Women’s Rights and Cultural Claims: Female Genital Mutilation in Germany and France

Anja Titze

Abstract
Since the 1960s, countries like France and Germany have seen a massive influx of immigrants from Africa and Southeastern Europe. Most of the immigrants feel committed to different standards and values then those of the majority. Women’s rights may reveal the complexity of the multicultural settings in a very insightful way. Immigrant women often have their own cultural beliefs as they belong to distinct communities. Due to legal pluralism, normative conflicts may arise when immigrant women claim recognition for particular cultural practices which are perceived by the mainstream population of the host country as a grave violation of women’s rights. This chapter turns the attention to female genital mutilation/cutting (FGM) and shows how the state law has changed over the time dealing with this cultural practice. First, I focus on the empirical dimension of multiculturalism in France and Germany. In both countries, FGM is practiced, although there are no reliable numbers on girls and women who were circumcised or who are at risk to be circumcised. Secondly, I compare the legal provisions concerning FGM in both countries. In France, there is no specific provision for such acts, but there are useful penal norms to prosecute and condemn circumcisers and parents. In Germany, the situation is quite similar, but there exist two draft laws against FGM. The third part is empirical and explores the implementation of legal provisions. Taking some illustrative cases, I show that women’s rights may be and are implemented against certain cultural practices, i.e. FGM.

Key Words: Minorities, immigration, cultural diversity, traditional practices, female genital mutilation, court trials, legal provisions, asylum.

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1. Empirical Dimension of Multiculturalism: Multiculturalism in Germany and France
The term multiculturalism which was first discussed in the United States, Great Britain and Australia refers to the diversity and heterogeneity of a society. It means that in addition to the mainstream society, there are many socio-cultural groups formed by people with different cultural backgrounds. These groups live together or at least next to each other. However, the multicultural society is not only a characteristic feature of major immigration countries as the ones mentioned above. Multiculturalism actually exists in many countries all over the world, in Europe, Asia and the Americas, and multicultural societies are often the rule rather than the
exception. Although some states define themselves as ‘multicultural’, such a
formal recognition is not necessary, because multiculturalism is a social fact.

Nevertheless, it is difficult to find an appropriate ‘umbrella term’ to encompass
all the groups that are not ‘mainstream’. The terms ‘socio-cultural groups’ or ‘local
communities’ seem to be appropriate, because they may also capture so-called
indigenous peoples as well as minorities.

In many Latin American countries, there are so-called indigenous peoples, such
as Maya, Quechua or Aymara. These are peoples who are seen as indigenous due
to their descent from the original inhabitants of the region. They refer to the
historical continuity with pre-colonial societies, and they emphasize their
distinctiveness due to their more traditional ways of life. Some of these indigenous
peoples gained formal recognition by state law and a specific legal status.

In Europe, the situation is quite different. Although we also find the Sami
indigenous peoples in the very North of this continent, the typical socio-cultural
groups are minorities. There are, for example, traditional minorities like the Sorbs
in Germany, Bretons in France and Sinti and Roma in various European countries.
These linguistic or national minorities are in a very narrow sense groups of people
which are autochthonous to a specific place and whose members – due to their
historic roots – normally own the nationality of the country of origin.¹

However, this concept of minorities is too narrow to be able to capture the
entire multicultural spectrum in European countries. Especially in the 20th century,
Europe has seen many forms of immigrations – be it from one European country to
another or from a non-European to a European country. Thousands of North-
Africans are living nowadays in France and Spain, South Asians (Pakistanis and
Indians) in the UK and in Norway, Turkish in Germany, and Latin-Americans in
Spain, etc. Most of them had already left their home countries in the 1950s and
1960s; and even afterwards, the population structure has been subject to a
continual process of change. As all these people with very different cultural
backgrounds have formed groups of immigrants and have settled in Europe for a
long time, another opinion has been expressed in legal literature. It states, that
these migrants or so-called ‘new minorities’ could also be included under the term
‘minority’ in the sense of the law. Cultural diversity is the result of immigration
processes and includes religious, linguistic and legal diversity.

2. Germany: National Minorities

In Germany, the term ‘national minority’ refers to a legal status that is
associated with the guarantee of specific rights, including the field of education. It
is not relevant whether the ethnic group might belong to another state folk or
whether the group is native to only one state or several states.

The recognized national minorities are: Danes, Sorbs, Frisians as well as Sinti
and Roma.² There are about 50,000 Danes, 60,000 Sorbs, 12,000 Frisians, and
70,000 Sinti and Roma.
3. New Minorities (Immigrants)

In German politics and in the German literature of social science, it is not usual to speak about new minorities. We rather find the concept of ‘people with a migrant background’. This concept does not only cover immigrants, who came to Germany since 1950, but also refers to their offspring born in Germany. In 2010 (according to the Federal Statistical Office), there were over 15.75 million people with a migrant background living in Germany which corresponds to 19.3 percent of the total population (81.7 million). Moreover, about 8.6 million of these people with a migrant background have German nationality.

People with a migrant background often concentrate in the Western part of Germany, namely federal states such as Bavaria, Baden-Wuerttemberg, Hesse and North Rhine-Westphalia as well Hamburg and Bremen. In Eastern Germany, there are relatively few immigrants. Within the federal states mentioned above, migrants are concentrated in big cities. Frankfurt am Main, for example, is a city with about 30 percent of migrants coming from more than 140 countries. There are other cities with a particularly high proportion of migrants, such as Stuttgart (24 percent), Munich (23 percent) and Cologne (20 percent). If we differentiate even more by districts of these cities, the picture becomes even clearer. Kreuzberg, a district in Berlin, is predominantly characterized by its Turkish immigrants. It is known to be the second biggest ‘Turkish city’.

