities.

⁶ Considerations of reports submitted by States parties under Article 18 of the Convention on the Elimination of All Forms of Discrimination Against Women. Fifth periodic report of State Parties. Spain (15th April 2003).

10. Conclusions

Spain has very recently fulfilled its commitments to transpose the EU Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA (Directive 2011/36/EU) and the EU Directive 2011/36/EU together with the EU Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

It resulted in a modification of the Criminal Code that include two different crimes applicable to the problem of forced marriage: article 177 Bis that include it as a form of trafficking in human beings and article 172 Bis that considers forced marriage as an aggravated form of coercion. This double criminalization is confused and we will have to wait the real applicability of these two articles. It seems it would be more difficult to apply the article 177 Bis and consider forced marriage as a form of trafficking in human beings, and if a case of forced marriage is prosecuted, it will likely be applied article 172 bis.

With this double criminalization, the Spanish State has also fulfilled its commitments under other international legal instruments, as the Istanbul Convention and Palermo Protocol.

But this legal option, together with a lack of preventive policies, awareness raising campaigns, specific training for legal actors and accompanying economic resources, these legal provisions will only play a symbolic role.