

STEP FORWARD, OR FOREVER HOLD YOUR PEACE: PENALISING FORCED MARRIAGES IN THE NETHERLANDS

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Abstract

Being confronted with the import of formerly unknown cultural practices, the European public authorities are expected to set clear public standards regarding the alleged harmful nature of such practices. The adopted solutions are often of a legal nature, using the law as a vehicle to frame certain social behaviour as socially unacceptable. One of the practices that have been subject to framing in terms of law and gender are what is commonly referred to as forced marriages. Calling upon human rights law, Europe's policy is in favour of penalization of forced marriages. However, such an appeal holds the risk of strategically misuse of human rights law for political benefit. Next to a clear risk penalisation being symbolic, diversity issues bear within a risk of xenophobia. Thus penalisation of diversity issues needs to be analysed scrupulously. This paper addresses the issue of the penalisation of forced marriages in Europe, with special attention paid to a draft law recently submitted by the Dutch government, addressing the issue which actors and factors have contributed forced marriages being put on the European and Dutch political agenda.

Keywords: framing; forced marriages; harmful cultural practices; penalisation; xenophobia

1. INTRODUCTION

Due to globalization Europe is confronted with the import of new and formerly unknown practices. Some of these practices are viewed by some as presenting a serious threat to fundamental European or even Western values, requiring the public authorities to set clear public standards regarding the harmful nature of such practices

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and the need to adequately combat these harmful practices. The adopted solutions are often of a legal nature, using the law as a vehicle to frame certain social behaviour as socially unacceptable.¹

Frequently, an appeal to human rights law goes hand-in-hand with a claim for penalisation. Both human rights and criminal law reflect and strengthen the sphere of 'justice', featuring the law in general. Another argument relates to gender. Issues of diversity are frequently linked to the social position of minority women and minors in terms of vulnerability. Women and minors have the right to equal treatment. They are entitled to legal protection against gendered violence flowing from the alleged superiority of men. Special attention is drawn towards the issue of domestic violence, including so-called 'harmful cultural practices'.

One of the practices that have been subject to framing in terms of law and gender are what is commonly referred to as forced marriages.² Since the beginning of this century, there has been an on-going debate in Europe regarding the need to legally combat forced marriages. Overall, Europe is in support of penalisation. Europe's consensus is reflected in the recent Council of Europe's 2011 Convention on Preventing and Combating Gender Violence and Domestic Violence (Convention 2011). The Convention specifically provides that States are to take 'the necessary legislative or other measures' to criminalize forced marriages (Article 37 of Convention 2011).³

Nevertheless, arguments *against* penalisation are also heard in Europe. Opponents argue that human rights law is used incorrectly, giving way to a wrongful denomination of forced marriage as a harmful cultural tradition. Moreover, the intended penalisation of forced marriages is called racist, and a violation of the right of ethnic minorities to preserve their cultural identity. Nonetheless, similar to those who argue in favour of penalisation, those who oppose it do acknowledge that forced marriages represent a specific form of domestic violence that is related to minority cultures and that need to be combated adequately. Accordingly, both proponents and opponents of penalisation classify forced marriage as a human rights violation, and accept the need for legal intervention.

But opting for legal intervention needs justification, for, to some extent, the law has to reflect 'common sense' in order to be socially legitimate. However, such an appeal towards 'common sense' holds the risk that politicians may strategically use human

¹ Following Loenen and Van Rossum, the term 'framing' is being used to refer to a process of building frames, meaning a rather consistent interpretive package surrounding a core idea directed towards building social and political support to nominate social behaviour as a social problem, as presented by a specific social actor, e.g. the legislator, a political party, an interest group or any other stakeholder. Therefore framing is not a neutral process, but is deeply subjective; Loenen, T., Van Rossum, W. and Tigchelaar, J., 'Introduction: Human Rights Law as a Site of Struggle over Multicultural Conflicts and Multidisciplinary Perspectives', *Utrecht Law Review*, Vol. 6, No. 2, 2010, pp. 1–16 and Goffman, E., *Frame analysis*, New York, Harper & Row, 1974.

² Note this paper to relate to marriage as within 'legal marriage'.

³ Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence, adopted 7 April 2011, CETS No. 210.

rights law for their own benefit. Therefore, it is more desirable for the State to hold on to the systematic of the law in order to enable the public authorities to withstand social pressure calling for legal intervention as the magic potion to solve perceived social problems. Diversity issues, which because of their connection to ‘minorities’ are vulnerable to xenophobia, have a higher risk of being framed ‘wrongful’ and ‘criminal’. Bearing this in mind, legal standards regarding the penalisation of diversity issues need to be analysed scrupulously, all the more as the theory of criminal law calls for restraint.⁴

Moreover, with regard to forced marriages, the need for restraint is all the more important as there is a risk that penalisation will only be symbolic. Forced marriages are located in the closed sphere of family life, so criminal investigation is notoriously problematic, while complaints about ‘force’ to the criminal justice authorities are rare, if not totally absent. But even if reports were to be made, problems regarding the evidence of force used upon the victim, as well as the condition of causality, are foreseeable. Thus, there is a risk of symbolic penalisation, which supports the argument that such a penalisation needs critical evaluation. Although one can argue that symbolic penalisation provides for a clear public standard, penalisation implies that States are obliged to provide for adequate and effective protection, in particular when the human rights law is addressed in support.

This paper addresses the issue of the penalisation of forced marriages in Europe, with special attention paid to a draft law recently submitted by the Dutch government reflecting the penalisation approach.⁵ The paper also addresses which actors and factors have contributed to the fact that forced marriages were put on the European and Dutch political agenda: why is it that the proponents of forced marriages are winning the debate? First, I will address the issue of definition: what constitutes forced marriages, and are these marriages necessarily qualified as a harmful cultural tradition (section 2)? Next, an overview is presented of the penalisation of forced marriages in Europe, referring to the underlying arguments and the stakeholders concerned. In addition, this section (section 3) will discuss Article 37 of Convention 2011.⁶ Section 4 provides for a critical analysis of the Dutch draft, providing an overview of the arguments put forward by the stakeholders and the potential legal drawbacks related to penalisation. Finally, I will present my conclusions in section 5.

To clarify my position, I want to stress the importance of acknowledging the need to combat gender violence, especially against women and children. There is no doubt that gender violence needs to be qualified as a violation of human rights, justifying

⁴ Van Kempen, P.H.P.H.M.C., *Repressie door mensenrechten [Repression by Means of Human Rights]*, Wolf Legal Publishers, Nijmegen, 2009.

⁵ Parliamentary Papers 2010/11, 32840, Nos. 1–3. In order to prevent misconception, note the draft does not relate, at least not officially, to the aforementioned Art. 37 of Convention 2011. Moreover, the Dutch draft focuses upon a broader range of topics, proposing the widening of the penalisation of several other ‘cultural issues’ as well (polygamy and female genital mutilation). Polygamy and female genital mutilation are already criminalized within Dutch law.

⁶ Note Art. 32 of Convention 2011 to oblige the State Parties also to provide for legislative or other measures to ensure that marriages concluded under force may be voidable, annulled or dissolved. However, I will leave out the civil law aspects of forced marriages.

the State's intervention. However, as stated above, a violation of human rights does not in itself justify penalisation, nor does an appeal to cultural tradition imply the need to reject penalisation. By taking a closer look at the arguments underlying the topical debate, I hope to provide a deliberate answer on why framing forced marriages as a 'crime' is gaining support in Europe.

2. FRAMING FORCED MARRIAGES AS A SOCIAL PROBLEM

2.1. IN LIGHT OF POLITICAL DEVELOPMENTS

Forced marriages became an issue in the last decades of the twentieth century. Notwithstanding diverging opinions heard in Europe, forced marriages are felt to represent gender violence. Moreover, forced marriages are evaluated in light of Europe's struggle to deal with the consequences of immigration and related issues of multiculturalism. From a European perspective, gender and multiculturalism are at odds with the standard of individual autonomy, being a constituting element of Western citizenship. Gender equality has been put on the political agenda from the 1970s onwards, the women's movement being the major stakeholder.⁷ In its wake, and in line with international developments, the position of ethnic women became an issue, reflecting a common interest in gender and multicultural issues. Despite the fact that human rights law initially acknowledged the rights of cultural minorities to be entitled to preserve their cultural identities, with the lapse of time, the universal nature of human rights became the prominent lens.⁸ To date, the mainstream opinion is that human rights are universal, exceeding the rather specific interest of the women's movement. Moreover, public opinion has come to believe in the failure of multicultural society.⁹ The on-going struggle of European societies to cope with the consequences of immigration gives rise to xenophobia, specifically regarding Muslims. As a result, the political opinion regarding multicultural issues has hardened and essentialist cultural opinions are on the rise.

