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# The Legal Framework for the Fight against Female Circumcision: From Cultural Indulgence to Human Rights Violations. The French Example

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## Abstract

The harmful consequences of female circumcision for women's health have been demonstrated and are regularly recalled by the World Health Organisation. Whereas in the past, the cultural dimension of the practice was emphasised, which result in impunity or absence of guilt, it is now considered by the United Nations as a violation of human rights, especially of the right to health. In 2012, the General Assembly asked States for a total ban on the practice. Despite the consensus on the punishability of female circumcision, its enforcement diverges, in particular in Western Europe. France is considered as a model in this area, that's why this study focuses on it. Yet, under French law, there is no special legislation criminalising the practice: female circumcision is punishable on grounds of mutilation. However, the French success is not complete: the prevention of such acts could be improved.

## Keywords

Female circumcision; female genital mutilation; right to health; human rights; criminal law; custom; cultural practice; asylum

## 1 Introduction

In February 2016, UNICEF estimated that some 200 million women and girls had suffered female circumcision in 30 countries<sup>2</sup>, with up to a quarter of them being under the age of 15. According to the most recent figures, there were 53,000 circumcised adult women living in France as at 2004<sup>3</sup>.

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<sup>1</sup> National Centre for Scientific Research (France).

<sup>2</sup> See United Nations Children's Fund, *Female Genital Mutilation/Cutting: A Global Concern* (New York: UNICEF, 2016). See also Armelle Andro and Marie Lesclingand, 'Female Mutilation: overview and current knowledge', *Population*, 2016, Vol. 71, No. 2, p. 228, <https://www.ined.fr/fichier/rte/41/population%202016/FemaleGenitalMutilation.pdf>, retrieved 19 December 2018.

The first female circumcision cases emerged in France during the 1970s, following the arrival of migrants practising that rite and the Soninke community in particular. The first criminal trial took place a short time later, in 1979, when a 3 year-old girl named Doua died following her circumcision. That judicial response was initially taken very badly by the Malian community concerned, which viewed the prosecutions as an assault on its cultural identity<sup>4</sup>. Female circumcision is a rite of passage for the Soninke. It is claimed that the practice contributes to a differentiation between the sexes and promotes fertility; it is intended to remove any vestige of masculinity in women and young girls.<sup>5</sup>

Contrary to received thinking, female circumcision is not specific to the Muslim community:<sup>6</sup> it is also practised by East African Christians and indeed has been since the times before Islam.<sup>7</sup> Female circumcision is therefore more a cultural than a religious rite<sup>8</sup>, even if the two aspects are all too often inexorably linked. Furthermore, genital mutilation (hereinafter FGM) has historically been practised in Europe, not for ritualistic reasons but rather on hygiene or therapeutic grounds.<sup>9</sup> Thus, in the 19<sup>th</sup> century, some doctors recommended its use in treating pathologies such as epilepsy and hysteria.<sup>10</sup> Nowadays, however, the harmful consequences of female circumcision for women's health have been very clearly demonstrated and are regularly recalled by the World Health Organisation.<sup>11</sup> During the excision itself, girls and women experience pain and bleeding<sup>12</sup>; they are exposed to risks of fatal haemorrhaging and subsequent infections. Later, there can be complications when giving birth. Lastly, and above all, the practice leaves psychological scars.

In this context, the fight against female circumcision has intensified and become universal: whereas in the past the cultural dimension of the practice was emphasised, which result in impunity or absence of guilt, it is now considered by the United Nations as a violation of human rights, especially of the right to health (2). Despite the consensus on the punishability of female circumcision, its enforcement diverges, in particular in Western Europe. France is considered as a model in this area<sup>13</sup>: it brings the highest number of prosecutions for genital mutilation in all of Europe; that's why this study focuses on it. However, under French law, there is no special legislation criminalising the practice: female circumcision is punishable on grounds of mutilation (3). Yet in France, the customary nature of female circumcision, while often argued, does not allow

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<sup>3</sup> Andro Armelle, Lesclingand Marie, Cambois Emmanuelle, Cirbeau Christelle, *Excision et handicap : mesure des lésions et traumatismes et évaluation des besoins en chirurgie réparatrice, rapport final -volet quantitatif du projet*, March 2009, p. 3., [http://www.univ-paris1.fr/fileadmin/CRIDUP/Rapport\\_final\\_ExH\\_volet\\_quantitatif.pdf](http://www.univ-paris1.fr/fileadmin/CRIDUP/Rapport_final_ExH_volet_quantitatif.pdf), retrieved 22 November 2018.

<sup>4</sup> National Consultative Commission on Human Rights (*Commission Nationale Consultative des Droits de l'homme*, hereafter CNCDH), *Etude et Proposition sur la Pratique des Mutilations Sexuelles en France, Etude Adoptée par l'Assemblée Plénière le 30 avril 2004*, p. 4.

<sup>5</sup> See Françoise Couchard, *L'Excision* (Paris: PUF, 2003) particularly p. 15 et seq and p. 60 et seq.

<sup>6</sup> For further information see Shayla McGee, 'Female circumcision in Africa: procedures, rationales, solutions, and the road to recovery', *Washington & Lee Race & Ethnic Ancestry Law Journal* 11 (2005) 137.

<sup>7</sup> *Ibid.*, p. 57 et seq.

<sup>8</sup> On this matter, see Kathleen Monahan, 'Cultural Beliefs, Human Rights Violations, and Female Genital Cutting', *Journal of Immigrant & Refugee Studies* 5(3) (2007) 21-35, [https://www.tandfonline.com/doi/abs/10.1300/J500v05n03\\_02](https://www.tandfonline.com/doi/abs/10.1300/J500v05n03_02), retrieved 19 December 2018.

