

# **Strafrechtelijke opsporing en vervolging van vrouwelijke genitale verminking**

## *De Franse praktijk*

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Boom Juridische uitgevers  
Den Haag  
2010

## ABSTRACT

This report contains the findings of a study into the criminal investigation and prosecution of female genital mutilation (FGM). The study centres on French practice, although in a comparative perspective, viewed from the Netherlands. The purpose of the study was to analyse and draw lessons from the French criminal prosecution of FGM. The study – as commissioned by the Dutch Ministry of Justice (Scientific Research and Documentation Centre) – was conducted during the second half of 2009 and the first half of 2010 by researchers of the Institute of Criminal Law & Criminology at Leiden University.

### REASON FOR THIS STUDY

FGM is an age-old custom, of African origin, during which non-medically indicated changes are made to the genitalia of girls and women. Under Dutch criminal law, FGM is classified as a form of aggravated battery that can also be prosecuted in the Netherlands if it is committed outside that country by a Dutch person or a foreign national with permanent residence in the Netherlands. The prevention and repression of FGM has recently been high on the international and Dutch political agenda. Within this approach, it is deemed necessary to investigate and prosecute cases of FGM in order to effectively combat it. However, to the best of our knowledge, no conviction has been handed down to date for FGM in the Netherlands. Earlier research and policy suggest that FGM is actively and therefore more ‘successfully’ investigated and prosecuted in France than in the Netherlands. As such, France lends itself to further research into the practice of investigating and prosecuting FGM. ‘Success’ within the context of this study means that a case of FGM has led to a criminal conviction. This must not be confused with the success of approaching the problem of FGM in general or the successful ‘tackling’ – in the broader sense – of a family within which one or more daughters have been mutilated.

### COURSE OF THE STUDY

Most of the French population originating from so-called risk countries live in Paris and the surrounding areas. Furthermore, hardly any French criminal

cases relating to FGM are known outside Paris and the surrounding areas. There is therefore a strong indication that any reference to the French criminal prosecution of FGM actually means criminal prosecution in the Paris region. The study was therefore conducted in the territorial jurisdiction of the Paris *cour d'appel*. The available FGM case files in this area were examined and doctors, magistrates and other parties involved in the criminal prosecution of FGM were interviewed for the purpose of the study. 31 criminal cases were analysed, which cases have led to 88 convictions. A total of 42 criminal cases relating to FGM have been documented in the whole of France.

## SWOT ANALYSIS

Chapter 8 contains a SWOT analysis, which includes the strengths, weaknesses opportunities and threats relating to French criminal prosecution in order to be able to assess the French practice of investigating and prosecuting FGM.

### *Strengths:*

- the relatively large density and intensity of medical examinations among children and the wide opportunity for doctors to report FGM;
- the low standard of proof and lack of requirements for corroboration. In practice, an incriminating statement (by the accused or a third person) suffices for a conviction;
- the general public awareness of FGM and the broad acknowledgement that FGM must be condemned and punished;
- the extensive opportunities for the *juge d'instruction* (examining magistrate) to make inquiries, using coercive measures if necessary, and to head an extensive investigation. In two major cases – known as the *exciseuse* cases – this has led to the large-scale discovery of FGM and the conviction of the *exciseuses* for numerous excisions.

### *Weaknesses:*

- the reactive nature of the French criminal prosecution of FGM. This refers both to the fact that investigation only takes place following the report of a completed mutilation and the reactive nature of this investigation, in which success is strongly dependant on the parents;
- the lack of an integrated policy to place criminal prosecution within a broader context;
- the imbalance in the number of convictions of mothers and fathers, which does not seem to completely correspond to the actual involvement of mothers on the one hand and fathers on the other.

*Opportunities:*

- the relatively large number of inhabitants from risk areas, where the prevalence of FGM is probably fairly high. This can also lead to more experience among doctors;
- the possibility of also discovering FGM cases outside the context of a medical examination;
- actively trying to get victims to come forward and press charges, since it sometimes happens that gynaecologists and forensic medical examiners, in particular, discover a mutilation which they cannot report themselves because of the age of the victim.

*Threats:*

- parents and *exciseuses* are becoming more familiar with how criminal prosecution works and how they can thwart the process. After all, the various phases of the French approach depend to a large extent on the parents;
- magistrates and doctors lose faith in criminal prosecution because of the significant likelihood that reporting FGM will not lead to a conviction. As such, the willingness of doctors to report FGM may eventually decrease even further;
- the division between the criminal law system and prevention and assistance. Although there is always a risk that criminally prosecuting FGM and providing assistance will thwart each other, this risk is even greater if there is no joint consultation.

## THE ORGANISATION OF THE PRACTICE OF INVESTIGATION AND PROSECUTION

The organisation of the investigation and prosecution of FGM is mainly reactive in nature. Intensive investigation and the use of intrusive methods of investigation only take place when specific and useful information about an *exciseuse* comes to light. In cases where there is no indication as to the identity of an *exciseuse*, the process is limited to interviewing the parents and verifying the genital mutilation of the victim as determined by a doctor before it was reported. If this does not produce any evidence, the investigation is halted.

