

## The Dutch approach to female genital mutilation in view of the ECHR The time for change has come

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### 1. Introduction

As a result of immigration Europe is increasingly confronted with many kinds of practices from other cultures.<sup>1</sup> This is not usually a problem, and familiarisation develops gradually over the course of time. However, in some cases a cultural practice, such as female genital mutilation (FGM), may be at odds with the standards and values felt to be fundamental by Western societies. In Europe FGM is considered a punishable and harmful tradition which must be combated effectively.<sup>2</sup> In practice, however, only France prosecutes FGM cases. Other countries have taken appropriate measures, such as the introduction of a specific criminal law section and/or a statutory duty to report, but FGM cases have not been prosecuted.

The latter also applies to the Netherlands. FGM cases have never been prosecuted in the Netherlands although it is qualified as the criminal offence of (serious) physical abuse which carries a penalty of at least three but no more than twelve years (Articles 300-303 of the Dutch Penal Code (*Wetboek van Strafrecht*)).<sup>3</sup> In the last few years the Dutch Parliament has discussed this failure of criminal justice enforcement on a number of occasions, and it has urged that the policy be accentuated. An issue that remains a point of special interest is whether (a suspected case of) FGM should be reported by the (medical) welfare services to the criminal enforcement authorities, implying the introduction of a statutory duty to report or a mandatory reporting code. Taking into account the consistent resistance among medical and social authorities towards a statutory duty to report, implying legal responsibility for non-compliance, the Dutch Government rejected the first option. Instead it chose to introduce a reporting code, implying that professionals would be bound by internal rules, however leaving the decision whether or not to inform the judicial authorities ultimately in their hands.<sup>4</sup> The question is, however, whether this is sufficient.

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1 C.J.M. Schuyt, 'Publiek recht in een multiculturele samenleving' ('Public Law in a Multi-cultural Society'), in: Nederlandse Juristen Vereniging (Dutch Lawyers Association), *Multiculturaliteit en Recht (Multiculturalism and the Law)*, 2008, pp. 63-125.

2 It is of importance to note that FGM is also rejected in the mother countries. Some mother countries have subjected it to criminal sanctions, but these are not always enforced, e.g. the African Charter on Human and Peoples Rights, June 27, 1981, p. 21. Also: UN, General Assembly, RES./34/180, 18 December 1979, *Fact Sheet No. 23, Harmful Traditional Practices Affecting the Health of Women and Children*, <<http://www.unhcr.ch/html.menu6/2/fs23.htm>>.

3 Recently a Dutch native of Moroccan origin was arrested on suspicion of having FGM performed on his 5-year old daughter. An acquittal followed; S. Kamerman, 'Het raadsel van vrouwenbesnijdenis' ('The Mystery of FGM'), *NRC*, 14 February 2008, <<http://www.nrc.nl/binnenland/article2152320.ece>>.

4 *Kamerstukken II* 2007-2008, 28 345, no. 65, p. 7.

This issue is all the more pressing since here we are nearly always dealing with the protection of juveniles, a category which usually requires further-reaching state obligations.

In this paper I will address the issue whether or not there is a need for the introduction of a statutory report, as a prerequisite to provide adequate protection. Taking the European Convention on Human Rights (ECHR) as a starting point, an overview will be provided of the extent and nature of the state's obligations to offer protection against FGM. The Dutch policy on FGM will serve as a case study, enabling me simultaneously to provide an answer to the question of whether the Dutch policy on FGM is compatible with the standards of the ECHR. Subsequently, for the sake of comparison, an overview will be provided of the French policy on FGM. What factors qualify the French success, and what lead does this provide to improve the Dutch policy, or for that matter, the policy regarding FGM in other European countries? As will be shown below, the willingness of French (medical) social workers to pass on information to the criminal justice authorities appears to be the key element. But first of all, I will begin with a short description of FGM and its cultural background.

## 2. Forms of circumcision and cultural background

FGM is a widespread practice; its origins can be found on the African continent, in some parts of Asia (Indonesia, Malaysia) and in the Middle East (Egypt, Yemen). It is an ancient custom, which was already being practised 2,500 years ago. Although it is a relatively rare occurrence on a global scale, the number of estimated circumcisions performed annually is large enough to be considered a serious problem. The moment of circumcision varies according to the interpretation of the ritual in which it is involved. Sometimes circumcision is performed on infants; at other times it takes place at puberty, as a sign of the transition to another phase of life, or at the beginning of pregnancy, as protection of the foetus against the supposed detrimental influences of the clitoris. The form of the circumcision may also vary: 1. circumcision, meaning the removal of the foreskin or the top of the clitoris; 2. excision, implying a total removal of the clitoris as well as the labia minora, and 3. infibulation, cutting away the clitoris and both the labia minora and majora, and afterwards stitching up the labia leaving a small incision to allow the discharge of urine and blood.<sup>5</sup> It should be remembered that such circumcisions, with the exception of surgical circumcision, are usually performed without anaesthesia in unhygienic conditions, which may be fatal for the girl or woman in question.<sup>6</sup> Moreover, it should be clear that this concerns an irreversible form of severe physical damage, paired with psychological trauma.<sup>7</sup> Healthy, sexually functional parts of the female body are removed without any medical indication whatsoever; restorative plastic surgery can only partially repair the damage.