<sup>9</sup> *Ibid.*, p. 37.

<sup>10</sup> See K.G. Fisaha 'Female Genital Mutilation: A Violation of Human Rights', *Journal of Political Sciences and Public Affairs* 4(2) (2016) No. 1000198, p. 1. On this matter, see also McGee, supra note 6. p. 145.

<sup>11</sup> See, e.g. World Health Organisation (hereafter WHO), *Female Genital Mutilation*, factsheet No. 241, updated January 2018.

<sup>12</sup> See Beth D. Williams-Breault, 'Eradicating female genital mutilation/cutting: Human rights-based approaches of legislation, education, and community empowerment', *Health and Human Rights Journal* (14 August 2018), available online: <https://www.hhrjournal.org/2018/08/eradicating-female-genital-mutilation-cutting-human-rights-based-approaches-of-legislation-education-and-community-empowerment/>, accessed 2 December 2018.

<sup>13</sup> See Renée Kool and Sohail Wahedi, 'Criminal enforcement in the area of female genital mutilation in France, England and the Netherlands: A comparative law perspective', *International Law Research* 3(1) (2014), available online : [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2433554](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2433554), accessed 19 December 2018

defendants to evade criminal penalties (4). Furthermore, French law strives to protect potential victims of female circumcision, particularly by granting them asylum. However, the French success is not complete: the prevention of such acts could be improved (5).

## 2 The Universalisation of the Fight against Female Circumcision

Given the risks that it presents to women's health, female circumcision is routinely condemned by the international community,<sup>14</sup> and particularly by the United Nations General Assembly.<sup>15</sup> However, whereas in the 1980s, female circumcision was framed only as a health problem,<sup>16</sup> it is now considered furthermore as a human rights matter. Indeed, the previous strategy failed to motivate large-scale behaviour change: 'In circumcising communities, people are often already aware of many, if not most, of the potential adverse health outcomes but feel that the risk is worth taking in light of the social and cultural importance of the practice'.<sup>17</sup> In addition, from a scientific point of view, it is quite difficult to establish a laundry list of adverse health outcomes. That is why female circumcision has been characterised as a violation of human rights.<sup>18</sup> On this basis, in 2012, the General Assembly asked States for a total ban on the practice, including where it is performed at medical centres; States are requested to intensify global efforts for the elimination of female genital mutilations.<sup>19</sup>

There are numerous international legal instruments underpinning the ban on female circumcision.<sup>20</sup> First, female circumcision is considered as a breach of the rights of women. The

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<sup>14</sup> See for example United Nations, Economic and Social Council, *Ending female genital mutilation, Report of the Secretary-General* (UN Doc. E/CN.6/2012/8).

<sup>15</sup> See for example UN General Assembly (hereafter UNGA), 'Girls', Resolution 64/145 of 1 March 2010 (UN Doc. A/RES/64/145).

<sup>16</sup> See for example Birgitta Essén and Charlotte Jensen Wilken, 'How to deal with female circumcision as a health issue in the Nordic countries', *Acta Obstetrica et Gynecologica Scandinavica*, 82 (2003) 683-686.

<sup>17</sup> Bettina Duncan, 'From health to human rights: Female genital cutting and the politics of intervention', *American Anthropologist New Series* 110 (2) (June 2008) 226.

<sup>18</sup> On this matter, see Frances A. Althaus, 'Female circumcision: Rite of passage or violation of rights?', *International Family Planning Perspectives* 23(3) (1997) 130-133; Mary Ruth Coffey, 'From comparison to paradox to the dichotomous nature of international human rights and feminist perspectives of female circumcision as a violation of the human rights of women', *DePaul International Law Journal* 4 (2000) 1-15; Henriette Kalev Dahan, 'Cultural rights or human rights: the case of female genital mutilation', *Sex Roles* 51 (5-6) (September 2004) 339-348; Cynthia Fernandez-Romano, 'The banning of female circumcision: cultural imperialism or a triumph for women's rights?', *Temple International and Comparative Law Journal*, 13 (1) (Spring 1999) 137- 162; Fisaha K.G., 'Female genital mutilation: a violation of human rights', *op.cit.*; Oba Abdulmumini A, 'Female circumcision as female genital mutilation: human rights or cultural imperialism?', *Global Jurist* Vol. 8, Issue 3. Retrieved 19 December 2018, <https://doi.org/10.2202/1934-2640.1286>; Grande Elisabetta, 'Hegemonic human rights and african resistance: female circumcision in a broader comparative perspective', *Global Jurist*, Vol. 4, issue 2. Retrieved 19 December 2018, <https://doi.org/10.2202/1535-1653.1145>; Packer Corinne, 'Understanding the sociocultural and traditional context of female circumcision and the impact of the human rights discourse' in: Nnaemeka O. and Ezeilo, J. (eds.), *Engendering Human Rights: Cultural and Socioeconomic Realities in Africa* (New York: Palgrave MacMillan, 2005) pp. 223-247; Yusuf Camilla and Fesha Yonatan, 'Female genital mutilation as a human rights issue: Examining the effectiveness of the law against female genital mutilation in Tanzania', *African Human rights Law Journal*, 2013, Vol. 13, No 2, pp 324 – 355.

<sup>19</sup> UNGA, 'Intensifying global efforts for the elimination of female genital mutilations', Resolution 67/146 of 20 December 2012 (UN Doc. A/RES/67/146); see specifically para. 2 of the Preamble and para. 4 of the Resolution. See also UNGA, 'Traditional or customary practices affecting the health of women and girls', Resolution 53/117 of 9 December 1998 (UN Doc. A/RES/53/117) and UNGA, 'Intensifying global efforts for the elimination of female genital mutilations', Resolution 71/168 of 19 December 2016 (UN Doc. A/RES/71/168).