It is important to stress the broad span of these social developments, for they reinforced an instrumental use of law. The law, as the prime instrument to display social values, has been called upon to fight 'deviant' cultural practices. Against the panorama of the privileged nature of human rights, distinct fields of law were called upon to combat (potential) violations of individual rights. To date, civil law, criminal

⁷ In order to be not mistaken, I do acknowledge the women's movement to represent an amalgam of social movements. However, for the sake of convenience I will use the term women's movement.

⁸ E.g. Brems, E., 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', *Human Rights Quarterly*, Vol. 19, No. 1, 1997, pp. 136–164.

⁹ E.g. Cliteur, P., *De filosofie van mensenrechten [The Philosophy of Human Rights]*, Nijmegen, Ars Aequi Libri, 1999; Wetenschappelijke Raad voor het Regeringsbeleid, *Identificatie met Nederland [Identification with the Netherlands]*, Amsterdam, Amsterdam University Press, 2007.

law and immigration law are deployed in a joint effort to protect values that are felt to feature in Western societies. The growing number of immigrants and the related import of 'foreign' cultural practices are seen as a threat towards national identity.¹⁰ As Razack points out, in Europe the story of immigration is perceived as 'a story of guests and host', implying the right of Western societies to judge 'deviant' cultural practices.¹¹ According to Razack, the struggle against harmful cultural traditions reflects a disciplining of Muslim women and communities in order to articulate European superiority.¹² Others also refer to a 'thick' European identity, its presence leaving little room for the opinion of religious and cultural minorities.¹³ According to these authors, this prevailing 'thick' identity is a result of Europe's struggle to hold on to the traditional nation-state structure, giving way to ethnocentrism.¹⁴

To date, immigration often demands assimilation, resulting in strict legal rules and punitive measures: those who are deemed not to live in accordance with the dominant Western cultural standards are denied social access to the European territory, or even indicated for deportation. Being part of the European community, the above-mentioned discourse has featured prominently in the Netherlands, with the pending draft on the penalisation of forced marriages reflecting a focus on integration. The Dutch context is elaborated upon in section 4. The following sections, however, deal with the definition of forced marriages and the related issue of forced marriages qualifying as harmful cultural traditions.

¹⁰ E.g. Ratia, E. and Walter, A., *Internationale verkenning gedwongen huwelijken: Een literatuur en bronnenonderzoek naar wettelijke maatregelen, beleid en publieke debatten in België, Frankrijk, Duitsland, Verenigd Koninkrijk en Zwitserland* [International Review Regarding Forced Marriages: An Investigative Research Regarding the Judicial Measures, Rules and Public Debate in Belgium, France, Germany, the United Kingdom and Switzerland], Wetenschappelijk Onderzoek en Documentatie Centrum, Den Haag, 2009. Also: Clark, B. and Richards, C., 'The Prevention and Prohibition of Forced Marriages: A Comparative Approach', *International Comparative Law Quarterly*, Vol. 57, 2008, pp. 505–528.

¹¹ Razack, S.H., 'Imperilled Muslim Women, Dangerous Muslim Men and Civilized Europeans: Legal and Social Responses to Forced Marriages', *Feminist Legal Studies*, Vol. 12, No. 2, 2004, pp. 129–174, at p. 146.

¹² Razack *loc.cit.*, Also: Feteke, L., 'Enlightened Fundamentalism? Immigration, Feminism and the Right', *Race & Class*, Vol. 48, No. 1, 2006, pp. 1–20, at p. 13; Feteke uses the term 'culturocide' referring to the consequences of Western policy for ethnic women.