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5 M. van der Liet-Senders, 'Inbreuken op seksuele en reproductieve rechten' ('Infringement of Sexual and Reproductive Rights'), in: I. Boerefijn *et al.* (eds.), *Het voorkomen en bestrijden van geweld tegen vrouwen (The prevention and combating of violence against women)*, 2000, pp. 238-239.

6 Van der Liet-Senders reports that 85 % of the women and girls who are circumcised undergo circumcision or excision; 15 % undergo infibulation. This last custom is practised, among others, within the Somali community in the Netherlands; Van der Liet-Senders, *supra* note 5, p. 239.

7 In order not to complicate the discussion unduly, I will not consider the fact that lighter forms of FGM such as a ritual circumcision of the clitoris exist. Such a minor operation has (recently) been suggested to solve the target group's cultural dilemma: G. Nienhuis, 'Knagen aan oude tradities?' ('Gnawing at Old Traditions?'), 2004; 'Een druppeltje bloed' ('A Drop of Blood'), 2008 *Medisch Contact*, no. 21-23; W. Limborgh, 'Dient meisjesbesnijdenis op culturele gronden te worden getolereerd' ('Should FGM be allowed due to Cultural Arguments?'), 2008 *NJB*, pp. 2514-2520. The Dutch Government, however, is unwilling to do this because of the gendered nature of this operation.

The disadvantages for girls and women are evident, but what benefits are offered in exchange? Viewed from a Western vantage point, such a ‘voluntary’ form of mutilation cannot be easily explained.<sup>8</sup> A number of cultural foundations can be claimed. First, the claim of religion: circumcision is said to be prescribed by the Koran or the Bible. However, such texts cannot be found in these scriptures, although they do exist in some authoritative interpretations.<sup>9</sup> A second basis lies in the mythical belief that the female sexual organ, in particular the clitoris, has a detrimental effect on male sexuality, or even on the baby. It is self-evident that no valid foundation exists for such a belief. A third reason is the necessity to control the sexuality of the woman. Without circumcision the woman may threaten to become promiscuous and no longer be under the control of her husband. Circumcision purges the woman of her overabundant sexuality and ensures that the man is able to respond adequately to the sexual demands of his wife. This image of purity is specifically expressed by the practice of infibulation, where the (potential) wife, remains, as it were, sealed until the moment that her husband can make his rightful claim on her sex. A corollary of this is the argument that circumcision increases the beauty of the woman, but – given the horrific mutilation which results from the more severe forms of circumcision – little significance can be attached to this argument. Finally, circumcision also serves as an initiation ritual, in the transition from girlhood to womanhood. This argument, however, is meaningless in cases where circumcision is performed at an extremely young age.

These foundations are in many ways an illustration of a gendered approach to female sexuality. The sexual autonomy of the girl/woman in such a cultural setting does not stand on its own but derives its meaning from the sexuality of the man.<sup>10</sup> The key to female sexual integrity within such a cultural context is contained in her circumcision.<sup>11</sup> What is more, the socio-economic context has to be taken into account. In the countries where female circumcision is common, marriage for women is often one of the few options for survival. Those who do not allow themselves to be circumcised are excluded from the community; in any case they are not considered to be marriageable and thus sacrifice a certain level of financial and social security. The consent of adult women to circumcision must be put into perspective against this background; as far as female minors are concerned, Western standards of legally valid consent are non-existent, and in any case parents or others take the decision as to their circumcisions.

### **3. The ECHR: The obligation to offer adequate and effective protection**

Having drawn a brief profile of the nature of FGM, the question arises how to relate FGM to the ECHR. It should be noted that the ECHR does not provide a specific norm prohibiting FGM. Moreover, one has to bear in mind that the ECHR does not provide detailed instructions on the nature and the extent of the protection to be offered by the States.<sup>12</sup> Moreover, according to the

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8 The only systematic exception that can be thought of is the circumcision of boys, which is practised on a large scale in the Western world (and elsewhere). While this form of circumcision in its outer form is comparable to the lightest form of FGM, the underlying reasons for it significantly differ. The same is true for plastic surgery, therefore I will not relate to this issue here.

9 L-J. Leusink, *Een huis is niet mooi zonder toegangsdeuren. Over FGM (A House without Front Doors is not desirable. Concerning FGM)*, doctoral thesis, Utrecht 2003.

10 L. Bibbing, ‘Female Circumcision: Mutilation or Modification’, in: J. Bridgeman & S. Mills, *Law and Body Politics*, 1995, chapter 7; M.C. Nussbaum, *Sex & Social Justice*, 1999, chapter 4.

11 A. Funder, ‘The minimis non curat lex: the Clitoris, Culture and the Law’, 1993 *Transnational Law and Contemporary Problems*, no. 10; Note, ‘What’s Culture got to do with it? Excising the harmful tradition of female circumcision’, 1993 *Harvard Law Review* 106.

12 Other international regulations do sometimes provide such ‘instructions’, e.g. Art. 19 Para. 1 of the Convention on the Rights of the Child, UN 20 November 1989, which refers to the taking of ‘appropriate legislative, administrative measures (...) to protect the child from physical or mental violence (...) maltreatment (...) while in the care of parents or any other person (...)’. The second paragraph relates this to the obligation of the creation of ‘effective procedures (...) to provide necessary support for the child (...) as well as for other forms of prevention (...) investigation (...) and, as appropriate, for judicial involvement’. Another example of an instruction can be found in Art. 4(c) of the UN

case law of the European Court of Human Rights (ECtHR), States are allowed a margin of appreciation in choosing the appropriate measures, provided that intervention by the criminal law is indicated when fundamental legal interests are violated.<sup>13</sup> So, what leads are there to judge the States' actions regarding protection against FGM?