<sup>20</sup> See Khosla Rajat, Banerjee Joya, Chou Doris, Say Lale and Fried Susana T., 'Gender equality and human rights approaches to female genital mutilation: a review of international human rights norms and standards', *Reproductive Health*, 2017, Vol. 14, No. 59. Retrieved 19 December 2018, <https://reproductive-health-journal.biomedcentral.com/track/pdf/10.1186/s12978-017-0322-5>.

Declaration on the Elimination of Violence against Women – a ‘soft law’ instrument -, expressly states that the concept of violence includes genital mutilation and any other traditional practices of that nature<sup>21</sup>. Female circumcision is also contrary to the Convention on the Elimination of All Forms of Discrimination against Women. In accordance with the latter treaty, which France ratified in 1983 and which therefore has binding force there, States must take all measures necessary with a view to achieving the elimination of customary practices which are based on stereotyped roles for men and women or on the idea of the inferiority or the superiority of either of the sexes<sup>22</sup>. Admittedly, the Convention does not make explicit reference to female circumcision but the Committee monitoring its application takes the view that the practice falls within the scope thereof<sup>23</sup>. Freedom of religion or belief cannot validly be argued in the face of a practice that violates gender equality<sup>24</sup>.

Female circumcision is also considered as a breach of the fundamental rights of the child. Young girls are protected as minors against it: ‘Traditional practices prejudicial to the health of children’ must be abolished according to the terms of the Convention on the Rights of the Child<sup>25</sup>. The Committee on the Rights of the Child does not hesitate in regularly reminding those States that are especially concerned of their obligation<sup>26</sup>.

In Europe, the fight against female circumcision entered a new phase in 2011 with the adoption of the Council of Europe’s Istanbul Convention on preventing and combating violence against women and domestic violence<sup>27</sup>. This treaty, to which France has been a party since 2014, also recalls that female genital mutilation constitutes ‘a serious violation of the human rights of women and girls’ and ‘a major obstacle to the achievement of equality’ between the sexes<sup>28</sup>. Moreover, it extends the scope of the repression of FGM by providing that States establish as a criminal offence not only the practice itself but also the act of inciting or forcing a woman or girl to undergo such an act, or even the act of furnishing her with the means of doing so<sup>29</sup>. Echoing the Convention<sup>30</sup>, the Parliamentary Assembly of the Council of Europe requested, in 2013, that member States establish their extraterritorial jurisdiction in cases of FGM performed overseas<sup>31</sup>.

It would be a mistake, however, to think that the condemnation of female circumcision was confined to Europe. It can also be seen in Africa: FGM is a ‘harmful practice’ which must be eradicated, according to the terms of the Maputo Protocol to the African Charter on Human and Peoples’ Rights<sup>32</sup>. In the same vein, ‘State Parties [...] shall take all appropriate measures to

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<sup>21</sup> See Article 2 of the Declaration, adopted by UNGA Resolution 48/104 of 20 December 1993.

<sup>22</sup> Article 5 of the Convention on the Elimination of All Forms of Discrimination against Women. Convention adopted by UNGA Resolution 34/180 of 18 December 1979.

<sup>23</sup> See UN Committee on the Elimination of Discrimination against Women, *Female circumcision*, General Recommendation n° 14 (ninth session, 1990) and UN Committee on the Elimination of Discrimination against Women, *Violence against women*, General Recommendation n° 19 (eleventh session, 1992), para. 11. The Convention on the Elimination of All Forms of Discrimination against Women applies to women and girls, as demonstrated in particular by these General Recommendations.

<sup>24</sup> In this sense, see in particular: *Interim Report of the Special Rapporteur on Freedom of Religion or Belief*, 7 August 2013, para. 37 et seq. and para. 43 (UN Doc A/68/290).

<sup>25</sup> Article 24 (3), International Convention on the Rights of the Child, adopted by UNGA Resolution 44/25 of 20 November 1989. France ratified the Convention on 7 August 1990.

<sup>26</sup> See in particular, UN Committee on the Rights of the Child, *Concluding Observations on Senegal*, 2016, specifically para. 42 (UN Doc CRC/C/SEN/CO/3-5); UN Committee on the Rights of the Child, *Concluding Observations on Togo*, 1997, para. 24 (UN Doc CRC/C/15/Add.83); UN Committee on the Rights of the Child, *Concluding Observation on the Sudan*, 1993, para. 13 (UN Doc CRC/C/15/Add.10).

<sup>27</sup> Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 11 May 2011.

<sup>28</sup> See the Preamble to the Convention.

<sup>29</sup> Article 38 of the Convention.

<sup>30</sup> See Article 44 of the Convention

<sup>31</sup> See Resolution 1952 adopted 1 October 2013 by the Assembly at its 31<sup>st</sup> session, para. 7.5.

<sup>32</sup> See Article 5 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women 2003.

eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child' and in particular those that are 'prejudicial to the health or life of the child', in accordance with the African Charter on the Rights and Welfare of the Child<sup>33</sup>. The approach taken to female circumcision as a human rights violation now tends to generate consensus within international and regional bodies.