4. France: Traditional Minorities

In France, the situation is quite different. Officially, there are no minorities at all - neither traditional nor new minorities. However, there are many different socio-cultural groups. Some of them formed decades or even centuries ago and have been living on French territory for generations. Others, like in Germany, emerged in the course of immigration during the 20th century. In fact, these local communities are culturally different with regard to the French majority because of their religion, language, customs, laws, etc. Even if French politics and French law do not formally recognize them as minorities nor do they award them a specific legal status, from a social science perspective these groups are minorities in the broader sense.

Interestingly, this strange perception of reality is rooted in the revolutionary era. The French Revolution led to a sharp depreciation of the regional cultures and linguistic minorities. Since then, a very dogmatic adherence to republican principles has prevented any improvement of the situation of minorities and still influences the attitude of the French government on this issue. For example, France has not yet signed the Framework Convention for the Protection of National Minorities. Despite the lack of public recognition, many different languages are spoken in France, and each language may be seen an expression of a regional or local culture.
However, the problem is to find reliable data. With regard to the traditional minorities, the exact number of language speakers remains uncertain, because there are no official statistics. According to estimates, there are about 150,000 Catalans, 143,000 Corsicans, 80,000 Basques, 80,000 Flemings, 350,000 Bretons and approximately 1 million German speaking French.

5. New Minorities (Immigrants)

In France, the share of immigrants in the total population has increased steadily since the end of the Second World War, especially since the mid-1970s. At that time, a massive influx of immigrants began to change the cultural composition of the population even more. These people who have come in the last 50 years do appear in official statistics as immigrants or foreigners, but they are not mentioned under the term ‘(new) minorities’.

France has a total population of approximately 61 million people. French statistics distinguish two categories: immigrants and foreigners. Immigrants (immigrés) are people who were born abroad to non-French citizens and who live in France. They remain recorded as immigrants even if some of them have obtained French nationality. In 2005, there were 4.93 million immigrants in France. This corresponds to a share of 8.1 percent of the total population. 1.97 million (40 percent) of immigrants have acquired French citizenship. Foreigners (étrangers), however, are people who do not have French citizenship even if they were born in France. According to French statistics, there are 3.51 million foreigners in France, which means a share of 5.7 percent of the total population.

Michele Tribalat, a French Demographer from the ‘Institut National d’Etudes Démographiques’ (INED) estimates that 14 million people with a migration background live in France which is about 23 percent of the population.

Immigrants are highly concentrated in large urban areas in France. The Paris area – the Île-de-France region – has the largest share of immigrants: about 40 percent of all immigrants live there. Other important regions are Rhône-Alpes (Lyon) and Provence-Alpes-Côte d’Azur (Marseille).

6. Empirical Dimension of FGM

Due to the increase in immigration, there is great cultural diversity in respect of religion, law, food habits, clothing etc. in France and Germany. Unsurprisingly, the members of ‘new minorities’ came also with very specific values and practices, and they want to live according to them. However, some of these norms and rituals are very different from the ones pursued by the majority population. One example is the practice of female genital cutting (henceforth: FGM).

FGM comprises – according to the World Health Organization (WHO) – all procedures which include the partial or total removal or other violation of the external female genitalia for cultural, religious or other non-therapeutic reasons.
WHO-experts distinguish among four types of FGM according to the severity of the intervention. Type No. 1, known as incision, is the ‘mildest’ form of FGM, because it involves the removal of the clitoral hood and normally of the clitoris as well (clitoridectomy). Type No. 2 is so-called excision, and this FGM-act removes the clitoris and the inner labia. The most extensive form of FGM is Type No. 3, infibulation or ‘pharaohnic circumcision’ because it removes all or parts of the inner and outer labia. Usually, the clitoris is cut as well. As a result, a small hole is left that should serve as a passage of urine and menstrual blood. If necessary – this little hole must be opened – be it for sexual intercourse or childbirth – and after this be closed again. This severe invention accounts for about 10 percent of all FGM-acts. Type No. 4 encompasses various forms of cutting which cannot be classified as type 1, 2 or 3.

Due to extremely unsanitary conditions under which FGM is normally done and due to the lack of anesthesia or antiseptics, all forms of cutting may have and often do have severe consequences for the health of the women, for instance death, acute and serious infections and strong pain. As no proper wound healing is possible, thousands of women suffer long-lasting physical and/or psychological diseases.

FGM is practiced in about 30 countries in Africa and in some countries in Asia, but there are some differences with regard to the prevalence in each of these countries. In Djibouti, Egypt or Mali, for example, more than 90 percent of the female population has undergone FGM.

However, FGM is not limited to countries in Africa or Asia. As a result of massive immigration, especially from African countries, FGM has established itself in European countries and North America. There are women and girls who were already circumcised or who are in danger of being circumcised. Unfortunately, there are no reliable figures on mutilated girls and women neither on girls and women at risk. The prevalence depends very much on the countries of origins of these female migrants, but will generally be lower than in their home countries (for social and legal reasons).

Germany has relatively few immigrants from African countries. Nonetheless, FGM is also an issue of increasing concern. According to estimations, about 24,000 circumcised women are living in Germany. More than 6,000 females are at risk of being subjected to FGM.