To date, no criminal case regarding FGM has been submitted to the ECtHR. Nevertheless, the Court is not unfamiliar with the phenomenon, having delivered judgments regarding FGM related to refugee law, stating that FGM is a violation of Article 3 (the right to be protected against inhuman or degrading treatment).<sup>14</sup> Next, Article 8 ECHR is applicable as FGM can be qualified as child abuse, implying a gross violation of physical integrity. On top of that, FGM bears features of sexual violence, thus constituting a violation of sexual autonomy also respected by Article 8 ECHR. Notwithstanding the 'good intentions' underlying the cultural tradition, FGM expresses a gendered image of female sexuality, resulting in serious damage to the reproductive rights of women.<sup>15</sup> Hence, the case law of the ECtHR related to Article 3, as well as Article 8 ECHR regarding child abuse and sexual violence, is applicable to FGM.

Regarding the case law related to Article 3 ECHR, the Court emphasises the fundamental meaning of the prohibition of torture, inhuman or degrading treatment, administered by State agents or private individuals. According to the ECtHR, Article 3 enshrines one of the most fundamental values of a democratic society, urging States to take measures directed at providing effective protection, including taking reasonable steps to prevent ill-treatment of which the authorities are aware or ought to be aware. The same holds true for Article 8 ECHR concerning the matter of private life, a concept which covers physical and moral integrity.<sup>16</sup> Here, too, States are required to provide effective protection.<sup>17</sup> Whether the efforts of the authorities meet the required standards is examined in each case individually, whereby attention should be paid to the nature of the problem. Moreover, the (potential) victim's social standing is a factor of importance in this. If a case involves people who are socially vulnerable, particularly children, the obligations to be met are more substantial. This is why it is the duty of the authorities to be alert to any possible signs of all forms of violence and take precautionary measures.<sup>18</sup> A substantial failure by the authorities to act if the risk was foreseeable constitutes a violation of the victim's rights under the ECHR.

At the same time, the ECtHR does not expect the protecting authorities to do the impossible. What makes FGM, and all other forms of child abuse, more complicated is namely that it presents a concurrence of legal interests: the right to be protected against inhuman treatment, as well as other serious violations of physical integrity must be balanced against the right to family life (Article 8 ECHR).<sup>19</sup> An extra complication comes into play when the (threatened) risk is

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Declaration on Violence Against Women, UN Doc. A/RES/48/104 (1994), which lays down that states must 'exercise due diligence to prevent, investigate and (...) punish acts of violence against women'.

13 *X and Y v. the Netherlands*, [1985] ECtHR, Paras 24 and 27; *Z and others v. the UK*, [2001] ECtHR, Para. 73; *E. and others v. the UK*, [2002] ECtHR, Para. 88; *M.C. v. Bulgaria*, [2003] ECtHR, Para. 152; *K.U. v. Finland*, [2008] ECtHR, Para. 41. With regard to Art. 2 ECHR: *Osman v. the UK* [1998] ECtHR, Para. 115.

14 *E.g. Collins and Akaziebie v. Sweden*, [2007] ECtHR. Also: Th. van Boven *et al.*, 'Domestic Violence against women and torture', in: I. Westendorp *et al.* (eds.), *Violence in the Domestic Sphere*, 2005, pp. 59-71.

15 For an overview of FGM as an issue of human rights: M. de Boer *et al.*, *Meisjesbesnijdenis in Nederland, een kwestie van mensenrechten? (FGM in the Netherlands: an Issue of Human Rights?)*, 2007.

16 *X. and Y. v. The Netherlands*, *supra* note 13, Para. 22; *K.U. v. Finland*, *supra* note 13, Para. 41.

17 *E. and others v. the UK*, *supra* note 13, Para. 88. Similar: *Z and others v. the UK*, *supra* note 13, Paras 74-75. Furthermore: *X and Y v. the Netherlands*, *supra* note 13, Paras 24 and 27; *M.C. v. Bulgaria*, *supra* note 13, Para. 152, and *K.U. v. Finland*, *supra* note 13, Para. 43.

18 See also: European Parliament (EU; 2001), under 11, which encourages Member States to 'approve legislative measures to allow judges or public prosecutors to adopt precautionary and preventive measures if they are aware of cases of women or girls at risk of being mutilated.'