As these legal texts show, 'attempts to divorce health and human rights concepts have been unsuccessful'<sup>34</sup>. The alliance persists: female circumcision is considered as a violation of the right to health and bodily integrity. According to the Committee on Economic, Social and Cultural Rights in its General Comment on the right to the highest attainable standard of health, 'there is a need to adopt effective and appropriate measures to abolish harmful traditional practices affecting the health of children, particularly girls, including (...) female genital mutilation'<sup>35</sup>; in addition, States have to 'prevent third parties from coercing women to undergo traditional practices, e.g. female genital mutilation'<sup>36</sup>. More recently, the Committee went further in its General Comment on the right to sexual and reproductive health<sup>37</sup>. It asserted that 'States parties have a core obligation to ensure, at the very least, minimum essential levels of satisfaction of the right to sexual and reproductive health', 'the core obligations include at least (...) to enact and enforce the legal prohibition of harmful practices and gender-based violence, including female genital mutilation'. It specified that 'violations of the obligation to protect occur when a State fails to take effective steps to prevent third parties from undermining the enjoyment of the right to sexual and reproductive health. This includes the failure to prohibit and take measures to prevent all forms of violence and coercion committed by private individuals and entities, including (...) harmful practices such as female genital mutilation'; Besides, 'it is also important to undertake preventive, promotional and remedial action to shield all individuals from the harmful practices and norms and gender-based violence that deny them their full sexual and reproductive health, such as female genital mutilation'.

### 3 Punishing Female Circumcision as Mutilation

In France, the human body is protected and considered as inviolate. Consequently, 'no mutilating intervention can be undertaken without serious medical grounds'<sup>38</sup>. In such a context, female circumcision is considered as damage; the victim is entitled to compensation<sup>39</sup>. Furthermore, female circumcision performed by one parent without the knowledge of the other may constitute grounds for the withdrawal of rights of access and accommodation<sup>40</sup>.

However, female circumcision is not just a tort under civil law; it is also a criminal offence. Nevertheless, it is not the subject of special legislation: it is apprehended through general legislation such as the law governing violations of the physical or mental integrity of the person<sup>41</sup>. By contrast, female circumcision is explicitly criminalised in other States. This is the case for some African

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<sup>33</sup> Article 21 of the African Charter on the Rights and Welfare of the Child 1990.

<sup>34</sup> Duncan Bettina, 'From health to human rights: Female genital cutting and the politics of intervention', *American Anthropologist New Series*, Vol. 110, No. 2, June, 2008, p. 226.

<sup>35</sup> United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)*, 11 August 2000 (UN Doc. E/C.12/2000/4).

<sup>36</sup> *Ibid.*

<sup>37</sup> CESCR, *General Comment No. 22 (2016) on the Right to Sexual and Reproductive Health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2016, (UN Doc. E/C.12/GC/22).

<sup>38</sup> Article R4127-41 of the French Public Health Code. See also Article 16-3 of the French Civil Code.

<sup>39</sup> In this sense, see Messner Francis, Prelot Pierre-Henry, Woehrling Jean-Marie, *Droit français des religions* (Paris : LexisNexis, 2013, 2e édition) p. 868.

<sup>40</sup> *Ibid.* Regarding the risk of female circumcision, see e.g. Douai Court of Appeal (chamber 7), Decision of 19 October 2006, No. 05/03743, *Juris-Data* n° 2006-336693.

<sup>41</sup> See Article 222-1 et seq of the French Penal Code.

countries such as Senegal, which punishes the violation of ‘the integrity of the genital organ of a person of the female sex by the partial or total ablation of one or several of its parts, by infibulation, anaesthetisation or by any other means’<sup>42</sup> ; this is also the case for some European countries such as Belgium, which criminalises the act of ‘performing, facilitating or encouraging any form of mutilation of the genital organs of a person of the female sex, without or without the consent of the latter’<sup>43</sup> .

In France, the issue of creating a specific criminal offence also arose but the idea faltered and would now appear to have been dismissed entirely<sup>44</sup> . Such an incrimination is seen as contrary to the French republican spirit to realise one shared identity: in France, particular attention is drawn to universalism, yet ‘the introduction of a specific penal provision would differentiate between citizens and thus might lead to discrimination and stigmatisation of minority groups’<sup>45</sup> . However, the creation of such a criminal offence would be justified nonetheless. Trials for female circumcision concern a cultural norm: it is the rite itself that is put on trial, more than it is the person<sup>46</sup> . From that perspective, the adoption of a law - ‘the expression of the general will’<sup>47</sup> and therefore the result of a democratic process - would appear to be the best way of establishing a ban on female circumcision. A specific criminal offence would send out a strong signal against FGM on a social level even where the offence can, in strictly legal terms, be punished on the basis of other offences. Furthermore, special legislation would fulfil a practical purpose insofar as it would serve to take better account of the different types of female genital mutilation as categorised by the World Health Organisation. Indeed, The WHO identifies different types of mutilation: Type I — Partial or total removal of the clitoris and/or the prepuce: clitoridectomy - Type II — Partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora: excision - Type III — Narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris: infibulation - Type IV — All other harmful procedures to the female genitalia for non-medical purposes: scarification, stretching for instance<sup>48</sup> .

Pending such a law – were such a law to see the light of day – female circumcision is, in France, primarily described as ‘*violences ayant entraîné une mutilation*’ (assault resulting in mutilation) and on that basis falls within the scope of Article 222-9 of the Penal Code. It is worth noting that when, after some hesitation, the practice was first described thus, the case concerned *non-ritual* circumcision: a French mother of Breton origin, in a fit of lunacy, had mutilated her daughter’s genitals<sup>49</sup> . The choice made in the case to hand down such an unprecedented classification was not without significance: French judges had initially expressed qualms in imposing a criminal standard on a cultural norm<sup>50</sup> ; the case concerned presented an opportunity to publish female circumcision without stigmatising its perpetrators, who are so often foreign nationals.

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<sup>42</sup> Article 299 bis of the Senegalese Penal Code (Law No. 99 - 05 of 29 January 1999).

<sup>43</sup> See Article 409 of the Belgian Penal Code.

