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Chapter 19

The Application of the French, English, and Dutch Notions of Citizenship on the Criminal Law Approach toward Female Genital Mutilation*

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Contents

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Recent research by the United Nations illustrates clearly that the global (criminal law) attention for the practice of female genital mutilation (FGM) is a matter of the last few years (United Nations Population Fund [UNFPA], 2014). However, at the European level, the question of how to deal with FGM has confronted societies for some decades. After the initial struggle with the question of whether the perpetrator's cultural background should result in impunity or absence of guilt, it has become clear that by standards derived from the notion of respect for human rights and human dignity, FGM is an unacceptable cultural practice. Human rights standards—interpreted in conformity with the classical liberal standards and values predominant in Western thinking with its focus on the harm principle—support this view. In this context, the keywords are "harmful traditional practices" and "gender-based violence" (European Institute for Gender Equality [EIGE], 2013a–d) often supplemented by the statement that crimes contradictory to the "views of civilized nations" are involved (Dustin, 2010; van den Brink and Tigchelaar, 2012). This view is laid down in (among others) the recently adopted Convention of Lanzarote on combating (sexual) violence against women and girls (Council of the European Union [EU], 2011) and the European Parliament resolution 2012/2684 (RSP) on ending FGM (European Parliament, 2012).

Critical of qualifying FGM a harmful cultural practice is Dustin who argues that such a qualification could be seen to be a result of the "external messiah syndrome" which has dominated the Western thinking with regard to cultural practices of minorities considered harmful and inadmissible by liberal societal standards (Dustin, 2010: 19). In this context, she has raised the question of why the practice of female circumcision is challenged while "cosmetic interventions" on female genitalia have been widely accepted across the Western world. Next, it is argued that by qualifying FGM as a "bad tradition" the right to culture is absorbed, as it were, by the—from a Western perspective—"superior" right to physical and psychological integrity (van den Brink and Tigchelaar, 2012).

The calls for a ban on FGM—based on the notion that it is a harmful and painful gendered practice to females—do not answer the more underlying question of why female circumcision cannot be considered a cultural exception in law, as is the case for some other (controversial) cultural (surgical) interventions such as male circumcision and cosmetic surgery (Wahedi, 2012). The question arises furthermore, whether Western legal systems are legitimized to qualify a non-Western cultural practice in terms of right or wrong and, if they are allowed to do so, if the only use of legal measures is sufficient in this context to eliminate this practice (Gunning, 1992; Dustin, 2010). In line with this, the question arises furthermore, why despite the consensus on the punishability of FGM its criminal enforcement diverges in Western Europe (Leye et al., 2007). To address the differences in outcome, we studied the criminal law approach to FGM in three countries: France, England, and the Netherlands. The term England is used to refer to the policy pursued in England and Wales, countries of the United Kingdom. Although to outsiders this distinction might seem a bit contrived, it is commonplace in British/English literature, especially in relation to societal views on the punishability of harmful cultural practices. In this chapter, we compare not only the legal framework and the underlying policy but also the underlying national views on citizenship. Our basic assumption is that national views on citizenship influence the way in which Western European societies deal with multiculturalism and harmful cultural practices. We believe strongly that this approach offers an explanation for the divergent enforcement practices in the area of FGM.

Methodology

This qualitative study focuses on the question of whether a particular notion of citizenship in the studied countries influences the criminal prosecution of FGM. Our choice for these countries is

based on our perception that outcomes in enforcement actions banning FGM diverge strongly in these countries. We assume a relationship between the different outcomes in legal enforcement and the different notions of citizenship in the studied countries. Based on this intellectual goal and theoretical assumption, the conceptual framework of this study is constructed of works concerning notions of citizenship, different researches on the admissibility of "harmful" cultural practices, cultural exceptions in law, and the way substantive criminal law, so far, has reacted to such practices. This qualitative legal research is based on comparative (legal) literature, case law, and legislation concerning the theme that is studied. It should be noted that the use of various notions of citizenship is meant as heuristic to explain the differences in criminal law approach to FGM and its criminal prosecution within the studied states (van der Burg, 2011).

This chapter begins with a short description of the phenomenon of FGM. This description is viewed from the human rights perspective that qualifies this practice as "harmful cultural practice" with the ensuing obligation of penalization. This is followed by a European consensus on the punishability of FGM and a more specific description of the French, English, and Dutch legal approaches to FGM in the context of prevailing views on citizenship. This chapter concludes by asserting that the outcome of the criminal approach to harmful cultural practices is to a certain extent declared by a particular notion of citizenship.

Human Rights as a Basis for Criminalizing the Practice of FGM

The World Health Organization (WHO) describes FGM as follows: "the partial or total removal of the external female genitalia, or any other injury to the female genitalia for non-medical reasons" (WHO, 2011). Worldwide, an estimated 130–150 million girls and women are genitally mutilated in one way or another; approximately another three million girls are estimated to run the risk of being circumcised. FGM is practiced mainly in parts of Northern Africa and Asia, but it is also reported to occur in Western Europe. This ranges from small operations (removal of the foreskin of the clitoris) to larger ones (the removal and sewing up of the labia majora or minora, sometimes in combination with the removal of the clitoris). Removal of the foreskin, which is generally considered a relatively mild form of FGM, is compared to male circumcision (Siesling, 2006; Limborgh, 2012; van den Brink and Tigchelaar, 2012). As FGM, as a rule, is practiced outside a medical context, more substantial health risks are usually involved.