19 *Z and others v. the UK*, *supra* note 13, Para. 74: 'The Court acknowledges the difficult and sensitive decisions facing social services and the important countervailing principle of respecting and preserving family life.' Also: *B. v. the UK*, [1987] ECtHR, Para. 63 and *Buchberger v. Austria*, [2001] ECtHR, Para. 39.

identified in the context of a (medical) welfare contact: the duty of professional confidentiality, the counterpart of the right to privacy. Welfare relationships are by definition confidential; any resulting information may not be passed on to third parties. This means that the social/medical worker faces a dilemma: reporting breaches the bond of trust and, if it leads to intervention, an infringement of family life. Therefore, the procedure of reporting, implying a violation of the duty of professional confidentiality, has to live up to certain conditions in order to be justified. The setting aside of the duty of professional confidentiality must be regulated under the law and must be necessary in a democratic society (Article 8 Paragraph 2 ECHR).<sup>20</sup> In order to justify the setting aside of the duty of professional confidentiality a substantial (threatened) violation to the individual (potential) victim is needed, to be supported by factual evidence and reasonable or understandable grounds that underlie the suspicion of FGM.<sup>21</sup>

Moreover, the decision-making process is subject to certain procedural requirements.<sup>22</sup> Thus, passing on information on (the reporting of) a FGM case to criminal law enforcement authorities is clearly subject to certain requirements.

However, once a substantial suspicion of FGM is aroused, medical and social authorities must inform the criminal justice authorities. This follows from the case law of the ECtHR, indicating that the State is obliged to provide effective protection against serious violations of fundamental legal interests, which is the case for FGM.<sup>23</sup> As was recently stated in *K.U. v. Finland*:

‘(...) States have a positive obligation inherent in Article 8 of the Convention to criminalise offences against the person including attempts and to reinforce the deterrent effect of criminalisation by applying criminal law-provisions in practice through effective investigation and prosecution (...). Where the physical and moral welfare of a child is threatened such injunction assumes even greater importance.’<sup>24</sup>

Clearly, in order to be able to provide effective protection and to reinforce the deterrent effect of criminalisation, the criminal justice authorities have to be aware of the offence, depending on medical and social authorities to pass through information. Nevertheless, the passing of information to the criminal justice authorities must not be taken as a synonym for prosecution, as the case law of the ECtHR indicates that the right to family life is a countervailing principle which has to be taken into account.<sup>25</sup> Whether prosecution is indicated depends on the circumstances of the case, implying that the criminal justice authorities need full information. What is more, full information is needed in order to draw up an effective criminal investigation, implying that the

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20 *Anderson v. Sweden*, [1997] *ECtHR*, Paras 33-35; *H.K. v. Finland*, [2006] *ECtHR*, Para. 105.

21 *D.P. & J.C. v. The UK*, [2002] *ECtHR*, Para. 110, in which case the ECtHR was of the opinion that such an indication was absent. Also: W. Duijst, ‘Meldplicht kindermishandeling voor professionele hulpverleners?’ (‘Should Professional Social Workers be required to report Child Abuse?’), 2007 *NJCM*, p. 15.

22 *Venema v. the Netherlands*, [2002] *ECtHR*, Paras 91-92. Also: A.C. Hendriks, ‘Zwijgplicht versus rapportageplicht: Zweedse artsen als contractanten of als overheidsinformanten’ (‘The Duty to remain silent versus the Duty to report. Swedish Doctors as Contractors or as Informers of the Authorities’), 1998 *NJCM*, pp. 164-181 and W.J.M. Duijst-Heesters, *Boeven in het ziekenhuis (Criminals in the Hospital)*, 2005. It must be noted here that these procedural requirements are based on Art. 6 ECHR.

23 *X and Y v. the Netherlands*, *supra* note 13, Paras 24 and 27; *Z and others v. the UK*, *supra* note 13, Para. 73; *E. and others v. the UK*, *supra* note 13, Para. 88; *M.C. v. Bulgaria*, *supra* note 13, Para. 152.

24 *K.U. v. Finland*, *supra* note 13, Para. 46.

25 *Z and others v. the United Kingdom*, *supra* note 13, Para. 74; *B. v. the UK*, *supra* note 19, Para. 63 and *Buchberger v. Austria*, *supra* note 19, Para. 39.

criminal justice authorities keep an eye open as to the specific nature of the offence, as well as the vulnerable position of the victim.<sup>26</sup>

Summing up, the conclusion is that the case law of the ECtHR obliges States to provide effective protection, indicating that intervention by the criminal justice system is justified, or at least is not blocked by withholding information to the criminal justice authorities. Whether or not prosecution is justified will depend on the circumstances of the case.

#### 4. Dutch policy on FGM with regard to the issue of (statutory) reporting

The question I would now like to address is how the Dutch practice of combating FGM is related to the observations made earlier, particularly where the issue of reporting is concerned. In order to have a good understanding of the considerations of the Dutch Government it is of importance to remember that FGM is committed on a regular, yet relatively small basis in the Netherlands: according to self-reporting sources there may be an estimated 50 cases per year.<sup>27</sup>

Determinative for the policy regarding FGM is the fact that it forms part of the broader policy on combating child abuse.<sup>28</sup> This is important since this area traditionally focuses on the provision of assistance: criminal law serves as a last resort, it is the big stick. Although this choice of policy has, in principle, been approved by the Dutch Parliament, it has always been urged to make the policy for combating FGM more specific.