<sup>44</sup> See CNCDH, *Avis du 28 novembre 2013 sur les mutilations sexuelles féminines* (Opinion of 28 November 2013 on female genital mutilation): ‘*There is no specific legal classification for acts of genital mutilation under French law. Such a classification is not desirable insofar as female genital mutilation is an indisputable infringement of physical integrity, sanctioned by the Penal Code*’.

<sup>45</sup> Kool and Sohail, *supra* note 13.

<sup>46</sup> Geneviève Giudicelli-Delage, ‘Excision et droit pénal’, *Droit et Cultures*, 1990, 20, pp. 207-208.

<sup>47</sup> Article 6 of the French Declaration of the Rights of Man and of the Citizen, 1789.

<sup>48</sup> For further information, see <http://www.who.int/reproductivehealth/topics/fgm/overview/en/> (as at 22/11/2018). See also McGee Shayla, ‘Female circumcision in Africa: procedures, rationales, solutions, and the road to recovery’, *op. cit.*, p. 134 and Williams-Breault Beth D., ‘Eradicating Female Genital Mutilation/Cutting: Human Rights-Based Approaches of Legislation, Education, and Community Empowerment’, *op. cit.*

<sup>49</sup> Court of Cassation (Criminal Chamber), Decision of 20 August 1983, No. 83-92.616, *Bulletin criminel*, n° 229.

<sup>50</sup> In this sense, CNCDH, *Etude et Proposition sur la Pratique des Mutilations Sexuelles en France*, *op. cit.*, p. 10.



Assault resulting in mutilation is a misdemeanour offence carrying a sentence of 10 years' imprisonment. However, where the offence is committed against a minor aged 15 or under (which is often the case in female circumcision matters), it becomes a crime and is then punishable by 15 years' imprisonment<sup>51</sup>. Furthermore, where the offence is committed by an ascendant, the sentence rises to 20 years<sup>52</sup>. In a scenario where the assault has also resulted in the death of the young girl, female circumcision is punishable under Article 222-7 of the Penal Code (*'violences ayant entraîné la mort sans intention de la donner'* – acts of violence causing an unintended death), which carries a sentence of 30 years imprisonment<sup>53</sup>.

Moreover, a criminal conviction for mutilation constitutes grounds for withdrawing a residence permit<sup>54</sup> and for not issuing such a permit<sup>55</sup>. Such a criminal conviction may also constitute a reason for deprivation of French nationality<sup>56</sup>; bearing in mind that it would apply only to those perpetrators of female circumcision who have acquired French nationality by naturalisation, the latter measure is controversial insofar as it is likely to generate inequality between French nationals.

#### 4 Rejecting the “Culture” and “Custom” Arguments

The punishment of female circumcision is first and foremost an issue of culture. Consequently, during criminal trials, the issue of whether the concept of ancestral custom, even religious requirements, would allow a perpetrator to avoid any punishment. Indeed, when questioned, defendants state that ‘our ancestors did it, our parents did it and we cannot do otherwise’<sup>57</sup>. While the argument is often raised by counsel, it has not however been welcomed by the courts. In the 1980s, one investigation chamber pointed out that ‘whilst it is true that, in their original tribal setting, circumcising young girls may be viewed by the accused as a duty that is more customary than religious - as it is widely recognised that not all Muslim women are subjected to this mutilation - the same cannot be said for Garges-lès-Gonesse and the country where they lived for a number of years’<sup>58</sup>.

The cultural diversity argument has thus gradually waned as the arsenal of legal measures against female circumcision has strengthened. In 2013, in order to take account of the Council of Europe Convention on preventing and combating violence against women and domestic violence recently signed by France<sup>59</sup>, a law was passed criminalising ‘the act of making offers or promises to

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<sup>51</sup> Cf Article 222-10 of the French Penal Code.

<sup>52</sup> *Ibid.*

<sup>53</sup> Art. 222-8 of the French Penal Code: ‘*The penalty incurred is increased to thirty years' criminal imprisonment where the offence defined under article 222-7 is committed against a minor under the age of fifteen years by a legitimate, natural or adoptive ascendant or by any other person having authority over the minor.*’

<sup>54</sup> Article R311-14 of the Code of Entry and Residence of Aliens and the Right to Asylum (*Code de l'entrée et du séjour des étrangers et du droit d'asile*, hereafter CESEDA): ‘*Where a foreign national who holds a residence permit is convicted of having committed against a minor under the age of fifteen years the offence defined at Article 222-9 of the Penal Code or of having been an accomplice to the same.*’

<sup>55</sup> Art. L314-5 CESEDA: ‘*A residence permit may not be issued (...) to a foreign national convicted of having committed against a minor under the age of fifteen years the offence defined at Article 222-9 of the Penal Code or of having been an accomplice to the same.*’

<sup>56</sup> Council of State (Conseil d'Etat, hereafter CE), decision of 22 February 2008, No. 303709.

<sup>57</sup> See M<sup>l</sup>Barga Jean-Pierre, ‘Excision et migrants de France. 1. Excision, fonction et conséquence de sa répression en milieu migrant en France’, in: Rude-Antoine Edwige (ed.), *L'Immigration face aux Lois de la République* (Paris : Karthala, 1992) p. 170.

<sup>58</sup> Baradji Case in 1988 cited in: Dominique Vernier, ‘Le traitement pénal de l'excision en France : historique’, *Droit et Cultures*, 20, 1990, p. 195-196. For more detail on the consideration given to custom in FGM cases, see: Le Bris Catherine, ‘La contribution du droit à la construction d'un “vivre ensemble” : entre valeurs partagées et diversité culturelle’, *Droit et Société*, 2016, No. 92, p. 82 et s.