FGM is evidently practiced in France, because there are many African immigrants coming from countries where the prevalence of FGM is quite high, for instance Senegal, Mali and the Ivory Coast. The number of mutilated girls and women is therefore much higher than in Germany (60,000). Some organizations estimate that up to 10,000 females are at risk of being subjected to FGM. About 200 cases of FGM are known to occur in France every year.
7. Reasons

The origin of female genital cutting is not clear, but probably dates back to ancient times. Today’s cultural justifications and reasons vary – depending on the communities and the very local context. There are many reasons for this bloody ritual. One reason is the control of female sexuality and purity. Furthermore, we find religious motives or arguments, although actually no religion and no sacred text – be it the Qur’an or the Bible – requires FGM. It is rather through ‘force of habit’. As FGM has been practiced for generations, the custom has solidified into a binding rule of customary law. Other reasons are cultural and social identity, aesthetics and hygiene.

Another important reason to continue this traditional practice is power. The circumcisers are mostly respected women, and their social status gives them social control in their local communities. In addition, they are in favour of FGM, because this ritual is an indispensable source of income as the families have to pay for this service. These latter reasons should not be underestimated.

The reasons for the practice of FGM in Western countries are quite similar. Some investigations, however, show that the attitudes toward this practice change in migration. Some parents who come from a country where FGM is still practiced or some women who had to suffer this violent act, start to rethink and to question this ritual when they are in Europe. Some of them are very happy that some European countries have adopted laws to prohibit FGM. Some women even actively fight against this women’s rights violation.

In fact, the debate on FGM plays an important role within immigrant communities. Nevertheless, there are also immigrants who are and continue to be in favor of FGM as it is for them an element of identification and therefore absolutely necessary.

8. Legal Provisions Concerning FGM

In this section, we will find out what German and French law states with regard to FGM. On the basis of relevant legal texts, we will answer the following questions: Are there legal norms that allow the prosecution of perpetrators and / or the prevention of FGM acts? What is the scope of protection?

9. Germany: (Penal) Law

Since the 27th of June 2013, there is a specific provision in German criminal law. The German Parliament (Bundestag) approved the ‘Law on the punishment of Female Genitale Mutilation’ and by this accepted the draft of the ruling parties (CDU/CSU and FDP). The legal situation is now the following: FGM is a crime and must be punished with imprisonment. Section 226 lit. a paragraph 1 states as follows: A person that mutilates the genitalia of a female person, is to be punished with imprisonment not under one year.
In less serious cases, the provision foresees an imprisonment of six months up to five years (paragraph 2).

Until June 2013, FGM acts could always be punished, but there was a lot of uncertainty as to whether or not these acts should be punished as bodily injury (section 223 Penal Code), as dangerous bodily injury (section 224) or possibly as serious bodily injury (section 226). In order to achieve more clarity, several draft laws were proposed and discussed.

The draft law of the ‘Bundesrat’ (the Federal Council of Germany), at the request of two federal states, had foreseen the creation of a special provision: section 226 lit. a of the Penal Code. The draft law of the faction of the Green Party proposed an amendment to section 226 paragraph 1 of the Penal Code so that FGM would be dealt as a case of a serious bodily injury. The draft law of the faction of the Social Democratic Party proposed an amendment to the Penal Code introducing FGM as another case of dangerous bodily injury.

The second draft had an advantage insofar as it clearly indicated that FGM was a serious bodily injury, i.e. a crime and that it has to be punished as such. The loss of or loss of the use of a limb is the core content of section 226 (serious bodily injury). In German legal literature, however, it was long-time debated whether also parts of the body are to be seen as a ‘limb’ (German: ‘Glied’) within the meaning of section 226, paragraph 1, point 2 when they are not connected to the body by hinges nor are they internal organs.

This strict interpretation was not very comprehensible as it was based too much on the wording ‘limb’ as an arm or leg. It overlooked the fact that the provision focuses on the loss of a body part and long life physical restrictions or health problems. A teleological approach here makes much more sense. The purpose of section 226 is to protect the integrity of all body parts. Therefore, it does seem reasonable to see the clitoris as a ‘limb’, because it is always removed in the FGM types 1, 2 and 3 and it is definitely an important part of the female body too. The loss of this part affects the integrity and the sexuality of a female person throughout life. The health constraints were already mentioned above (see page 5). Concerning wrongfulness, there is no real difference to see between the loss of an arm or eye and the loss of the clitoris and the labia. The latter do also fulfil important functions. For instance, the labia’s main function is to protect the internal reproductive structures of a woman from any infection.

Interestingly, the lowest minimum prison sentence which was proposed has become established.

According to the first draft law, FGM was intended to be punished with imprisonment not under two years. The penalty, according to the Green Party’s draft law, would be based on the provisions for serious bodily injury, i.e. a minimum penalty of three years imprisonment. Finally, the minimum penalty of the draft law of the Social Democrats was one year. The minimum penalty is now – as above mentioned – one year. Unfortunately, the legislator by establishing this
penalty clearly showed that FGM with its far-reaching psychological and physical consequences is apparently less severely punished than a serious bodily injury whose minimum sentence is three years imprisonment.\textsuperscript{20}

\section*{10. Limitation Period}

In order to enforce Penal law, it is essential that the authorities become aware of criminal acts. However, since FGM is mostly carried out on little girls, it is unlikely that they press charges against their parents. Usually, they do not question this traditional practice, especially when they are very young and when family ties are still very strong. Prosecution is more likely when the victims are older and more independent from their families and from their parents. Yet, then the acts are often time-barred and cannot be pursued anymore. Therefore, the statute of limitations is crucial and should ideally be postponed until the age of 18 (Ruhender Verjährung). Then, a more effective criminal prosecution is possible. This is due to the fact that only when the victims are old and independent enough may they decide to charge their parents.