All this led to the establishment of a state commission in 2004, the Sanders Commission, which was given the task of advising the Government on the policy for combating FGM.<sup>29</sup> The Commission advised, among other things, that the medical and social services should have a statutory duty to report FGM to the Centre for Consult and Report Child Abuse (CCRCA) (*Advies- en Meldpunt Kindermishandeling*). It should be noted that Dutch law already provides for such a reporting possibility: youth welfare workers are already permitted to disregard professional confidentiality by virtue of Article 53 Paragraph 3 of the Youth Care Act (YCA) (*Wet op de jeugdzorg*) whenever the child's best interest requires this.<sup>30</sup> Indeed, according to Article 55 Paragraph 3 of the YCA Implementation Decree (*Uitvoeringsbesluit Wet op de jeugdzorg*), youth welfare workers have a duty to report such cases.<sup>31</sup> They report to the CCRCA which, in turn, then have the authority to report cases to the authorities by virtue of Article 11 of

26 *M.C. v. Bulgaria*, *supra* note 13, Paras 152-153; according to the ECtHR protection against a violation of physical integrity by virtue of Art. 8 'may extend to questions relating to the effectiveness of a criminal investigation (...)'. In the underlying case an allegation of rape was not examined effectively as the criminal justice authorities focussed on the absence of clear physical resistance by the victim. Thus, according to the authorities, there was no proof of rape. The ECtHR rejected this rigid approach stating that the criminal justice authorities must focus on the issue of consensus, to be evaluated in the circumstances of the case. Also: *K.U. v. Finland*, *supra* note 13, Para. 46, regarding the criminalisation and reinforcement regarding the risk of the sexual abuse of minors with regard to the Internet.

27 Commissie Bestrijding vrouwelijke genitale verminking (Commission on Combating Female Genital Mutilation), *Bestrijding vrouwelijke genitale verminking. Onderbouwing advies (The Combating of FGM. Substantive Advice)*, 2005; A.E. van Burik *et al.*, *Resultaten analyse meldingen VGV (An Analysis of the Reporting of FGM: the Results)*, 2008; the authors mention 38 reports to the CCRCA over a period of eight months (July 2007-March 2008). However, the medical sector in Rotterdam (unofficially) reports the number of cases to be 50 to 500 annually; J. van der Kamp, 'Betere bestrijding vrouwenbesnijdenis' ('Improving the Combating of FGM'), *Metro*, 14 February 2009, <<http://www.pvdarotterdam.nl/nieuwsbericht/4058>>. Also: *Kamerstukken II 2008-2009*, no. 1168. It is not clear whether this includes cases of FGM performed abroad. As to criminal liability, this is irrelevant as Art. 5a Book 1 of the Dutch Penal Code constitutes jurisdiction in both cases.

28 *Kamerstukken II 2008-2009*, 28 345, no. 69, p. 1; moreover, in the meantime the policy has become even wider as FGM now falls under 'domestic violence'. For an overview of the Dutch policy on FGM: De Boer *et al.*, *supra* note 15.

29 Commissie Bestrijding vrouwelijke genitale verminking (Commission on Combating Female Genital Mutilation), *Beleidsadvies (Policy Advice)*, 2005. Kool *et al.* examined the judicial background of this problem for the purpose of this advice; R.S.B. Kool *et al.*, *Vrouwelijke genitale verminking in juridisch perspectief (FGM from a Judicial Perspective)*, 2005.

30 See also Art. 1:240 Dutch Civil Code (*Burgerlijk Wetboek*), and Art. 9 of the reporting code issued by the authorities, <<http://www.huiselijkgeweld.nl>>.

31 Doctors are covered by the Individual Healthcare Professions Act (*Wet op de beroepen in de individuele gezondheidszorg; Wet BIG*) and the Medical Treatment Contracts Act (*Wet op de geneeskundige behandelingsovereenkomst; WGBO*), which do not lay down a duty to report.

the YCA. The Sanders Commission proposed that this authority to report should be replaced by an obligation to do so.

Related to the obligation to report, the Sanders Commission advocated intensifying the periodical medical check-up carried out by the Youth Health Services. The commission was in favour of a full bodily examination to be performed on a voluntarily basis; a compulsory check-up, at the time being suggested by the Dutch MP Ayaan Hirsi Ali, was found to be disproportionate and to be in violation of the right to privacy (Article 8 ECR).<sup>32</sup>

The recommendation to introduce statutory reporting was rejected by the Government; instead it was stated that medical and social workers have a moral duty to report.<sup>33</sup> Prolonging the former policy, the Government focused on promoting information and expertise,<sup>34</sup> as well as raising awareness among the target groups.<sup>35</sup> So-called risk areas were designated,<sup>36</sup> each area developing a local policy implying cooperation between social, medical and judicial authorities.<sup>37</sup> It is clear that this choice of policy is in perfect keeping with the preferences of the (medical and) social services since within these circles there is a great deal of resistance to the introduction of a statutory duty to report.<sup>38</sup>

However, as mentioned above, the Dutch Parliament was – and is – in favour of a more robust approach. In accordance with the Sanders Commission's proposal, it adopted an amendment urging the introduction of a statutory duty to report.<sup>39</sup> This motion was suspended as the Secretary of Public Health, Welfare and Sport, as well as the Minister of Juvenile Care, had committed themselves to ordering an internationally-oriented survey into the pros and cons of a legal duty to report.

That report has been recently published.<sup>40</sup> It concludes that a statutory duty to report has no added value as experiences elsewhere show that this results in an increase in incorrect reports.<sup>41</sup> This is why, until very recently, the Dutch Government preferred to incorporate mandatory reporting in the YCA, based upon self-binding norms, thus continuing the present

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32 A. Hirsi Ali, *Voorstel tot het invoeren van een controlesysteem ter bestrijding van genitale verminking (Proposal for the Adoption of a Monitoring System to Combat Genital Mutilation)*, 2004. See also: Commission on Combating Female Genital Mutilation, *supra* note 29, chapter 4.