<sup>59</sup> France signed this Convention on 11 May 2011 before ratifying it on 4 July 2014.



a minor, or offering them any gifts, presents or advantages whatsoever, or using pressure or constraints of any nature whatsoever against them, in order for said minor to submit to genital mutilation' when – and herein lays the innovation – said mutilation has yet to be carried out<sup>60</sup>. In the same vein, acts of direct incitement of others, by one or other of the means mentioned above, 'to perform genital mutilation on the person of a minor, where said mutilation is not carried out' now constitutes a criminal offence<sup>61</sup>. Prior to this law, in order for such acts to be punishable, the mutilation had to have been carried out, i.e. an advance from word to deed. From that perspective, the legislation strengthens existing protection<sup>62</sup> by instituting a preventive criminal offence<sup>63</sup>.

Where a young girl has already been circumcised, French law also reveals a genuine concern for protecting the victim. Thus, where in principle the limitation period in France is 3 years for misdemeanours and 10 years for crimes and said period begins to run from the time when the offence is committed, in mutilation cases – and particularly those involving genital mutilation – the limitation period is 20 years and only begins to run from the time when the victim reaches legal majority<sup>64</sup>. Although minors at the time when the offence is committed, women have until they are 38 to file a complaint.

This concern for protecting victims who are minors is all the more striking as this may be against their will. Thus, if a young girl refuses to bring a civil action for damages when a prosecution has already been set in motion (e.g. because she finds it difficult to face her relatives in such a context), an anti-FGM association can exercise those civil-party rights on the girl's behalf without her agreement<sup>65</sup>. In the same vein, doctors are not bound by medical confidentiality in genital mutilation cases involving 'a minor or a person unable to protect themselves owing to their age or physical or mental disability'<sup>66</sup>. This provision is essential insofar as healthcare professions are often called upon to play a frontline role in identifying victims of female circumcision<sup>67</sup>. In practice, 'despite the fact that not all PMI doctors are willing to report, a larger degree of cooperation between doctors and criminal authorities exists than elsewhere'<sup>68</sup>.

This policy of punishing female genital mutilation can be seen in cases where female circumcision is performed/ overseas but is nevertheless punished by French courts. While criminal law applies in theory only on French territory, it can exceptionally take on an extraterritorial dimension. This is the case for instance of FGM which, if performed on a minor who is habitually resident in France, can be sanctioned by the relevant French authorities<sup>69</sup>. Introduced in 2006<sup>70</sup>, this

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<sup>60</sup> Article 227-24-1, para. 1, Penal Code.

<sup>61</sup> Article 227-24-1, para. 2, Penal Code.

<sup>62</sup> For greater detail on this issue, see Benillouche Mikaël, 'L'interdiction des mutilations sexuelles : entre confirmation et révolution...', *Revue des Droits Fondamentaux*, 2014, chron. n° 6.

<sup>63</sup> See Grunvald Sylvie, 'La répression des mutilations sexuelles féminines : une mise à distance de principe de la diversité culturelle, Brèves remarques à propos de l'avis de la CNCDH du 28 novembre 2013', *Archives de Politique Criminelle*, 2014, No. 36, p. 84.

<sup>64</sup> See Article 7 of the French Criminal Procedure Code: '*The limitation period for the prosecution of the felonies set out in article 706-47 when committed against minors is twenty years, and only starts to run from their coming of age*'.

<sup>65</sup> See Articles 2-3 of the French Criminal Procedure Code: '*Any association lawfully registered for at least five years on the date of offence proposing through its constitution to protect or assist children in danger or victims of any form of abuse may exercise the rights granted to the civil party in respect of torture and acts of barbarity, acts of violence and sexual aggressions committed against minors and the offence of endangering minors punished by articles (...) 222-1 to 222-18-1 (...) of the Penal Code, where the public prosecution has been initiated by the public prosecutor or by the injured party*'.

<sup>66</sup> See Article 226-14 of the French Penal Code.

<sup>67</sup> In this sense, see CNCDH, Opinion of 28 November 2013, cited above.

<sup>68</sup> Kool and Sohail, *supra* note 13.

<sup>69</sup> See Article 222-16-2 of the Penal Code: '*In the event that the offences provided at Articles 222-8, 222-10 or 222-12 are committed overseas against a minor habitually resident on French territory, French law shall apply by derogation to the provisions of Article 113-7. Where a misdemeanour is concerned, the provisions of the second sentence of Article 113-8 shall not apply*'.

<sup>70</sup> See Article 14 of Law No. 2006-399 of 4 April 2006.

option is of real benefit as, while in the 1990s female circumcision was mainly performed on French soil, it is currently performed for the most part during a visit to the parents' home country, although it sometimes takes place elsewhere without the parents' knowledge<sup>71</sup>. In order to prevent such situations occurring, parents may instigate opposition proceedings (before the Prefect)<sup>72</sup> and apply for an order prohibiting the removal of their child from the territory (before the *juge aux affaires familiales* (Family Court)<sup>73</sup> or, if the child is the subject of educational assistance measures, before the *juge des enfants* (children's court)<sup>74</sup>).

While the principle banning female circumcision is clearly established in the French legal order, the perpetrators of this practice are, additionally, *effectively* liable to criminal prosecution. France brings the highest number of prosecutions for genital mutilation in all of Europe<sup>75</sup>. In 2007, 29 criminal trials took place in France while in Italy, for 2009, the figure stood at just two (bearing in mind that the number of victims of FGM is significantly lower in France: 35,000 according to recent estimates)<sup>76</sup>. For these reasons, a success status is internationally awarded to France. This French 'success' can be explained in different ways<sup>77</sup>. First, care providers working in infant and youth health care (*Protection Maternelle et Infantile*, hereafter: PMI) play a key role: the parents are obliged to have their children undergo medical examinations until the age of six; an examination of the genitals is part hereof and this also applies to immigrants. In addition, 'for them the fact that PMI offers freely available health care, something they otherwise would not be able to afford, also plays a role'<sup>78</sup>. Moreover, as stated above, a doctor, discovering a genital mutilation during a medical check, is under the obligation to denounce it and associations are entitled to join as a party during a preliminary judicial investigation. Finally, the organisation of French criminal investigation and more specifically the prominent presence of the investigating judge can also explain the French success: 'When the police are on the track of a cutter, they call in an investigating judge, who has wide, independent investigative powers. In combination with PMI's readiness to provide information in connection with the report, building a criminal case [is] relatively easy'<sup>79</sup>.