There is no clear explanation for this age-old tradition. There are various reasons for practicing FGM: sometimes it is based on religious beliefs, although it is argued that religious texts do not explicitly support this (Kalev, 2004; Leye et al., 2007). Other times, FGM involves an initiation ritual within a group from which the woman derives status (Berkovitch and Bradley, 1999). A critical interpretation hereof is reflected in human rights texts, assuming a gendered practice. This view, however, is not undisputed. Various scholars have referred to the existence of a "double standard" in the fight against FGM (Shweder, 2002; Dustin, 2010). The aforementioned interpretation clarifies matters, as it reveals the "political" nature of international legislation (including human rights) and the underlying conceptualization of cultural practices. Such rules are the result of political negotiations; where the Western liberal discourse is predominant when human rights are involved. In female-related matters such as FGM, gender has been the dominant frame for some decades. Although this frame contains inconsistencies, that is, cosmetic surgery increasing in popularity in the West (breast enlargement, corrections of the labia, etc.) is hardly ever problematized; it strongly affects the evaluation of cultural practices that are qualified as gendered (Lewis, 1995; Dustin, 2010; Smith, 2011; van den Brink and Tigchelaar, 2012). In this context, it

is argued by Brems that the increased thinking in terms of women's rights and the related interest in gender has led to a fundamental subordination of the right to culture (Brems, 1997). However, from a more pragmatic point of view the subsumption of FGM under human rights violations also fits in with the prevailing Western opinion that human rights are universal by nature (van den Brink and Tigchelaar, 2012).

The most far-reaching effect hereof may be found in the judgment that this is a cultural practice "in contradiction with the views of civilized nations." Within the sphere of influence of the European Convention on Human Rights (ECHR), which is decisive for Europe, the applicability of this qualification has direct consequences for the requirements of criminal legality. On the basis of Article 7 ECHR, the applicability of this qualification requires no previous, knowable penalization any more: punishability is so obvious that no misunderstanding is possible on the basis of a moral intuition shared by all. In addition, one often resorts to the argument of the universality of human rights. However, an easy appeal to this exceptional category impairs the interest of both foreseeability and recognizability of punishability (requirement of legality) that is also protected as a human right. At the national level, one more or less automatically appeals to the applicability of this category, in the event that the punishability of cultural offenses or related jurisdiction issues is concerned.

In the case of FGM, there may be good reasons for this. As a rule, major (possibly irreversible) violations of a person's physical and mental integrity are involved, which are carried out without permission of the person concerned. This is not applicable, however, to genital mutilations that are performed on adult women at their own request. Even those were sometimes made punishable explicitly, that is, Article 5 (1) (3) and (5a) of the Belgian Criminal Code and Article 5 of the English Female Genital Mutilation Act 2003. However, what if we are dealing with lighter variants of FGM? As a result of the "indivisibility" of the gender frame and of the "generous" use of the label "contradiction with the views of civilized liberal nations," these are also qualified as (at least potentially) punishable behavior—with the ensuing claim for both national and international jurisdiction.

Leaving aside the correctness of such a categorical criminalization, one cannot avoid the conclusion that the predominant human rights frame—which views FGM as a violent and, therefore, criminal practice—contains inconsistencies that raise questions as to the legitimacy of penalization and criminal enforcement. Although one might presume otherwise, FGM was not initially recognized as a human rights violation (Berkovitch and Bradley, 1999; Kalev, 2004; WHO, 2011; van den Brink and Tigchelaar, 2012; UNFPA, 2014). After a slow start in the fifties, it even took until the mid-1990 for FGM to be put on the human rights agenda. Since then, states have been under an obligation to develop legislation providing effective protection against FGM at the state level (Wheeler, 2004).

This has been realized at the European level, as is shown by the Convention of Lanzarote, the resolution of the European Union of June 2012 on ending FGM and the case law of the European Court of Human Rights (ECtHR) among others. A restriction applies with regard to this last source: no case has yet been brought before the ECtHR claiming the infringement of a Convention right on account of the lack of criminal law protection offered against FGM. Nevertheless, in its decisions on the application of migration law, the ECtHR has clearly indicated that member states are under an obligation to provide adequate and effective protection against FGM (*Omeredo versus Austria*; *Izevbekhai* et al. *versus Ireland*; *Collins and Akaziebie versus Sweden*). Although in these cases FGM was deemed to violate Article 3 ECHR, prohibition of torture and inhumane treatment (Van Boven and Puig, 2005), one may presume that FGM will also violate criminal law protection to be offered under other provisions of the Convention such as the right to life (Article 2 ECHR) or the right to physical and mental integrity (Article 8 ECHR).

With regard to the aforementioned serious violations, the ECtHR, as a rule, deems it appropriate to resort to criminal law—resulting in the need for an adequate criminalization and effective enforcement hereof (Kool, 2010). Both the association of female circumcision with mutilation and the starting point of criminalization and effective enforcement suggest that the ECtHR will not be inclined to accept a cultural defense easily. This is in line with other human rights conventions that explicitly exclude an appeal to tradition to justify violent practices against girls and women. Consider in this regard among others Article 12 (5) of the Convention on preventing and combating violence against women and domestic violence (Council of the European Union, 2011).