33 *Kamerstukken II 2007-2008*, 28 345, no. 65, pp. 6-7.

34 To this extent NGOs are being structurally financed in order to support the exchange of data and knowledge.

35 One of the instruments being used is the Civic Integration Act (*Wet Inburgering*) of March 2006, 2007 *Staatsblad*, no. 625, requiring potential immigrants to pass an examination testing their knowledge of the Dutch language and traditions, information regarding criminal liability for FGM thereby being provided within this context. Recently the Government has put forward a plan to introduce a contract, to be signed by parents belonging to the risk groups who are planning to travel to their homeland with their minor daughters. The contract obliges the parents to protect their daughters from FGM in their homeland. In case of non-compliance, a punitive sanction may follow. In addition, a group of experts will be appointed who will report cases of (alleged) FGM; G. Herderschee *et al.*, 'Groep deskundigen gaat letten op meisjesbesnijdenis' ('Control over FGM by a Group of Experts'), *Volkskrant*, 6 February 2009.

36 Six risk areas have been designated: Amsterdam, Rotterdam, Tilburg, Eindhoven, The Hague and Utrecht, the intention is to increase the amount of risk areas; *Kamerstukken II 2007-2008*, 28 345, no. 65, p. 5.

37 However, two recommendations were accepted, indicating a broadening of the criminal law: the recommendation to extend the period of limitation in criminal law until the eighteenth year of the victim and the recommendation to extend the competence of the criminal law. The latter allowing Dutch prosecutions of FGM cases performed abroad.

38 One might argue that 'resistance' is an incorrect term as medical and social personnel are clearly confronted with a moral dilemma when reporting as it implies a breach of trust. Moreover, a report requires a substantial suspicion, indicating a voluntary bodily examination or information to be obtained from the persons involved. However, notwithstanding the need to solve such (practical) difficulties, in my opinion the key lies in the strict division between medical and juvenile care and the legal field, specifically the criminal justice system, giving way to a fundamental reluctance to inform the criminal justice authorities.

39 *Kamerstukken II 2007-2008*, no. 78, p. 5453.

40 *Kamerstukken II 2008-2009*, 28 345, no. 71, attachment: Ministry of Justice, DJJ, *Meldplicht bij huiselijk geweld? Literatuurverkenning naar ervaringen met meldplicht in het buitenland (Statutory Reporting in Cases of Domestic Violence? Literature Study of Foreign Experiences with Statutory Reporting)*, 2008; *Kamerstukken II 2008-2009*, 28 345, no. 71, Attachment: J. van Rossum *et al.*, *Meldplicht kindermishandeling: een toegevoegde waarde? (The additional Value of Statutory Reporting in Cases of Child Abuse)*, 2008.

41 See Van Rossum *et al.*, *supra* note 40, p. 4; authors report that there are relatively few countries with a statutory duty to report. The United States was the first country to introduce it and at the moment there are six countries with a statutory reporting duty. In Europe there is a (form of) reporting duty in Denmark, Finland, France and Sweden.

policy. However, in the explanatory notes, as well as the surveys underlying these notes, there is an insufficient distinction between forms of domestic violence, namely the specific problems concerning FGM.<sup>42</sup> The policy proposals and conclusions are particularly aimed at the broader problem of child abuse, whereby insufficient attention is given to the specific nature of FGM and the violations of fundamental rights entailed therein. Although domestic violence and child abuse can entail very serious forms, this is by definition the case with FGM. That is the reason why it entails further-reaching obligations for the State. In this light it is important to note that efforts to introduce reporting codes by the social services, undertaken in the past, have not been successful.<sup>43</sup> To date, as a result of consistent political pressure, the Dutch Government has consented to present a draft proposal to legalise the reporting code.<sup>44</sup>

## 5. Following the French example?

As the Dutch Government recently has taken a serious interest in the French policy on FGM a short overview is useful.<sup>45</sup> France is, after all, the only European country with a substantial number of FGM convictions.<sup>46</sup> This raises the question of what elements contributed to this ‘success’, particularly related to the issue of the transfer of information.

Beforehand it is important to note that the French success had a very long build-up period and must be put into perspective. There is no question of a national prosecution policy; in fact, the prosecution of FGM has been limited to the areas of Paris and Ile-de-France. Moreover, it must be noted that the occurrence of FGM in France is – assumingly – on a much larger scale than in the Netherlands. Because of its colonial past, France has always been a host country for many African immigrants. As far as FGM is concerned immigrants from Mali attract particular attention; they commonly perform circumcision at an extremely young age, which leads to increased health risks. As a result the chance of discovery is considerable because these children are periodically examined by infant welfare services and paediatricians. These periodical check-ups are compulsory; moreover, parents often depend on this free medical care owing to their socio-economic circumstances.

All this meant that medical and social services were frequently faced with the medical consequences of FGM in the late 1970s, particularly in the Paris area. It led to them to lodge a request to the French Government, urging that tougher action be taken.