Nonetheless, it must be acknowledged that French courts have displayed a degree of leniency in sentencing<sup>80</sup>. The cultural background of the accused and the wish not to disrupt family life are stated as reasons for these relatively light sentences. For a long time, sentences were often suspended. They are currently a little more severe but they remain relatively lenient if we consider them in the light of the classification of the offence, namely mutilation. Thus in France, a couple of Guinean origin, parents to 4 girls who had been circumcised, were convicted of 'complicity in assault resulting in the mutilation of a minor under the age of 15 by an ascendant' in June 2012. The parents faced up to 20 years' imprisonment; the Assize Court at La Nièvre ultimately sentenced them to two years' imprisonment for the father, and 18 months' imprisonment for the mother<sup>81</sup>. The difficulty lies in the fact that this kind of trial gives the sense that it is not an individual on trial, but an entire community and a rite. In this respect, the idea of creating a specific criminal offence

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<sup>71</sup> In this sense, see CNCDH, Opinion of 28 November 2013, cited above.

<sup>72</sup> See Article 2, III, 3° of Decree No. 2010-569 of 28 May 2010 on the database of wanted persons.

<sup>73</sup> See Article 373-2-6 of the French Civil Code.

<sup>74</sup> See Article 375-7 of the French Civil Code.

<sup>75</sup> See European Institute for Gender Equality, *Female Genital Mutilation in the European Union and Croatia: Report*, 2013, Belgium, European Union, p. 45. Retrieved 19 December 2018, <http://eige.europa.eu/sites/default/files/documents/eige-report-fgm-in-the-eu-and-croatia.pdf>.

<sup>76</sup> For these figures, see the Communication from the Commission to the European Parliament and the Council, *Towards the Elimination of Female Genital Mutilation*, (COM/2013/0833).

<sup>77</sup> See Kool and Sohail, *supra* note 13.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*

<sup>80</sup> In this sense, Libchaber Rémy, 'Circoncision, pluralisme et droits de l'homme', *Recueil Dalloz*, 31/7524, 13 septembre 2012, p. 2044 et seq.

<sup>81</sup> See Agence France-Presse (AFP), 'Excision : 2 ans et 18 mois de prison', 01/06/2012.

remains relevant. Female circumcision is not a relic of the past: according to France's *Commission nationale consultative des droits de l'homme* (CNCDDH – National Consultative Commission on Human Rights), it no longer concerns 'populations from sub-Saharan Africa only'; they have become more widespread and affect a variety of populations'; furthermore, the target has changed: adolescent girls 'become a high-risk population': taken out of school from the age of 11-12, they are forced back to their parents' country and then circumcised<sup>82</sup>. Faced with the continued existence of this practice, its cultural dimension is held at a distance<sup>83</sup>: in its 2013 report, the CNCDDH stated forcefully that 'no right to be different, no respect for a cultural identity can legitimise violations of the integrity of the person, which are criminal offences'; from the Commission's point of view, 'the legitimate consideration of respect for other cultures cannot induce a relativism that would prevent female sexual mutilation from being understood in terms of violation of the fundamental rights of women'<sup>84</sup>. The terminological development is a reflection of that change: the CNCDDH recommends the use of the term '*mutilation sexuelle féminine*' (female sexual mutilation) rather than '*excision*' or '*mutilation génitale*' (genital mutilation)<sup>85</sup>.

## 5 Conclusion

The French success in the area of the fight against FGM is closely linked to criminal policy. In recent years, punishment has intensified under the influence of international law and of the universalisation of the total ban of female circumcision. However, 'the nationwide familiarity with the punishability of FGM that was generated by the criminal cases has not opened up the issue any further, nor intensified the combat thereof'. Punishing female circumcision is not enough in any assumption, if only because such punishment generally arises when the ban has been breached. With this in mind, it is supplemented on two levels, by protection and prevention.

As regards protection, in France, refugee status may be granted to girls arriving from a State where they face the threat of sexual mutilation, but also to girls born in France who run the risk of being circumcised if they were to their parents' country of origin<sup>86</sup>. Girls threatened with female circumcision constitute, according to the *Conseil d'Etat*, a '*social group*' within the meaning of the Geneva Convention: likely to be persecuted owing to their membership of that group, they are granted asylum in France if they cannot get appropriate protection in their country of origin. According to a study conducted by the United Nations High Commission for Refugees in 2012, France is the European country that receives the greatest number of female asylum seekers from countries where genital mutilation is performed<sup>87</sup>.

As regards the parents of a girl threatened with female circumcision, the *Conseil d'Etat* considered in 2013 that insofar as they themselves did not personally face the risk of persecution,

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<sup>82</sup> See CNCDDH, Opinion of 28 November 2013, cited above.

<sup>83</sup> In this sense, Grunvald Sylvie, 'La répression des mutilations sexuelles féminines (...)', *op. cit.*

<sup>84</sup> See CNCDDH, Opinion of 28 November 2013, cited above.