With the 2\textsuperscript{nd} Law of the Rights of the Victims (in German: ‘Opferrechtsreformgesetz’), adopted in 2009, a solution could be found for this problem. This law foresees amendments of provisions of the Penal Code and the Code of Criminal Procedure, etc. One amendment is of particular importance with regard to FGM. It concerns section 78b of the Criminal Code and provides a stay of the limitation period in the cases of sexual crimes. This section reads as follows: ‘(1) The limitation period shall be stayed

1. Until the victim of offences under sections 174 to 174c and sections 176 to 179 and 225 has reached the age of eighteen; the same shall apply with respect to offences under sections 224 and 226, as long as at least one participant has also infringed section 225.’

Under this section, the running of the limitation period is now also postponed for criminal acts such as dangerous and serious bodily injury, provided that one participant is also punishable according to section 225. As a result, these limitation rules also apply to criminal FGM acts, which were planned and organized by the parents of the female victims.

\section*{11. Criminal Liability for FGM Acts Committed Abroad}

German criminal law is – in principle – only applicable to acts committed in Germany (section 3 of the Criminal Code). There are only a few exceptions to this rule. Section 5 of the Criminal Code lists the criminal acts committed abroad that can be prosecuted by German authorities as they affect domestic legal interests. This includes, for example, criminal acts such as the preparation of a war of aggression, high treason against the Federation, the abduction of minors or offences against sexual self-determination. In these cases, German criminal law
shall apply, regardless of the law applicable in the locality where the act was committed.

In order to effectively protect them, criminal liability should be established for FGM acts committed abroad. More precisely, section 5 of the Criminal Code must include FGM acts – under the condition that the victim, at the time of the criminal act, has their domicile or habitual residence in Germany.

However, the legislators of the new provision concerning FGM did not pave the way to broader law enforcement. It remains as it was. The legal situation does not permit the prosecution of FGM acts committed abroad.

This seems to be very unacceptable as there are girls and women who live in Germany and who are at risk of undergoing this ritual abroad, i.e. in the country of origin of the family, by so-called ‘holiday FGM’. Furthermore, the draft laws of the Green Party and of the Federal Council\(^{21}\) reflect this view and emphasize the necessity to include FGM acts in section 5.

12. The Role of Experts

Of course, there are people who could get information on FGM acts that were committed or that are about to happen. For example, school-teachers or other employees of educational institutions have often a closer relationship to pupils. Thus, they may possibly obtain sensitive personal information, for example on a planned or performed FGM. The same holds for doctors, nurses and other medical personnel. In fact, the latter are often the only people who can know for sure if a female had undergone FGM. Though, these experts are subject to confidentiality.

However, the doctors – according to section 203 in conjunction with section 34 Penal Code – may report information also without the consent of the patient if there is no other possibility to ward off a danger for life and limb, more precisely for life, health or freedom. When a FGM threatens a female, the doctor must decide whether to break the obligation to confidentiality in order to protect health, life and self-determination of the person or not.\(^{22}\)

Women’s rights activists fiercely criticize this rule. They call for a general reporting obligation. Then, experts would be obliged to report FGM acts which are about to happen or which already have happened. The doctors, however, say that such a statutory duty is not appropriate, because the girls would probably not go or be brought to the doctors. In that logic, the German Medical Association, the Federal Ministry of Health and several politicians are against the introduction of mandatory reporting. Unsurprisingly, the draft laws do not contain a provision in order to change this either. Moreover, the opponents point to constitutional arguments that speak against a general reporting obligation of doctors because this falls within the competence of the federal states.\(^{23}\)
13. FGM and the Refugee Status

There are females who do not want to undergo FGM and who leave their communities and home countries in order to find safety. Some of these female refugees arrive in Germany where the state authorities have to decide on their legal status and on a right to stay. The core question is the following: Can FGM influence the status of a refugee?

First of all, German asylum law does make a difference between asylum and a refugee. To be granted asylum status, the conditions of Article 16 of German Basic Law (*Grundgesetz*) must be fulfilled. The three core conditions are the following: First, there must have been a State persecution in the home country which could be deemed as relevant to the status of asylum. Second, the person must have fled to Germany because of this persecution. Third, she/he must have applied for asylum in Germany. If only one condition of Article 16 is met, the granting of asylum is not possible. For example, if the person came to Germany via a ‘safe third state’ he or she cannot be granted asylum status.

However, a person who had fled his home country may obtain the status of a ‘recognized refugee’ by means of section 60 paragraph 1 of the German Residency Act. This means that the person has a right to stay and has got the same rights to certain benefits as the people to whom courts granted asylum. Here, the rule of the ‘safe third state’ does not apply.

With regard to FGM, the legal situation has considerably changed in January 2005 when the Immigration Act 24 entered into force. It explicitly mentions ‘gender grounds for asylum’. For the first time in German law, gender-based persecution is recognized in section 60 paragraph 1 of the Residency Act. Equally important is the clarification that persecution of females can originate from state actors and non-state actors. In the past, many women who had applied for asylum were not granted asylum status because they were not persecuted by the state. This new legal situation means the following: women and girls, who are at risk of being circumcised in their countries of origin, can obtain the status of a ‘recognized refugee’ by reason of gender-specific persecution.

14. France

In general, there is much stronger consciousness with respect to this harmful traditional practice in France than in Germany. One reason for this is that the French public and the French authorities were much earlier faced with FGM acts than was the case in Germany. Since the beginning of the 1980s, this ritual has been an issue of public concern and seen as an intolerable form of violence and more precisely as a serious crime, which needs to be extinguished.

15. (Penal) Law

Interestingly, there is not a specific provision for the prosecution and punishment of FGM acts, but there are several useful and relevant norms. Article
222-9 of the Penal Code (henceforth: PC) for example, is of particular importance. It states: ‘Les violences ayant entraîné une mutilation ou une infirmité permanente sont punies de dix ans d’emprisonnement et de 150,000 euros d’amende.’ This means that FGM acts that result in a mutilation or in a permanent disability will be punished with ten years of imprisonment and a fine of 150,000 Euros. This provision is the result of a reform of the Penal Code in 2006 by means of the ‘Law that Reinforces the Prevention and Repression of Violence between Spouses or against Children’.