This was the start of a process to find better ways of combating FGM, whereby, just as in the Netherlands, it was first opted to encourage awareness. At first a protocol was drawn up, directed towards informing the target groups as to the criminal nature of FGM. When this failed

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42 See also: Defence for Children, *Belangrijk initiatief meldcode artsen, meldplicht wenselijk (A Reporting Code for the Medical Sector is an Important Initiative, Statutory Reporting preferable)*, 5 September 2008, <<http://www.defenceforchildren.nl>>.

43 *Kamerstukken II 2007-2008*, 28 345, no. 71, attachment: I. Doeven, *Meldcodes kindermishandeling. Beschikking, waardering, gebruik en scholing (Reporting Codes regarding Child Abuse. Decision, Evaluation, Use and Training)*, 2008, <<http://www.veldkamp.net>>. With a view to these findings, the Government has developed instructions on the use of the reporting code. It can be found on: <<http://www.huiselijkgeweld.nl>>.

44 *Kamerstukken II 2008-2009*, 28 345, no. 71, p. 4; *Kamerstukken II 2008-2009*, no. 2706; the code is expected to enter into force on January 1, 2011.

45 *Kamerstukken II*, 2008-2009, 28 345, no. 77. Over the years the Dutch Parliament has more than once referred to the French policy. Recently, the Dutch Government has heeded this call; in search of good practices the Secretary of State for Public Health, Welfare and Sport, and the Minister of Juvenile Care went on a working visit to France.

46 Pharos, an important Dutch NGO in the area of FGM, mentions 37 convictions in the 2004-2007 period, <<http://www.pharos.nl>>. Also: Pharos, *Inventarisatie aanpak vrouwelijke genitale verminking in 3 Europese landen (An Assessment of Combating FGM. A Comparison between 3 European Countries)*, 2008. Our own investigation showed 34 cases during 1979-2004, including one acquittal. Sanctions imposed varied from six months' conditional imprisonment to five years' unconditional imprisonment; see Kool *et al.*, *supra* note 29, pp. 80-85.

to produce the desired results, the choice was made to resort to the criminal law.<sup>47</sup> From the onset, the expectations regarding criminal law intervention were very low; people were very much aware of the legal implications and reservations regarding reporting FGM by the medical and social services.<sup>48</sup>

Nevertheless, the continual confrontation with the severe, sometimes lethal, consequences of FGM on infants, in connection with the lack of concrete policy results induced the Parisian infant welfare organisation (*Protection Maternelle et Infantile; PMI*) to set aside the duty of professional confidentiality and to seek cooperation with the police. This enabled the French Public Prosecution Service to prosecute, initially, a number of well-known practitioners. The aim was not only to make the target groups aware of the criminal sanctions against FGM, but also of their enforcement.

Initially, these criminal trials did not generate the desired public attention because they were tried before the lower courts.<sup>49</sup> In later years, however, the French Public Prosecution Service saw the opportunity to qualify FGM as a ‘crime’ and this led to trials in the Assize Courts where cases are tried before a jury. The *Centre d’Abolition Mutilation Sexuelle (CAMS)*, an NGO that supported the trials as a private prosecutor (Articles 2 and 3 of the French Penal Code), played an important role in this. The latest criminal trials have led to an extensive public debate on the criminal nature of FGM.

In later years the French Government introduced an additional measure: the medical contract, implying that parents travelling to their homeland, accompanied by their daughter(s), are requested to sign a medical contract stating that they have been informed about FGM being punishable, as well as promising not to have their daughter(s) circumcised during their stay abroad.<sup>50</sup> The aim is to inform the parents as well as their peers regarding FGM being an offence, as well as to provide immigrants with an instrument against peer pressure.

Nevertheless, it is fair to say that according to reports French policy has not led to a decrease in FGM. The problems have shifted: circumcisions are postponed until girls are older, which effectively reduces the possibility of any discovery.<sup>51</sup>

From the above it appears that a number of factors have been crucial for the French ‘success’: the extent of the problem, the willingness of part of the (medical) juvenile welfare service to report FGM to the police, the willingness of the French Public Prosecution Service to prosecute and encouragement from the CAMS. And last, but certainly not least, losing belief in a policy primarily aimed at prevention and information.

## 6. Evaluation

The issue I have addressed in this paper is whether or not there is a need for the introduction of statutory reporting as a prerequisite to provide adequate protection against FGM. Having taken

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47 B. Winter, ‘Women, the Law and Cultural Relativism in France: the Case of Excision’, 1994 *Journal of Women in Culture and Society*, pp. 939-973; V. Houben, *Vrouwenbesnijdenis, van gedogen tot vervolgen? (FGM, from Tolerance to Prosecution?)*, 2004 and see Kool *et al.*, *supra* note 29, pp. 71-74.

48 It should be noted that Art. 434 Para. 4 of the Penal Code at the time already provided for the statutory reporting of child abuse, with the understanding that one did not per se have to report to the judicial authorities. (Medical) social workers, however, are not obliged to observe this duty to report by virtue of their duty of professional confidentiality (Art. 226 Para. 13 of the Penal Code). Moreover, a violation of this duty is punishable (Art. 226 Para. 14 of the Penal Code).

49 The desire was not so much to generate a public debate on the criminal nature of FGM, but rather to persuade the target groups that FGM is punishable and that FGM cases will be prosecuted.