<sup>85</sup> *Ibid.* Article 227-24-1 of the French Penal Code uses the notion of '*sexual mutilation*' and not '*female sexual mutilation*'; the omission of the adjective is such as to create confusion: thus worded, the article can apply to FGM and male circumcision: on this issue, see Benillouche Mikaël, 'L'interdiction des mutilations sexuelles (...)', *op. cit.*

<sup>86</sup> See CE (Assembly), decisions of 21 December 2012, No. 332492; No. 332491; No. 332607. On those decisions, see Cholet Guillaume, 'Droit d'asile : Le Conseil d'Etat aux prises avec les mutilations génitales féminines', *Lettre 'Actualités Droits-Libertés' du CREDOF*, 18 February 2013. See also CE, 30 December 2014, No. 367428.

<sup>87</sup> See European Institute for Gender Equality, *Female genital mutilation in the European Union and Croatia (...)*, *op. cit.*, p. 25 and 26: 'A recently published statistical study using this method is the UNHCR study on 'Female Genital Mutilation and Asylum in the European Union' (UNHCR, 2012), which calculated estimates of the prevalence of FGM among female asylum seekers in the EU, disaggregating data by the applicants' countries of origin and their countries of asylum. According to this study, the EU Member States with the highest number of female asylum applicants originating from FGM-practising countries were, in 2011, France (4,210), Italy (3,095), Sweden (2,610), the United Kingdom (2,410), Belgium (1,930), Germany (1,720) and the Netherlands (1,545) (UNHCR, 2012). Compared to 2008, these figures increased in all but two (the Netherlands and Sweden) countries'.

they could not be granted refugee status in light of the stipulations of the Geneva Convention<sup>88</sup>. In that context, the parents were admittedly likely to obtain a temporary residence permit on the grounds of private and family life, but that was a more precarious status than that of refugee<sup>89</sup>. However, the Law of 29 July 2015 on reforming the right to asylum<sup>90</sup> brought an end to that paradox, providing that the parents of a refugee child (unmarried) can now benefit in their own right of the same residence permit as their child, i.e. a ten-year residence permit<sup>91</sup>.

As regards the prevention aspect<sup>92</sup>, while many years after the first criminal prosecutions for female circumcision, the practice has become an established one, it is because the existing punishment does not suffice and persuasion remains the key. From that perspective, two preventive measures would appear to be essential. Firstly, insofar as female circumcision is most often performed in the parents' country of origin, co-operation between those countries and France remains fundamental<sup>93</sup>. Secondly, while it seems necessary to 'make women seen and heard on matters of female sexual mutilation'<sup>94</sup>, it is equally important increasingly to involve men in prevention measures: according to the findings of the *Excision et handicap* inquiry published in 2009 by the *Institut national d'études démographiques* (National Institute for Demographic Studies), men play a major role in the decision to have their daughters circumcised<sup>95</sup>. Female circumcision is not, in fact 'women's business' and 'while men are habitually held responsible for instituting the practice and for its continued existence', a distinction must be made between patriarchal power and men's individual situations in order to understand that the facts are 'more complex and contradictory'. Some in fact do not hesitate in 'standing against the old ways in order to give rights to their daughters'<sup>96</sup>.

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<sup>88</sup> See CE, Opinion of 20 November 2013, No. 368676. On this issue, see Brice-Delajoux Claire, 'Quel statut pour les parents des fillettes reconnues réfugiées du fait d'un risque d'excision ? ', in *Lettre 'Actualités Droits-Libertés' du CREDOF*, 27 December 2013.

<sup>89</sup> Refugees are issued 10-year residence permits while the duration of the 'private and family life' permit was then one year maximum (since the Law of 7 March 2016 on the rights of foreign nationals in France, multi-annual permits can now, in certain conditions, be issued on the basis of private and family life).

<sup>90</sup> Law n° 2015-925 of 29 July 2015 on reforming the right to asylum.

<sup>91</sup> See Article L314-11, 8°, CESEDA.

<sup>92</sup> On this matter, see Kwoka Margaret, 'Female Genital Surgeries: Rethinking the Role of International Human Rights Law', *Human Rights Law Commentary*, 2007, Vol. 3. Retrieved 19 December 2018, <https://www.nottingham.ac.uk/hrlc/documents/publications/hrlcommentary2007/femalegenitalsurgeries.pdf>.

<sup>93</sup> In this sense, see Andro Armelle, Lesclingand Marie, Pourette Dolorès, *Volet Qualitatif du Projet Excision et Handicap (ExH) - Comment Orienter la Prévention de l'Excision chez les Filles et Jeunes Filles d'Origine Africaine Vivant en France: Une étude des Déterminants Sociaux et Familiaux du Phénomène*, 2009, p. 73. Retrieved 19 May 2018,

[https://www.ined.fr/fichier/s\\_rubrique/269/volet\\_qualitatif\\_de\\_exh\\_rapport\\_final.fr.pdf](https://www.ined.fr/fichier/s_rubrique/269/volet_qualitatif_de_exh_rapport_final.fr.pdf): 'Interviews also demonstrate the need to have an understanding of the fight against female genital mutilation that is shared by countries of the North and the South. Migrants generally keep in touch with their families in the various countries of origin and across borders, the families are attentive and sensitive to the changes at work. Anti-FGM programmes in the countries of origin resonate with migrants in Europe when the denunciation of those practices in the countries of Europe is reflected in public opinion in the countries of origin'.

<sup>94</sup> See CNCDH, Opinion of 28 November 2013, cited above.

<sup>95</sup> See Andro Armelle, Lesclingand Marie, Pourette Dolorès, *Volet Qualitatif du Projet Excision et Handicap (...)*, *op. cit.*, p. 73. See also, Williams-Breault Beth D., 'Eradicating female genital mutilation/cutting: Human rights-based approaches of legislation, education, and community empowerment', *op. cit.*

<sup>96</sup> Couchard Françoise, *L'Excision*, *op. cit.*, p. 115.