There are possibilities to increase the penalty. FGM acts are punished with 15 years of imprisonment when the person is under 15 years of age (Art. 222-10, point 1 PC). If the FGM act results in the death of the person without intention to kill, the offender will be punished with 15 years of imprisonment (Art. 222-7 PC). If the person who is subjected to FGM is under 15 years of age and if the act results in the death of the latter, the offender is to be punished with 20 years of imprisonment according to Article 222-10 PC.

Acts of violence causing a complete inability to work for more than eight days, are punishable by three years in prison and a fine of 45,000 Euros under Article 222-11 PC. The crime mentioned in Article 222-11 is punished with five years in prison and a fine of 75,000 Euros, if it is committed against a minor under 15 years (according to Article 222-12).

16. Limitation Period

The limitation period was also changed and is now up to 20 years according to Article 222-10 and Article 222-12 (in conjunction with Article 7 and Article 8 Code of Criminal Procedure [henceforth: CCP]). Most importantly, the limitation period does not begin to run until the victim reaches the age of majority. Females who were circumcised as minors are now entitled to press criminal charges against the perpetrators until the age of 38.

17. Criminal Liability for FGM Acts Committed Abroad

In principle, French criminal law is not applicable on criminal acts committed abroad. In order to prosecute FGM acts committed abroad, an amendment of the Penal Code was made in 2006 by the law mentioned above (‘Law that Reinforces the Prevention and Repression of Violence between Spouses or against Children’). This law introduced a new provision, Article 222-16-2, which reads as follows: If the acts described in Article 222-8, 222-10 or 222-12 PC were committed abroad and on a person under 18 years of age who has their habitual residence in France, French criminal law is applicable.

Until 2006, the non-French nationals who were living in France and who took their daughters abroad to be circumcised could not be prosecuted. Their minor female daughters had no legal protection against this act of violence. This loophole in French criminal law is now closed. All people who live in France and arrange or
commit FGM, in France or abroad, may be punished according to French criminal law.

18. The Role of Experts

With regard to experts, there are two crucial points here. The first is criminal liability in case of non-assistance of a person in danger, and the second is the authorization for release of medical records.

According to Article 223-6 PC, ‘[a]nyone who, being able to prevent by immediate action a felony or a misdemeanour against the bodily integrity of a person, without risk to himself or to third parties, wilfully abstains from doing so, is punished by five years' imprisonment and a fine of € 75,000.’

If a person willfully fails to offer assistance by him or herself or by starting rescue operations, although there is no risk to him or herself or to a third party, she/he receives the same punishment. 30

This obligation to assist a person in danger is worked out in detail for medical and paramedical personnel. There is a provision in the French Public Health Code 31 as well. Article R. 4127-9 states that any doctor who is faced with a person being sick, injured or at risk, or she/he knows that a person is injured or in danger, then she/he is obliged to provide assistance or to make sure that this person in need receives the necessary help as fast as possible. 32

These provisions also apply to FGM acts. If a doctor, for example, knows about a planned FGM act and if she/he does not inform the court or other authorities, she/he is held responsible for the failure to render assistance and punished according to Art. 223-6 PC.

Another important point is confidentiality. Article 226-13 PC states the following: The release of secret information by a person that is entrusted with this information due to its position or its profession is punished by one year imprisonment and a fine of 15,000 Euros. However, in the case of FGM, there is an exception to this rule included in Article 226-14. Doctors, for example, are released from professional secrecy, if they know that a minor has been subjected to FGM 33 and report it to the law enforcement authorities.

In this context, Article 434-3 PC is important as well. This provision contains a general obligation to inform the law enforcement authorities. A person who has knowledge of maltreatment or sexual assaults upon children under 15 years of age is obliged to report these offences. This obligation also applies to doctors. In the case of FGM, they are released from confidentiality. If a doctor knows or gets to know that a minor has been subjected to FGM, he must report this to the police. Otherwise she/he could be punished with three years of imprisonment and a fine of 45,000 Euros.

In conclusion, French law is indeed very clear for professionals: If they have information that a person will be subjected to FGM and if they fail to assist that person in danger, they may be prosecuted and punished. The same holds for the
case of a professional who gets to know about an FGM act committed on a person
and who does not inform the state authorities (courts, etc.) responsible for child
protection.  

19. Implementation of Legal Provisions: Law Enforcement in Germany

Until now, no criminal trial and no condemnation have taken place, but many
courts have dealt with FGM with regard to the right to asylum.

In fact, the risk of FGM has already been recognized by several courts as a
grounds for asylum, for example the administrative court of Magdeburg. On the
20th June 1996, this court declared that the denial of state protection is an act of
political persecution and accorded the asylum status to an Ivorian woman. The
judge said: In principle, political persecution means persecution by the state.
However, persecution by private actors may be attributed to the state if the latter is
unwilling to take appropriate measures in order to protect the people at risk.
According to the court, FGM is a violation of a person’s physical and
psychological / mental integrity. In Ivory Coast, FGM is not punishable and it is
unlikely that the State would take action against this form of violence.

However, German jurisprudence shows no clear line on this issue. Afterwards,
some courts rejected while others accepted the risk of FGM as a grounds for
asylum. Subsequently, court decisions have not always reflected the view of the
judge of the Magdeburg court. In March 1999, for example, the administrative
court of Frankfurt/Main rejected the application for asylum of a woman from the
Ivory Coast. Although FGM is practiced in the whole country, especially in the
North and in the West, and also within the Djoula community to which the
applicant belongs.