European Consensus on the Punishability of FGM: Some Specific Criminal Law Provisions on the FGM Practice

As indicated previously, FGM is a crime in all the member states of the EU (EIGE, 2013a). Additionally, there are periodic calls across the European states to adopt specific criminal law provisions on FGM (Kool, 2005; Kool et al., 2005; Siesling, 2006; Ten Voorde, 2007). Reference is often made to countries that consider FGM a specific offense. Such specific prohibitions are often a *lex specialis* of assault and injury offenses. As such, Sweden was among the first countries prohibiting FGM specifically. In 1982, the Swedish "Act Prohibiting the Genital Mutilation of Women" took effect—according to which is illegal to cut any female genitalia. The consent of the victim is in this context irrelevant. Any attempt to practice this offense is considered punishable in Sweden by imprisonment of not less than two years and not more than ten years. In 2006, two court cases of FGM were registered in Sweden. It should be noted that the principle of extraterritoriality applies to the FGM crime (EIGE, 2013b).

Belgium is another European country in which FGM has been a specific offense since 2001. Article 409 of the Belgian Penal Code criminalizes all variants of FGM with a minimum prison sentence of three years and a maximum of five years. Even the attempt to FGM is prohibited by the Belgian Penal Code. If a minor is circumcised, the defendant will face a minimum prison sentence of five years and a maximum of seven years; if death occurs as a result of FGM, the defendant could face an imprisonment of at least ten years with a maximum of 15 years. The principle of extraterritoriality is applicable, meaning that FGM practiced outside Belgium constitutes a crime.

Cyprus also has a specific criminal law provision on FGM. Since 2003, Article 233A of the Cypriot Penal Code prohibits all forms of FGM. The consent of the victim does not justify this practice, and the defendant could face a maximum imprisonment of five years. However, to date, there have not been any cases of FGM registered in Cyprus. In contrast to many other European states, the principle of extraterritoriality is only applicable to FGM cases after a court decision (see EIGE).

The Spanish Penal Code, since 2003 has specifically prohibited the practice of FGM with a minimum prison sentence of six years and a maximum of 12 years. It should be noted that circumcision of fragile groups of women could affect the length of the imprisonment there. On the other hand, the consent of the victim might reduce the duration of the imprisonment (EIGE, 2013c).

Italy has criminalized FGM specifically as a crime against fundamental human rights. Since 2006, the Articles 583bis and 583ter of the Italian Penal Code have declared all variants of FGM illegal and punishable by imprisonment from four to 12 years (Doe, 2011). Next, punishment can be decreased from three to seven years imprisonment for lighter versions of FGM, or increased if a minor is circumcised. To date, very few cases have reached the courtrooms in Italy (see EIGE).

In Ireland, the Criminal Justice (FGM) Act 2012 clearly excludes "cultural defenses" for FGM and penalizes the practice of it with imprisonment up to 14 years, potentially in combination with a fine of up to €10,000.

Since 2013, Article 226a of the German Penal Code has made FGM illegal. The practice hereof is threatened with an imprisonment of *at least* one year.

The specific criminal provisions on the practice of FGM across Europe illustrate the great disapproval of this practice. However, specific criminal provisions on FGM apparently have not affected the criminal prosecution of this practice. Hereafter, we elaborate on France, England, and the Netherlands (as particular case studies) to see whether the notion of citizenship might be of influence on the criminal approach (and the results hereof) to FGM.

Intermezzo: Notions of Citizenship

Although magnification should be avoided and as factual (im)possibilities set the political agenda, a comparative analysis of the criminal law approach of FGM calls for a closer look at society's views on multiculturalism and citizenship. FGM is a cultural offense, and this colors prosecutorial discretion. Moreover, in case of prosecution, a cultural defense may be advanced. The answers of the criminal justice system to both the question of prosecutorial discretion and the question of assessment of the cultural defense are (also) determined by views in society on the need for immigrants to assimilate, and the extent to which they are allowed to hold and to practice cultural minority views. Although the (mostly) major and irreversible character of FGM limits the "workspace" of criminal law, society's views on multiculturalism also are relevant here.

We use three models of citizenship derived from literature: the republican, the ethnocultural, and the multicultural model (McCormick, 2005; Netherland Scientific Council for Government Policy/Wetenschappelijke Raad voor het Regeringsbeleid [WRR], 2006). The model a country belongs to depends on factors such as the degree to which newcomers are eligible to obtain citizenship of the host country, and the way in which a country recognizes diversity.

Q5 Anticipating the country's analyses, it can be said that France fits in with the republican model. It is more complicated to decide which models apply to England and to the Netherlands. In the past (and to a certain degree this still is true for England) both countries espoused a multicultural model (Koopmans et al., 2005). This model embraces diversity and accepts differences. However, under the influence of a growing globalization and a global fear of Muslim terrorism and even Muslim takeover of civil achievements in recent years, views on citizenship have emerged that fit in better with an ethnocultural model. Like the republican model, this model focuses on a culturally homogeneous society, resulting in less scope for diversity. As France is the only European country that, by far (and without any specific legal prohibition of FGM), actively enforces in the area of FGM—or so it appears—we have taken the liberty of elaborating on this case.