The practice of investigation and prosecution is described in detail in Chapters 4 to 7, leading in Chapter 8 (in addition to the SWOT analysis) to a theoretical diagram depicting the various obstacles on the way to a conviction. This is followed by a brief summary of the various phases of discovering, reporting, investigating, prosecuting and trying FGM cases.

From a preventative perspective, it would be desirable to be able to prosecute parents or the *exciseuse* before the FGM is completed. This does not actually happen in French practice, however, since reporting FGM as an offence always relates to a completed excision. PMI doctors, who carry out regular physical check-ups on children until they are seven and also act as general practitioners for children, have reported most of these cases. Nevertheless, only a small proportion of all FGM cases are actually discovered and reported. Once reported, the *procureur de la République* designates a specialised police service to initiate an investigation, which seldom involves more than interviewing the parents and having a forensic medical examiner examine all the girls in the family. The criminal law process is suspended if no incriminating information about the parents or an *exciseuse* is forthcoming from the initial investigation. If there is an incriminating statement about one or both of the parents, a preliminary judicial investigation is opened, which seldom unveils new facts. As a rule, the parents referred to in the incriminating statement are convicted after this preliminary judicial investigation. If information about an *exciseuse* comes to light during the investigation, more active inquiries follow and intrusive methods of investigation, such as telephone tapping, are used after the preliminary judicial investigation is opened. In two infamous cases (the “*exciseuse* cases”), address books with the names of the excised girls were found at the *exciseuses*. This method of finding the parents ultimately led to more than half of the convictions.

The French criminal law system has a civil party (*partie civile*) with a far stronger procedural position than in the Netherlands. The civil party may be the victim, or an organisation which defends specific interests. As such, there are various organisations that stand up for victims of FGM. These civil parties can do practically everything that the public prosecutor (*procureur de la République*) and defence can do during the preliminary judicial investigation (*instruction*) and the trial. For instance, victim organisations often provide experts in the area of FGM. A civil party can also claim compensation.

## ANSWERS TO THE RESEARCH QUESTIONS

The research questions and overarching problem are answered in Chapter 10.

*To what extent is the French practice of investigation and prosecution of female genital mutilation successful?*

It cannot be unreservedly maintained that the practice of investigation and prosecution is more successful in France than in the Netherlands, since the French ‘success’ is limited to the region in and around Paris. There is also some doubt as to whether the practice of investigation and prosecution in this

region is more successful than in the Netherlands as the greater number of convictions does not seem to be the result of a more successful practice, but rather of the relatively and absolutely greater number of FGM cases that are reported to the prosecuting authorities.

*Which circumstances lead to the opening of an investigation into cases of female genital mutilation in France?*

By far the majority of convictions for FGM cases are the result of earlier investigations (aimed at other people). If one looks at investigations initiated on the basis of original reports, reports by a *PMI* doctor rank head and shoulders above the rest. Nevertheless, only a small proportion of excisions are discovered during checkups by *PMIs*. These discoveries are also far from all being reported to the *procureur de la République*. FGM cases can also come to light in other ways, but this is strongly characterised as being by 'stroke of luck'. If a case of FGM is reported to the *procureur de la République*, the matter is always investigated.

*Which circumstances lead to the initiation of a prosecution of cases of female genital mutilation in France?*

Other than in exceptional circumstances, a person suspected of FGM is only prosecuted on the basis of his or her incriminating statement or an incriminating witness statement. The situation differs if information comes to light about an *exciseuse*.

*How are female genital mutilation cases that have led to criminal proceedings investigated and prosecuted in France?*

Generally, the investigation and preliminary judicial investigation can be characterised as very reactive. This differs and active investigation follows if specific and useful information is obtained about an *exciseuse*.

*In these cases, which evidence was available before the start of the investigation and which evidence was the result of intensive or other investigation?*

In practically all cases, it is already an established fact when the investigation starts that FGM has actually taken place. The investigation focuses almost entirely on finding those involved and proving their involvement. If no *exciseuse* is identified, the investigation will focus on obtaining an incriminating statement against the parents.

*How much and which evidence is necessary to obtain a conviction for female genital mutilation in France?*

France has a system of free proof. For the purpose of a conviction, it suffices for the court or two-thirds of the jury to be convinced of the accused's guilt. In other words, no requirements are laid down for the presentation or

corroboration of evidence. Generally, it may be stated that there is sufficient evidence for a conviction if there is an incriminating statement about the accused and a report from a forensic medical examiner confirming the FGM.

*To what extent has forensic evidence of female genital mutilation played a role in cases that have led to a conviction?*

Forensic examination takes place in all cases, frequently more than once. Forensic medical or other evidence seems to be a requirement for a conviction. Obtaining cooperation for this examination has not proved to be very problematic.