According to information, the judge explained that there was sufficient
probability that the female applicant born in 1995 had been threatened to be
subjected to FGM and that she could not escape from this violent act. Without any
doubt, such an act would violate the physical integrity of the applicant. However,
this does not give her right to asylum. The court further stated that one cannot
assume a political persecution, because this act actually serves as an initiation rite
whose purpose is to fully integrate girls into society or the local community.
Furthermore, FGM cannot be attributed to the State, because it is practiced within
social groups or tribes. This argumentation is quite questionable as it implies the
enforcement of a local norm of ritual initiation to the detriment of a norm of
international law. It oversees that a state is obliged to protect women against
violence, and FGM definitely constitutes severe women’s rights violation.

In April 1999, the administrative court of Trier did not grant asylum status to a
Nigerian woman. The judge found that the risk of FGM may definitely be grounds
for asylum – but only when the threat originates from the Nigerian state. On the
basis of information provided by the Federal Foreign Office and NGOs (i.e. Terre
des femmes), the judge concluded that the government of Nigeria was absolutely
willing to protect women against violence. Therefore, the asylum-seeking woman could return to her home-country where there was no risk of being persecuted.\textsuperscript{37}

In October 2003, the administrative court of Düsseldorf dealt with the case of a Nigerian woman too. It rejected her asylum application and declared that the woman born in 1975 could return to her home country as she may create her livelihood without any fear of being circumcised. The court referred to the information given by her. Accordingly, before she came to Germany, she had already worked in Nigeria as a single woman. The judge recognizes that it is difficult for a single woman there (to find a job or to find a flat, etc.), but she is not the only one with such difficulties. It is a problem for many more women. Furthermore, she has no family anymore so that there is no familiar pressure with regard to FGM. Her declaration not to find a safe place in Nigeria and to avoid a forced marriage was not plausible either in the view of the court. Even if ‘Chief B1’ – a man she apparently had been promised to – would try to find her; Nigeria is a huge country. She should not go back to Agbor; instead it was suggested that she go to another city or region.\textsuperscript{38}

In August 2003, the administrative court of Aachen granted right of asylum to a three-year old girl from Nigeria. The court said that the girl - if she returned to Nigeria - would probably undergo FGM against her will and against the will of her parents. This violent act would also be attributable to the State and could be seen as political prosecution. The female would have no possibility of escaping.\textsuperscript{39}

In May 2004, the administrative court of Oldenburg granted asylum status to a woman from Togo belonging to the ethnic group of Kotokolli.\textsuperscript{40} The court declared that the genital mutilation of the Togo women was political prosecution. Women have a clitoris and labia, and because of these genitals, they are seen as ‘dangerous’ and ‘inferior’ in Togo. There, as in many African countries, lots of people believe that FGM is necessary to control female sexuality. In that sense, it is useful – they think – to cut off the female genitalia in order to avoid any form of sexual permissiveness and guarantee premarital chastity or marital fidelity. Consequently, women are prosecuted due to their very specific physical characteristics.\textsuperscript{41}

The legal reasoning of the administrative court of Gelsenkirchen went in the same direction when it accepted the risk of FGM as grounds for asylum. In July 2004, the court decided that a girl born in Germany in 2001 with Guinean nationality would probably be subjected to FGM if she and her parents returned to their home country.\textsuperscript{42} The court emphasized that the risk of a genital mutilation represents political prosecution.\textsuperscript{43} The court clearly explained that in FGM cases the reason for prosecution is belonging to a specific social group: females. Therefore, the female sex itself is also the key point with regard to the right to asylum, because it is the right of the applicant – and of every female person in general – ‘to have fully preserved, intact genitals.’\textsuperscript{44}

In addition, the judge took up the argument of the ‘initiation rite’ of the Frankfurt court decision (see above) and stated that is not at all relevant if FGM is
socially accepted (or not). The court points out that the purpose of this harmful practice is to preserve the traditional roles of men and women in society. Women are mere objects of marriage, and their social status is inseparably linked with marriage. In order to get married and to meet the expectations of the community, women have to undergo FGM – otherwise they will be excluded. In the logic of this comprehensive approach, FGM basically serves as a means for ‘perpetuating the social inferiority’ of women.46

In 2005, the administrative court of Stuttgart did not grant asylum status, but it assumed an impediment to deportation. The court explained that there was a prosecution when a person is threatened with harm because of their sex. The woman had fled her home country in order to escape forced marriage and related genital mutilation.47

In 2007, the administrative court of Aachen decided in a similar case.48 An Ivorian woman had fled her home country escaping arranged marriage and planned premarital-genital mutilation. The court concluded that there was an impediment to deportation as it is probable that after returning to her home country, the applicant could be submitted under FGM. This would be a prosecution due to her female sex. It is not relevant, whether this ‘female prosecution’ is attributable to the State or not. According to the new legislation, political persecution is also possible by non-state actors.

In March 2010, the administrative court of Münster did not grant asylum status to a Nigerian woman. Although she fled the threat of forced marriage and genital mutilation, the court did not qualify the risk of FGM as a political prosecution as this harmful practice may not be attributed to the State. Yet, the court raised the difficult situation of uncircumcised women in Nigeria. According to the judge, the woman would be in ‘extreme danger’ if she returned to Nigeria.59 On the basis of the declarations made by the applicant, the court concluded that there was ‘concrete danger’50 for her life. For example, within the community of the Urhobo, it is usual that women be circumcised even if they are already adults. Normally, in such a case the ritual is performed during the first pregnancy. She could not flee to another part of the country as the threat emanating from the father was to be taken very seriously. As a result, there was an impediment to deportation. Interestingly, this court decided in favour of a single woman explaining that she would be in an extremely difficult situation without the support of her family.51

20. Law Enforcement in France

It is remarkable that France is the only European country with a systematic practice of criminal court cases dealing with FGM, from as early as 1979 onwards.52 In approximately 20 cases circumcisers and parents who let their daughters be circumcised have already been prosecuted and punished.