France: From Laissez-Faire to Assimilation

In the past decades, France (like other Western European countries) has had a pressing need for labor immigrants (WRR, 2001). Until the early 1970s it conducted a "laissez-faire" immigration policy—which as a result of the subsequent economic crisis made way for an "ethnocentric assimilation policy" (Guiné and Moreno Fuentes, 2007: 490). The French preference for a centralist approach and universalism resulted in a more restrictive assimilation policy aimed at maintaining

French unity, minimizing the cultural differences, and mandating cultural assimilation of newcomers (WRR, 2001). The emphasis shifted to restricting immigration and to "*integration à la française*" (Winter, 1994; Wihtol de Wenden, 2003; Jugé and Perez 2006). This assimilation policy had its impact in various areas including the approach of FGM; while no accurate numbers are available in France for FGM, it has been estimated that at least 61,000 women and girls or more have been subjected to FGM in the country, with four thousand more at risk (Leye et al., 2006; EIGE, 2013d). **Q6**

This new assimilation policy did not focus on FGM from the onset. On the contrary, due to the belief that the newcomers were prepared to live according to the French values and to distance themselves from their original cultural background, a blind spot for cultural inequalities existed for quite some time—especially with regard to the position of women and children. Those data were ignored and, therefore, not registered, as a result of which they remained invisible (at least officially). The idea that an official care policy had to be developed in order to prevent "social, ethnic or religious particularism" (i.e., FGM) within the minority group was insufficiently recognized for a long time (Guiné and Moreno Fuentes, 2007: 491).

The death of a baby—baby Bobo—in 1982 as a result of wounds inflicted upon her during her circumcision opened up a debate about FGM practices in France (Winter, 1994; Kool et al., 2005). The tone of the resulting major media coverage indicated that the prevention policy pursued so far would no longer suffice. It became obvious that baby Bobo was not the only victim, care providers working in infant and youth health care (*Protection Maternelle et Infantile* [PMI]) reported having been confronted before with (the consequences of) FGM. In the *arrondissements* in which many immigrants had settled (especially around Paris), these circles insisted that enforcement be tightened up.

The fact that PMI played a prominent role in opening up the FGM debate has to do with the fact that the parents of children born in France are obliged to have their children undergo medical examinations until the age of six, irrespective of their residency status. An examination of the genitals is a part hereof. In conformity with the French views on obedience owed to the authorities, this obligation, as a rule, is not questioned (Nijboer et al., 2010). In addition, a PMI doctor, discovering a genital mutilation during a medical check, is under an obligation to report this to the *procureur de la République,* despite his/her duty of confidentiality. Consider in this regard the Articles 4 and 44 of the *Code de Déontologie Médicale*. Breaching the duty of confidentiality—apart from the exceptions following from Article 226-14 French Code Penal—constitutes a crime, but here an exception applies. Many care workers are not acquainted with the duty to report. As a consequence, hereof, directives were drafted for the PMI doctors. It appears from the case law that immediate action is only required if the danger to the patient's health is of an imminent and constant nature (Henrion, 2003).

Despite the fact that not all PMI doctors are willing to report, a larger degree of cooperation between doctors and criminal authorities exists in France than it does elsewhere (Nijboer et al., 2010). An important fact at the time was that most reports coming in after baby Bobo's death led to two identifiable cutters. As a result, more cases were discovered, and criminal prosecutions were initiated—such as the Keita (1991) and Greou (1994) cases (for a description of these and other French legal cases, see Appendix 5). In this context, one could assert that a complex variety of factors has contributed to the success France has had in prosecuting cases. **Q7**

There are more factors, however: the organization of French criminal investigation (and more specifically the prominent presence of the investigating judge) also plays a role. When the police are on the track of a cutter, they call in an investigating judge with wide, independent investigative powers. In combination with PMI's readiness to provide information in connection with the

report, building a criminal case is relatively easy. According to Nijboer et al. (2010) in each of the cases tried, indications against the cutter as well as (one of) the parent(s) were present. The victim is examined by a forensic gynecologist at the request of the *procureur de la République* and with the permission of the possibly appointed temporary guardian. This is done to prevent the advance in court—on the basis of a countercheck report—of the defense that the girl has not been genitally mutilated (Nijboer et al., 2010). Here again, parents responding to an invitation for a conversation and doctors collecting such information is more "self-evident" in the French setting than elsewhere.

It should also be noted that French reports mainly originate from PMI doctors in the Paris region. This region has a high concentration of immigrant groups practicing FGM, and one is often confronted with the medical consequences of genital mutilation. This does not alter the fact that there are concentrations of these groups in other parts of France as well; however, activities by the judicial authorities are at a lower level there (Nijboer et al., 2010). What is more, Nijboer et al. conclude that, as a rule, the French police are not actively involved in investigating FGM, with the exception of the cutter cases. In this respect, they point out that, "the reactive character of the French criminal approach of FGM is not only of a formal-legal nature. A fact of a more cultural nature is that in the event of a report of a FGM already committed, relatively few man-hours are invested in investigating possible other cases and more evidence" (Nijboer et al., 2010: 167).