*How is the offence, the seriousness of the offence and the evidence presented to the court in these cases?*

The presentation of evidence is not subject to any strict format in French criminal procedure, although all the evidence that is put forward to support a conviction must be discussed at the trial. In cases before the *tribunal correctionnel*, the evidence is mostly presented by reading out documents from the case file during the trial and witnesses and the accused are interviewed. Assize proceedings are not confined to reading out the documents and all the parties involved (witnesses, experts, etc.) are examined again at the trial. In FGM cases, the defence and *partie(s) civile(s)* often make use of the possibility to examine witnesses and experts in the area of FGM.

*Which circumstances do the court or jury take into account in their verdict to acquit or convict?*

As stated above, there is sufficient evidence for a conviction if there is an incriminating statement about the accused and a report from a forensic medical examiner confirming the FGM. The court does not have to motivate its decision to convict and this therefore does not happen in case of a *cour d'assises* ruling. The cultural background of the offence also still appears to play a role in sentencing, but not in the question of whether the accused is guilty of the suspected offence.

*Which strengths and weaknesses are to be observed in the criminal investigation and prosecution of female genital mutilation in France?*

The researchers considered this question to be so important that a separate SWOT analysis of the French practice was carried out (see above). There is obviously a very close connection between the various strengths and weaknesses and the opportunities and threats of the system.

*Which lessons can be drawn from the French system for the effective criminal investigation and prosecution of female genital mutilation in the Netherlands?*

Some specific pointers for the Dutch prosecution of FGM are provided in Chapter 9. The following general lessons are drawn, based in part on those pointers:

- it is relatively uncomplicated for doctors in France to examine children, including a genital examination, without having to request detailed consent from parents. Dutch doctors probably also have sufficient standing among parents to be able to carry out this examination, but do not currently make use of it;
- most reports of FGM in France that lead to conviction, originate from doctors who have discovered a completed FGM. In order to increase the number of reports in the Netherlands, more attention can be spent on educating doctors how to detect and then report a completed FGM to the prosecuting authorities via the Child Abuse Counselling and Reporting Centre (AMK);
- it is probably less difficult (in the preliminary inquiry) to establish FGM than is currently thought. French forensic medical examiners indicate that it is not difficult, after some training, to conclude FGM has taken place, at least in those types of FGM in which something is excised. Furthermore, the fear that parents would refuse consent for forensic examinations has hardly materialised in France;
- concerted efforts to find an *exciseuse* merits recommendation. Based on the French experience, it is worthwhile using intrusive methods of investigation once the *exciseuse* is found to obtain as much information as possible. This can lead to a snowball effect, uncovering a large number of cases. By far the majority of convictions in France have come about in this way. The *exciseuse* cases in France have moreover played an essential role in bringing the harmfulness of FGM and the importance of prosecution under the attention of professionals and the wider public;
- the general Dutch policy against FGM (i.e. not limited to criminal law) is more integrated than the French approach to FGM. The researchers accordingly expect that the Netherlands, based on its own policy, would be able to make its own headway in increasing the chances of successful prosecution. They believe consideration could be given, for instance, to the possibilities of converting reports from professionals other than doctors (such as school staff, social workers and youth care workers) into a successful prosecution.

*Which elements of investigation and prosecution from France are also applicable (in the short or long term) in the Netherlands?*

The French situation does not translate literally to the Dutch system and so the direct application of elements from that situation is not possible. It is moreover noted again here that the researchers are not convinced that the French system



of investigation and prosecution is more effective in dealing with a report of FGM than would be the case in the Netherlands.

## CONCLUSION

*To what extent does or did France have a more successful practice of investigating and prosecuting female genital mutilation than the Netherlands, how is this organised and how can lessons be drawn from this for Dutch practice?*

It cannot be unreservedly maintained that France has a more successful practice of investigating and prosecuting FGM than the Netherlands. The prevailing impression in the Netherlands that France ought to be seen as the benchmark for investigating and prosecuting FGM therefore needs to be adjusted in any case. The investigation and prosecution of FGM in France is mostly reactive in nature and intensive investigation only takes place if the identity of the *exciseuse* is known.

Lessons for Dutch practice can mainly be taken from the discovery and reporting phase. The major role of doctors appears to be decisive in this regard. This role is greater in France than in the Netherlands in two ways. Firstly, children in France undergo more regular physical examinations, including of their genitalia. In addition, they are examined by doctors from one agency (the *PMI*), instead of various types of doctors from different agencies. Secondly, doctors in France have more opportunities to report FGM and work together with the prosecuting authorities than their Dutch counterparts.

The researchers further call for a relatively concerted effort by investigating agencies to find *exciseuses*. From a more general perspective, the researchers believe that there are opportunities for the Dutch investigative authorities to adopt a more active approach than the French investigative and prosecuting authorities.

Lastly, the researchers wish to emphasise that although France has a higher conviction rate for FGM, the approach to FGM in the Netherlands is far more integrated and, as such, is more advanced than French practice in some respects.