50 *Kamerstukken II* 2008-2009, 28 345, no. 77; the introduction of such a medical contract has recently been suggested by the Dutch Government. Note that such a contract implies a medical examination after returning.

51 *Kamerstukken II*, 2008-2009, 28 345, no. 77.

the Dutch policy as a case study, I have provided an overview of the standards applied by the ECtHR regarding adequate protection against serious offences, including child abuse and sexual violence. Moreover, for the sake of comparison, I have provided an overview of the French (criminal) policy towards FGM, France being the only European country known to have prosecuted FGM successfully. So, does the Netherlands meet the conditions which enable adequate and effective protection against FGM, in particular by instigating investigations and prosecutions? And if not, what is to be learned from France?

My answer to the first question is in the negative. Even if we put the meaning of criminal law interference in such complex matters as FGM into perspective, we cannot but conclude that the possibility of providing protection by means of the criminal law is hampered in the Netherlands by the (medical) social services that are reluctant to report or pass on relevant information, in any shape or form, to the criminal law enforcement authorities. Moreover, the Dutch Government continues to lend its support through the policy choices it makes. Indeed, even as the need for intervention by the criminal justice system is explicitly acknowledged in the present policy, one is still confronted with the objections raised by the social and medical authorities against statutory reporting.<sup>52</sup> Moreover, the administration of criminal justice cannot be blamed for this: as there is no adequate transfer of information, the criminal justice authorities cannot live up to the obligation to provide adequate protection.

However, I do not wish to suggest that the ECtHR's case law lays down that statutory reporting should be introduced, at any rate not in the sense of a direct duty to report to the criminal law enforcement authorities. The ECtHR has stipulated that government bodies should take specific measures, but States have discretion in their choice of measures: it is the result that matters, not the way in which that result is achieved.<sup>53</sup> Nevertheless, taking into account the serious nature of FGM, intervention by the criminal justice system is clearly indicated. Because of this, the construction which was proposed by the Sanders Commission is to be preferred: the introduction of a statutory duty for the (medical) social services to report to the CCRCAs, which in turn then have to report the FGM to the police. This does not preclude any preceding consultations with other colleagues, if only to prevent a (medical) social worker having to bear the responsibility by him/herself.<sup>54</sup> In this way the (medical) social worker is protected as much as possible and the transfer of information to the criminal law enforcement authorities is safeguarded. Later on, these consultations can become more inclusive to allow the participation of criminal law enforcement authorities in the decision-making process, which may then lead to prosecution. This particular construction also meets the procedural demands made by the ECtHR regarding the setting aside of the duty of professional confidentiality.<sup>55</sup>

Moreover, and of crucial importance in this matter, the reporting of a FGM by the CCRCAs does not necessarily lead to criminal prosecution. After all, the Dutch Public Prosecution Service has the right not to prosecute if this is in the general interest by virtue of Article 167 Paragraph 2 of the Dutch Code of Criminal Procedure (*Wetboek van Strafvordering*) (the principle of prosecutorial discretion).<sup>56</sup> This creates room to take the appropriate decision in the

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52 *Kamerstukken II*, 2007-2008, 28 345, no. 69, p. 1.

53 The same holds true for the rules made by the EU Council of Europe and the European Parliament.

54 See Duijst-Heesters, *supra* note 22, p. 154, who is in favour of such internal consultations among colleagues. Against: C. Prins, 'Niet spreken over, maar voor het kind' ('Do not Speak about but for the Child'), 2008 *NJB*, p. 1983.

55 *Kamerstukken II*, 2007-2008, 28 345, no. 65, p. 7; the Minister of Justice has explicitly stated that privacy may not stand in the way of a transfer of information, as this blocks intervention by the criminal justice system.

56 *Kamerstukken II*, 2007-2008, 28 345, no. 69, p. 2.

case submitted by using well-known procedures while balancing all the interests concerned.<sup>57</sup> So, prosecution may be indicated, but need not necessarily be the case. The possibility to do this, however, should remain open and not be precluded – as is practically the case now – given the demands which the ECtHR makes.

Finally, as to the French policy, I cannot help but conclude that the situation is different. Not only are there – assumingly – fewer circumcisions in the Netherlands, they are also performed at a later age which means that the health risks and, as a result, the chances of discovery are smaller.<sup>58</sup> It is therefore plausible that the (medical) juvenile welfare service in the Netherlands is confronted with fewer FGM cases; the chances are that statutory reporting to the criminal law enforcement authorities is felt to be disproportional by medical and social authorities. Moreover, Dutch criminal law does not allow interest groups to participate in a criminal lawsuit in order to generate attention to FGM. Nevertheless, despite the clear cultural and legal differences, there is a clear lesson to be learned from the French: in order to be able to guarantee the level of legal protection required by the ECtHR, the authorities must provide for an adequate transfer of information to the criminal justice authorities. Clearly, the Dutch will have to adjust their policy in this respect, in order to live up to the ECtHR's standard of adequate protection against FGM.

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<sup>57</sup> Actually, the Directive on Child Abuse is under revision in order to instruct the Dutch Public Prosecution Service how to handle FGM; *Kamerstukken II 2007-2008*, 28 345, no. 65, p. 8.

<sup>58</sup> In the Netherlands FGM is performed in particular by immigrants from Eritrea and Somalia on girls in the 8-14 age group; see Commission on Combating Female Genital Mutilation, *supra* note 29.