The last (cultural) factor that is important for a correct understanding of the French "success" is the fact that interest groups are entitled to join as a party during a preliminary judicial investigation. Unlike the Dutch regime, for instance, these interest groups have far-reaching procedural authorities. They may inspect documents or make requests, that is, have someone summoned as an expert (Nijboer et al., 2010). The NGOs involved in the criminal proceedings—including the leading women's rights organizations *Ligue pour le Droit des Femmes and the Groupe pour l'Abolition des Mutilations Génitales Féminines*—at the time advocated settling criminal cases regarding FGM at the highest criminal level, that is, the *Cours d'Assises*, (instead of at the level of the single judge) in order to give the case the character of a public warning. A jury trial before the *Court d'Assises* (drawing a lot of attention) promoted public visibility of the issue (Kool et al., 2005; Guiné and Moreno Fuentes, 2007; Nijboer et al., 2010).

All in all, some 40 criminal cases have been settled in France thus far, the majority ending in a conviction (Nijboer et al., 2010). Frequently, appeals were made to the cultural background of the accused to justify the genital mutilation or to exclude individual punishability. In a number of cases, experts established circumstances beyond the defendant's control; however, this defense has never been admitted. In fact, the feminist quarter has criticized such defenses, as the women in question were portrayed as victims of their own culture without a will of their own (Winter, 1994). In other cases, the accused invoked error of law, arguing that as an immigrant they had not been aware of the fact that FGM was punishable in France. Nijboer et al. are of the opinion that these defenses were meant to influence the nature and scope of the sentence, not to effect an acquittal or an exemption from punishment. This effect appears to have been realized, that is, with regard to the parents. The cultural background of the accused and the wish not to disrupt family life have been listed as reasons for relatively light sentences (Kool et al., 2005; Nijboer et al., 2010). By contrast, the cutters were often sentenced to severe and unconditional imprisonment, especially if they had been involved in a series of circumcisions.

This French "success" later attracted the attention of other countries, especially of the Netherlands. In response to the (seemingly) successful French approach, the Dutch House of Representatives insisted on a comparative law study to examine whether the Netherlands should follow the French example. The Secretary of State also paid a working visit to the country (Nijboer

et al., 2010). Nevertheless, Nijboer et al. point out that most French criminal cases resulted directly from the arrest of a cutter, and that French criminal law lacks the minimum evidence requirement; the "conviction intime" suffices (Kool et al., 2005; Nijboer et al., 2010). Moreover, there have been very few reports on any other basis (except some active PMI circles), and there is no integrated official approach (Nijboer et al., 2010). The nationwide familiarity with the punishability of FGM generated by the criminal cases has not opened up the issue any further, nor intensified the combat thereof.

Notwithstanding the aforementioned qualifications, the question arises whether, and to what extent, the characteristically French republican views on immigration and assimilation have contributed to the French "success." This does appear to be the case, albeit with the usual provisos. It was pointed out that in the French setting the acceptance of authority (as implied in the hierarchical relations between citizen and government) is more self-evident. In France, the question of whether parents are obligated to participate in a routine examination of the genitals by a doctor and to make a relevant statement is not raised—it is simply accepted. In comparison, we refer to the resistance encountered in the Netherlands in this respect. A proposal for the introduction thereof by the then Member of Parliament Hirsi Ali resulted in strong resistance, as objections were raised from the privacy point of view. It should also be noted that the "French examinations" have a countereffect: circumcision is postponed until the moment at which the child is not subject to the obligatory medical examination anymore (Kool et al., 2005).

The readiness of the various authorities to cooperate—especially the readiness in specific regional medical circles—to report their findings directly to the criminal authorities also testifies to a centralist attitude that is lacking elsewhere. The fact that, due also to the NGOs' involvement, the message was phrased in terms of promoting the equality of the sexes and protecting human rights, furthermore, promotes public and political support (Guiné and Moreno Fuentes, 2007).

This attitude also explains the lack of specific penal provision. The women's movement was in favor hereof, but it was rejected in conformity with the French republican spirit of realizing one shared identity. The introduction of a specific penal provision would differentiate between citizens, and thus might lead to discrimination and stigmatization of minority groups (Guiné and Moreno Fuentes, 2007; Nijboer et al., 2010). The French legislator continues to adhere to this methodology. In order to meet the explicit demand for criminalization contained in Article 38 of the Lanzarote Convention, a legislative proposal was nevertheless drafted with the aim of supplementing the general provision on abuse (Article 222-9 *Code Penal*) by the element "*mutilation génital feminine*." Another proposal was made that explicitly criminalizes the attempt and/or the furtherance of FGM. This proposal is still pending (Assemblée Nationale, 2010). **Q8**

By contrast, an agreement was reached on the need to extend extraterritorial jurisdiction, in view of FGM practiced on French citizens abroad. The original connecting factor, requiring either the suspect or the victim to be a French national at the time of the offense, was relinquished in 2006; France now has jurisdiction in case of an underage victim with a permanent resident status. It should be noted that his legislative amendment came into effect with retroactive force (Nijboer et al., 2010).

England: A Climate of Polarization toward Cultural Minorities?

The English approach to FGM must be viewed against the background of the "compounded character" of the British Empire and its long colonial history. For many years, English society underwent large-scale, and prolonged immigration, which (has) shaped English views on citizenship.