Between 1982 and 1987, only correctional tribunals dealt with FGM cases. These tribunals are competent to pronounce a sentence of up to five years of
imprisonment. Later then, the competence of the Assize Courts was established and recognized.

With regard to penalties there was also an increase in them. The sentences in FGM cases have become more severe over time. From 1991 onwards, penalties imposed on the circumcisers were no longer suspended on probation; and parents were punished without probation from 1993. In 1997, a court for the first time even decided a compensation for damages should be paid (10,000 French Francs at the time).

Let us have a closer look at how jurisprudence has changed over time. The first trial dates back to 1979. However, this was a time when excision was not perceived as a crime and therefore only tried by a correctional chamber. It was the case of the little girl called Doua (3½ months old) who died as a result of this violent intervention. The circumciser was convicted of involuntary manslaughter and was given a one-year suspended sentence. The parents were not charged; and the judgment was hardly noticed by the public.

Only three years later, in July 1982, it was the case of Bobo Traoré that triggered strong emotions in France. This three-month old little girl bled to death in Bobigny, near Paris, after she had been circumcised. Doctors could not save her life, and judges were at first somehow stumped over what to do with this case and how to apply criminal law. After the death of this child, feminist organizations started to lobby that cases of excision should be judged by criminal courts (in French: les Cours d’Assises; in English: Courts of Assize) and not by correctional chambers.

Shortly after, in October 1982, the 15th Correctional Chamber of Paris started to deal with another case of excision. A Malian man, Fousseyni Doukara, charged himself when he declared that he had circumcised his daughter Bintou with a knife. It is pretty rare that a father has the courage to take responsibility for the act that he probably did not perform himself. Normally, the mothers take the girls to the circumciser. In the Bintou Doukara case, the FGM act had already taken place in September 1980. The child, aged three months, was admitted to the Hospital of St. Vincent de Paul with heavy bleeding and fortunately survived.

With regard to the case of Bintou Doukara, the experts spoke of an extended clitoridectomy and the disappearance of an erogenous zone that may affect, according to Western ideas, the future sexual life of the female. Though, at no time did they indicate that it is ‘mutilation’. Consequently, this (FGM) act remained in the field of tort and therefore within the competence of the correctional chamber. The father was convicted by the 15th Correctional Chamber not earlier than January 1984 for intentional bodily injury to a suspended sentence of one year.

The parents of Bobo Traoré were charged for failure to assist a person in danger.

Attorney Linda Weil-Curiel, a representative of civil organizations, strongly emphasized that this violence should be qualified as mutilation and therefore must
be tried as a crime by the Cour d’assises. Only these courts are competent to hear cases related to crimes.

She based her argumentation on a judgement pronounced on the 20th of August 1983\textsuperscript{56} when a judge stated:\textsuperscript{57} ‘The clitoris and the labia are female erectile organs; their absence as a result of violence constitutes a mutilation under article 312-3\textsuperscript{o}\textsuperscript{58} of the Criminal Code.’\textsuperscript{59} This case concerned a Breton female who had no connection with Africa or African culture at all. This French mother had sadistically cut off the clitoris and the labia minora of her daughter, and the case was brought before the Cour d’assises. Weil-Curiel concluded that there should not be a different treatment to an African mother or an African girl. Both, African as well as white girls who had been mutilated will suffer the lifelong consequences of such a criminal act.\textsuperscript{60} For that reason, Weil-Curiel was concerned that the FGM act committed on Bobo Traoré was classified as a serious bodily injury and tried as such.

On 1\textsuperscript{st} March 1984, the correctional chamber of Créteil – due to the severity of the criminal act – declined jurisdiction. Finally, the court of Appeal of Amiens convicted to a suspended sentence of six months.

Significantly, the court accepted the argument of Weil-Curiel and decided that the cutting of the clitoris is a serious bodily injury. It is a mutilation that implies the loss of a body part.

In May 1988, the Assize Court of Pontoise decided the first case of excision that was directly referred to such a court. It convicted a man (Baradji) and his two co-wives charged as accomplices to a three-year suspended sentence. They had circumcised the little 6-week old girl Mantessa who died due to this act. The sentences were still quiet lenient and therefore harshly criticized by Weil-Curiel. In the first FGM trial before a Cour d’assises, she stated that the court should have pronounced prison sentences without probation, in order to make clear that it was and is a criminal act.

21. The Hawa Gréou Case

The real turning point was the Hawa Gréou case in February 1999. This trial ended with a long prison sentence. A woman circumciser was convicted to eight years in prison, because she had carried out several circumcisions.

Interestingly, it is also the first trial in which young girls who were circumcised in their childhood bravely raised voices against their parents and the circumciser. There was a real awareness of the suffering and tragedy caused by excision. Mariatou – one of the victims – had denounced her parents and the circumciser (Hawa Gréou) and brought them to justice. She was supported by the Attorney Weil-Curiel. The mother of the applicant was sentenced to two years in prison, and the circumciser received a sentence of eight years in prison. A further 26 parents who let their daughters in France by the same excisor, received suspended prison sentences.
In a trial held in the Cour d’assise of Paris in November 2003, a couple from Mali was sentenced to punishments of imprisonment as a suspended sentence: the father who had obtained French nationality was sentenced to five years and the mother to one year. Their little girl born in September 1996 had been excised in Mali in 1998. The mother said that they did not know female circumcision was banned in France.