Some say that this colonial past has left the British (including the English) with a multicultural outlook discerning them from other Europeans. This view has been formulated prominently in the influential Parekh report, which discusses the development of the United Kingdom as a multicultural nation (Runnymede Trust, 2000; Guiné and Moreno Fuentes, 2007). Q9

Fortier (2000), however, points to the polarizing tone of the Parekh report, and to the critical attitude adopted herein with regard to the designation "the English cultural identity". Others have also questioned this multicultural identity that is publicly adhered to by politicians. Young (1999) interprets the hostile tone by English toward newcomers as stemming from a certain conservatism that is driven by the desire to maintain "the English community." Other authors point to underlying racism and animosity toward immigrants, inspired by the fear of Muslim terrorism (Mirza, 2012; Sales, 2012). They conclude that the past years have seen a shift in political thinking toward assimilation and integration.

Nevertheless, the English views on citizenship still exemplify the multicultural model. Although the former policy of "equal opportunity, coupled with cultural diversity" (Poulter, 1986) has become a bit worn, it has not been abandoned completely yet. The political feelings of guilt as regards the "racist (colonial authors') past" are too deeply rooted, according to Mirza. In this context, Mirza speaks of "faith-based approach multi faithism" (Fortier, 2005; Mirza, 2012: 121–123). This is reflected in the political influence of the multicultural NGOs on English policy with regard to FGM. More than elsewhere, the English authorities take into account the opinions of (locally) organized minority groups and consult these when outlining policies on multicultural issues.

However, the involvement of these NGOs also has a downside: when issues of criminalization and the criminal enforcement of cultural offenses such as FGM are concerned, this quarter is quick in raising suspicions of racism against government policy (Guiné and Moreno Fuentes, 2007). This undertone can be heard in Mirza's writings, and may also be found in opinions on the punishability of other cultural offenses such as forced marriages (Mirza, 2012). At the same time, there has been a growing awareness in England that violations of human rights are to be prevented. Fortier (2000) argues in this context that the approach advocated in the Parekh report and endorsed at the time by the English government comes down to a "pluralist model of managing cultural pluralism in a human rights framework" (Fortier, 2000).

Last February, the U.K. government firmly condemned the practice of FGM and qualified it an "extremely harmful form of violence" (Her Majesty's Government (HMG), 2014). It appears from this official statement that the U.K. authorities have chosen a twofold approach to eliminate FGM: aiming to create awareness about the consequences of this practice while also using criminal law to discourage people from performing FGM (HMG, 2014).

On balance, England appears to be in a transitional phase with regard to the approach to FGM (and other cultural offenses). On the one hand, a policy that enjoys wide support and does not clearly pursue a homogeneous national identity is aimed for. However, societal unrest regarding the consequences of globalization and recent lack of success for efforts to combat FGM has resulted in a stronger emphasis on repression. This indicates a shift toward an ethnocultural model (Dustin, 2010).

The question as to why English authorities thus far have not managed to prevent FGM and/or to fight it through criminal law is not an easy one to answer. With regard to prevention, we do not know if this has been effected. What we do know is that FGM occurs on a large scale in England. For lack of adequate registration we can only guess at the scope hereof; reasoned estimates come up with 20,000 high-risk cases (Dorkenoo et al., 2007). Later research by the Health Department, however, mentions 80,000 high-risk cases, that is, over a quarter of all girls originating from

immigrant groups under the age of fifteen (The Independent On Sunday, 2013). The majority of the girls at risk is between seven and ten and originates from Kenya and Somalia.

However, in the European context England is leading with regard to legislation. Already, in 1985, the *Prohibition of Female Circumcision Act* was adopted with the main purpose of promoting awareness. In addition to a specific penal provision, this act allows for genital circumcision on medical grounds. Despite its lack of clarity on the precise conditions under which this is permitted, it is clear that a woman's conviction of the rightness of the circumcision, as prescribed by tradition, does not constitute a justification. It is also noteworthy that the penal provision covers the genital mutilation of adult women at their own request. Moreover, the 1985 Act was replaced by the *Female Genital Mutilation Act 2003*; under this act, a substantially increased maximum sentence (from five to 14 years of imprisonment) applies and extraterritorial jurisdiction is extended so that genital mutilations practiced abroad by and on English citizens can also be prosecuted. To promote consciousness of the punishability of FGM, a pilot was started recently with the issuance of a so called "health passport," especially in the relevant countries of origin. The objective is to protect English immigrant girls who travel to relatives in their countries of origin against genital mutilations practiced there (HMG, 2012).

In addition, the Crown Prosecution Service (CPS) has drafted instructions on fighting FGM adequately (*FGM Guidance*). Supplementary to the Guidance, operating instructions were formulated for assistance prosecutors: CPS Female Genital Mutilation Pack. One of the instructions reads that on suspecting FGM, one should contact a so called Violence Against Women Coordinator (VAWC) (cps.gov.uk, 2015). These instructions are part of the broader policy of the CPS on fighting violence against women (*Violence Against Women Strategy and FGM*), which in turn is incorporated in the coordinating policy on fighting violence against women (HMG, 2013, 2014; Home Office, 2013). It is also noteworthy that anyone suspecting child abuse (including FGM) is obligated to report this to the local social services or to the police (*Children Act 1989*, Section 47) (Black and Debelle, 1995; Home Office, 2011). This applies despite possible professional, confidential duties (Home Office, 2011).

The English government, pressured by growing criticism of the observed enforcement deficit, has announced its intention to intensify combating FGM. Questions were recently asked in the House of Commons in response to the observation that between November 2009 and 2011, 63 cases had been reported to the Metropolitan Police, whereas not once had a prosecution been instituted. This resulted in a call for action to the English government to tighten its approach of FGM by the House of Lords and a motion of the House of Commons, which was adopted unanimously (parliament.uk, 2010). In addition, both the adoption of the Draft Resolution Aimed at Intensifying Global Effort to Eliminate Female Genital Mutilation by the United Nations (United Nations, 2012), and the publication of the aforesaid critical journalist research report play a role (The Independent on Sunday, 2013). A matter of permanent concern is increasing the willingness to report. For this, an attempt is being made to open up the issue through a community-based multiagency approach and local authorities are entitled to take preventive measures necessary to protect a child's health (custodial placement, request of ban to leave the country). The Crown Prosecution Service recently stated that it intends to start implementing these child protection measures in fighting FGM. Thus far, this policy has not led to any concrete acts of prosecution. In 1993, two doctors were judged guilty of "serious professional misconduct" by a medical disciplinary tribunal. One doctor had genitally mutilated a woman, although he was aware of its punishability; the other had offered to perform the operation. The first doctor was deleted from the medical register.

While there is no clear answer to what extent the English views on citizenship influence (have influenced) the combating of FGM, it is possible to discern an "English signature" subject to

the necessary provisos. Unlike the French ideology, there is no centralist approach based on a homogeneous cultural identity. On the contrary, in the English setting one traditionally feels very strongly about every person's claim to his or her own cultural identity. Beneath the surface of this multicultural model, however, a trace of ethnocentrism has been spreading—inspired by an unspoken but nevertheless strongly felt superiority of the "real" English identity. This trace has been picked up by minority groups and has led to accusations of racism, which in turn interferes with the identification of FGM as a (cultural) offense.

The Netherlands: Toward an Ethno-cultural Model of Citizenship?

The Netherlands began combating FGM quite late, only in 1993 (Appendix Parliamentary Papers, 1982/83). Around that time, the multicultural model of citizenship ("integrating while preserving one's own culture") that had prevailed in the Netherlands in the 1970s was already beginning to shift. According to the Dutch Scientific Council for Government Policy, this earlier "open" attitude is to be put into perspective. They point out that although Dutch culture was receptive to external influences for a long time, these were "often made invisible by strongly nationalizing them." (Koopmans et al., 2005; WRR, 2006). The impact of the surge of labor immigrants that had begun in the 1960s resulted in a political swing toward embracing Dutch identity at the end of the twentieth century. The political debate began around the year 2000, in particular by the leader of the Dutch Liberal Party (VVD), Frits Bolkestein. Critical reports appeared in the media such as the article by Paul Scheffer in the NRC of January 29, 2000, which described the "multicultural drama." As of 2004, parliamentary debates and government circles showed an official dissociation from "multiculturalism as a normative ideal." The immediate cause for this was the publication of the report "Building bridges" (by the Blok Committee); the subject of the report was Dutch integration policy (WRR, 2006). As of then, an ethnocultural model of citizenship became popular that was characterized by a homogeneously-presented Dutch identity (Ghorashi, 2006). Its roots may be found in the former "pillarization" (i.e., the compartmentalization of Dutch society along traditional religious and socio-political barriers) entailing the policy of sovereignty within one's own circle. Although this policy was abandoned in the middle of the past century, in the wake of the "depillarization" the inherent typical development of identities along the lines of group building stayed intact beneath the surface. According to the Dutch Scientific Council for Government Policy, the WRR, the Dutch identity has a somewhat "implicit and sunk character" that permits little reflection on the normative principles at its basis (WRR, 2006). The Dutch criminal law also bears the signs hereof, as't Hart has argued ('t Hart, 2000).

In this political climate, a firm stand was made against FGM. Its punishability was stressed, and it was labeled as an "imported offense" (Parliamentary Papers, 2003/04). The seriousness of the consequences led to its qualification as child abuse, an issue for which criminal law enforcement was (also) deemed appropriate. In conformity with the system of Dutch criminal law, the common criminal provisions applied (article 300 ff of the Dutch Criminal Code: *Wetboek van Strafrecht*) (Dutch Ministry of Welfare, Public Health and Culture, 1993). Nonetheless, these were not enforced actively initially. Due to the sensitivity of the issue, a criminal investigation was considered undesirable (Appendix Parliamentary Papers, 1990/91).

FGM now falls under the heading of domestic violence, which is one of the spearheads of present criminal law policy (Dutch Government Gazette, 2010). The view that criminal law intervention may be appropriate in cases of FGM is undisputed in the present policy. What is more, the Dutch government extended its extraterritorial jurisdiction in 2006 and 2013 with

regard to genital mutilations of nationals or residents practiced elsewhere (Dutch Government Gazette, 2006, 2013). The provisions on the prescription of the right to prosecute were also extended.