The risk of FGM has also been recognized as grounds for asylum.

On the 7th of December 2001, a family from Mali (Mossa and Nacira Sissoko and her daughter born in 1999), was granted the status of refugees by the Appeals Commission for Refugees (in French: Commission des recours des réfugiés). With that decision, the commission confirmed a judgment of July 1991 that stated the following: an ablation of the clitoris against the will of the victim is mutilation and inhumane persecution and is therefore valid grounds for asylum.

Since then, the French Office for the Protection of Refugees and Stateless Persons has granted asylum in many similar cases. After all, the number of such requests has increased from year to year. In 2006, there were 117 and in 2008 more than 1,000 similar requests.

22. Conclusion

France and Germany are culturally very heterogeneous countries that have seen since the 1960s a massive wave of immigration. Immigrants do always come with their cultural beliefs and often want to live according to them even far from their home countries. Thus, FGM is a reality in both countries, and legislators and judges had to deal with this violent act and its serious consequences.

France with its great community of African immigrants had to find legal solutions much earlier than Germany. Already at the beginning of the 1980s, judges started to trial FGM as a crime. However, Germany has not seen any trial so far, but the legislator saw the necessity to change the Penal Code by introducing a special section. In France, the probability to detect FGM cases is greater because there is a general obligation to report. This obligation also applies to doctors and to the personnel of medical or educational institutions. In Germany, there is no such obligation, and it is therefore very unlikely that FGM will be tried in a criminal court in the near future.

At least, in both countries it is possible to grant asylum to females that are at risk of being mutilated.

Notes

2 Frisians are called an ‘ethnic group’, but they have the legal status of national minorities according to German law. See: Bundesministerium des Innern, Nationale Minderheiten in Deutschland, Berlin, 2011, 3rd edition, 7-50.
5 The sub-categories are: immigrants with French nationality (immigrés français) and immigrants with another nationality (immigrés étrangers).
6 We find in literature and in the political discourse also the term ‘female genital cutting’. However, many women’s rights activists find this wording too neutral to describe that extremely damaging and painful practice. For the same reason, the author of this chapter also uses the term FGM.
9 Gatestone Institute, UK: The Crisis of Female Genital Mutilation, 9.5.2013.
10 In the 19th century, many women in Europe and the United States had to undergo clitoridectomy and sometimes even the removal of the labia in order to ‘treat’ masturbation. Anna Kölling, Weibliche Genitalverstümmelung im Diskurs, Berlin, 2008, 63 ff.
12 Poste de veille, France: entre 55.000 et 60.000 femmes excisées, 8.11.2012.
13 In German: Gesetz zur Strafbarkeit der Verstümmelung weiblicher Genitalien.
15 Penal Code = Strafgesetzbuch (StGB).
22 Deutscher Bundestag, Drucksache 17/9005, 16.3.2012, 8.
23 Ibid., 8.
24 The Immigration Act (German Version).
25 The Residency Act is the most important part of the Immigration Act.


27 Code pénal.

28 LOI n° 2006-399 du 4 avril 2006 renforçant la prévention et la répression des violences au sein du couple ou commises contre les mineurs.


31 In French: « Tout médecin qui se trouve en présence d’un malade ou d’un blessé en péril ou, informé qu’un malade ou un blessé est en péril, doit lui porter assistance ou s’assurer qu’il reçoit les soins nécessaires. » There is a provision with the same wording in the French Code of Medical Deontology (Article 9).

32 This provision explicitly mentions « mutilations sexuelles ».


34 Judgement of the administrative court of Magdeburg, 20th June 1996 - 1 A 185/95.


36 Judgement of the administrative court of Trier, 27th April 1999 - 4 K 1157/98.TR.


38 Judgement of the administrative court of Aachen, 12th of August 2003 - 2 K 1924/00.A.

39 Judgement of the administrative court of Oldenburg, 7th of May 2004 - 7 A 92/03.

40 However, there are also local communities in which women play an important role in introducing and upholding this ritual, see: Liselott Dellenborg, *A Reflection on the Cultural Meanings of Female Circumcision. Experiences from Fieldwork in Casamance, Southern Senegal* (Uppsala, 2005), 79.

41 The application of the parents to obtain a right to stay was rejected by court decisions before.


43 Ibid., 9.

44 Ibid., 10.

45 Ibid., 11-12.
Judgement of the administrative court of Stuttgart, 10th June 2005 – A 10 K 13121/03, 10.

Judgement of the administrative court of Aachen, 9th of January 2007 - 7 K 1621/05.


Ibid., 14.

Ibid., 14.

Sophie Poldermans, *Combating Female Genital Mutilation in Europe*, 2006, 33.


‘SOS Femmes Alternative’ and the ‘Ligue du Droit International des Femmes’.


Old penal code in force until 1st February 1994.

« Le clitoris et les lèvres de la vulve sont des organes érectiles féminins, que leur absence à la suite de violence constitue une mutilation au sens de l’article 312-3° du Code Pénal. »


Cours d’assises. This court has jurisdiction over crimes.


Today it is called: National Court of Asylum Law (in French: Cour Nationale du Droit d’Asile, CNDA).

In French: *Office français de la protection des réfugiés et apatrides* (OFPRA).
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**Anja Titze** studied Law and Romance Languages as well as European studies. In 2008, she obtained her Ph.D. degree in Legal Anthropology with a thesis on the
implementation of the rights of indigenous women in a pluri-legal society. Her research interests lie in the areas of human rights and transitional justice.