Despite the fact that the criminal law currently is an integral part of the approach to FGM, preference is still given to prevention and the rendering of assistance. This is also true for the Dutch approach toward FGM on a global level (Parliamentary Papers, 2013/14). Support for criminal law enforcement has increased lately, but the medical and youth services still adopt a reticent attitude. They are often not prepared to report suspicions and observations on FGM to the criminal authorities. This attitude has been respected by the government thus far; however, a legal obligation for medical services to report suspicions to one of the Child Abuse Reporting Centres (*AMK*s) was introduced recently (Dutch Government Gazette, 2013). It may be noted that the Instruction investigation and prosecution child abuse prescribes prosecution in case there is sufficient proof (Dutch Government Gazette, 2010). However, since the introduction of the *Social Support Act* in 2010, policy responsibility for the prevention of FGM exists at the local level. As a rule, this local level does not opt for criminal intervention but focuses instead on opening up the issue via the communities involved through the interference of key figures. From a Dutch perspective, it is presumed that the minority groups involved should also carry responsibility for the problems within these groups (Parliamentary Papers, 2011/12).

The question of whether the Dutch approach has proven fruitful and what fruits it has borne is not an easy one to answer. In terms of the number of criminal cases, the result is meager: thus far, only one case was submitted to the criminal court, which ended in an acquittal for lack of evidence. Moreover, this case was only opened up to the criminal authorities following a report by the (Dutch) mother (District Court Haarlem, 2009; Court of Appeal Amsterdam, 2012). In both instances, (partial) acquittals were pronounced. It was an established fact that the five-year-old girl had been circumcised, but there was no conclusive evidence that the suspect (the father) had performed it. In January 2013, a second case was submitted to the District Court Dordrecht, but the judgment was deferred. Both normal child abuse and circumcision are suspected. It is expected that the latter will not be included in the final indictment.

Politicians, however, insist that combating FGM through criminal law should be intensified. The right-wing liberal Freedom Party (PVV) particularly insists on this. As of 2008, six motions were submitted in the name of the PVV, aimed at intensifying combating of FGM. The proposals included increasing the maximum penalty, but also halting the asylum procedure and/or withdrawing residence permits in case of suspected FGM. Insisting on tightening criminal repression mainly seems to serve the purpose of demonstrating to the public that FGM is absolutely forbidden in the Netherlands, in the hope of deterring potential perpetrators. The extension of extraterritorial jurisdiction, which was introduced a while ago and extended recently, also fits into this context.

This is in line with a general tightening of the criminal regime with regard to cultural offenses that is currently visible in the Netherlands (Dutch Government Gazette, 2013). The Dutch government clearly wishes to draw the line with regard to the impunity of cultural practices and is convinced of being in the right, both from human rights and from a cultural angle (van den Brink and Tigchelaar, 2012). Objections to extending penalties and extraterritorial jurisdiction were invariably rejected with the argument that the disputed actions violate "the views of civilized nations." These, in the prevailing policy view, render it foreseeable for everyone that both FGM and other cultural offenses constituting violations of human rights are punishable according to Western views. The Dutch approach to FGM thus shows ethnocultural features (Kool, 2012).

Comparison and Conclusion

The French, English, and Dutch societies are all, in their own manner, clearly struggling with the impact of globalization and the resulting influx of nontraditional cultural practices. Their approaches differ due to (legal) cultural differences and underlying views on citizenship, but these seem to be the differences of degree. The conviction that, measured by Western views, FGM is punishable and should be combated is beyond dispute in all three countries. Also, there is more or less agreement on the approach: the focus is on prevention and assistance, with criminal law functioning as the tailpiece.

It is this last issue, the use of the criminal law (or to be more precise, the overlap of assistance and criminal law) where the biggest differences occur. The readiness of national governments and practitioners to resort to criminal law diverges. The existence of a specific criminal provision is not decisive in this respect, as is shown by the French practice. Not the law, but practice decides whether there is support for actual criminal law intervention. This practice, as it turns out, is determined by the degree of tolerance toward cultural practices that is implied in national ideas on citizenship.

Although it is not possible to draw hard conclusions in view of the limitations discussed, the French and Dutch societies seem to take a "harder" stand on FGM than the English society. The message that newcomers are expected to adjust to the standards of the new motherland and assimilate can be heard clearly in France and the Netherlands. Such a centralist approach fits into the relatively simple political-administrative structure of the Netherlands, as compared to France and England. The fact that the same message applies in France, despite the more complex political-administrative structure, provides an extra layer to the felt homogeneity of the French identity. The contrary, however, applies to England: having a "bad conscience" toward a colonial past, the English policy features as "faith-based" (Poulter, 1986; Fortier, 2005; Mirza, 2012). Minority groups being politically active, the English authorities felt "obliged" to champion multiculturalism. However, notwithstanding the recognition of various cultural identities, the English identity is still felt to be "superior." Moreover, recent developments show multiculturalism to be in decline in England. All these factors influence the approach to FGM in these countries.

However, these three countries (like all Western European countries) have a great attachment to human rights and expect to provide adequate protection against gendered cultural practices that are considered to be harmful. This justifies the use of criminal law, in the course of which the human rights claim to universality leads to an extension of jurisdiction. At the practical level, the actual role of criminal law appears to be defined by the complexity of the issue of FGM and the related multicultural aspects, with the need of weighing opposite interests. It may come as no surprise that to date not one of these countries—France included—has been able to fight FGM adequately. The search for the "correct approach" will continue for a while—both at home and abroad.

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