¹³ E.g. Feteke *loc.cit.*, at p. 10, where she points at the self-centred attitude featuring European immigration policy, leading European citizens to believe that Europe is 'too soft' on immigration issues. Also: Ghorashi, H., 'Paradoxen van culturele erkenning' ['Paradoxes of Cultural Appreciation'], *Tijdschrift voor Genderstudies*, Vol. 97, No. 4, 2006, pp. 42–54.

¹⁴ E.g. Entzinger, H., 'Changing the Rules while the Game is on; From Multiculturalism to Assimilation in the Netherlands', in: Bodemann, Y.M. & Yurdakul, G. (eds.), *Migration, Cizitenship, Ethnos: Incorporation Regimes in Germany, Western Europe and North America*, Palgrave MacMillan, New York, 2006, pp. 121–144; Raad voor Maatschappelijke Ontwikkeling, *Migratiepolitiek in een open samenleving* [Migration Politics in an Open Society], The Hague, 2011. Also: Orücü, E., 'Waar wet en cultuur elkaar ontmoeten' ['Where Law and Culture Meet'], *Justitiële Verkenningen*, Vol. 8, No. 5, 2002, pp. 96–108, at p. 96: 'Cultureel pluralisme wordt een serieus probleem als het een bedreiging lijkt te gaan vormen voor de territoriale integriteit van de staat' ['Cultural pluralism will be seen as a serious problem when it becomes a threat to the territorial integrity of the State.'].

2.2. DEFINITION OF FORCED MARRIAGES

As mentioned, forced marriages are a complex phenomenon relating to immigration,¹⁵ gender violence and the preservation of national culture, the latter linked to growing xenophobia. Moreover, in the context of human rights law, forced marriages are qualified as harmful cultural practices. Forced marriages on its turn are linked to the topical issue of domestic violence, being classified as ‘honour related violence’.¹⁶ Due to these mixed arguments the public debate regarding forced marriages has become clouded.

The starting-point for marriage in the Western world is the right to consent,¹⁷ with standards emphasizing consent being found as early as in the Universal Declaration on Human Rights (1948).¹⁸ In its wake, the right to marry has been recorded in leading human rights documents such as the International Convention on Civil and Political Rights, the European Convention on Human Rights and the Convention against the Elimination of All Violence against Women.¹⁹ However, force, as used in the concept of ‘forced marriages’, is an open concept that needs to be related to the cultural context of the social patterns featuring the social life of ethnic minorities. Indeed, the denomination of forced marriages covers diverse social situations that, to a greater or lesser extent, can be linked to performances of marriages.²⁰ Bearing in mind that the

¹⁵ Ratia and Walker, *op.cit.* at p. 16.

¹⁶ Parliamentary Papers 2010–2011, 32 840, No. 3, at p. 2; Storms, O. and Bartels, E., *De keuze van een huwelijkspartner: Een studie naar partnerkeuze onder groepen Amsterdammers [The Choice Whom to Marry. A Study of the Choice of Partners Among Amsterdam Subpopulations]*, Vrije Universiteit Amsterdam, Afdeling Sociale en Culturele Antropologie, Amsterdam, 2008, at p. 33; Kromhout, M.H.C. et al., *Eergerelateerd geweld in Groot-Brittannië, Duitsland en Turkije: Een overzicht van informatie inzake aard, omvang en aanpak [Honour Related Violence in Great Britain, Germany and Turkey: An Overview Regarding the Nature, Extent and Approach]*, Wetenschappelijk Onderzoeks en Documentatie Centrum, The Hague, cahier 2007–1. A similar analysis is given for the United Kingdom: Chantler, K., Gangoli, G. and Hester, M., ‘Forced Marriage in the UK: Religious, Cultural, Economic or State Violence?’, *Critical Social Policy*, Vol. 29, No. 4, 2009, pp. 587–612; Razack, *op. cit.*

¹⁷ E.g. Ertürk, Y., *Intersections Between Culture and Violence Against Women: Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. A/HRC/4/34 (2007), at p. 5. Also: Adviescommissie voor Vreemdelingenzaken [Advisory Committee on Immigration Issues, ACV], *Tot het huwelijk gedwongen: Een advies over preventieve, correctieve en repressieve maatregelen ter voorkoming van huwelijksdwang [Forced into Marriage: A Recommendation Regarding Preventive, Corrective and Repressive Measures to Combat Forced Marriages]*, The Hague, 2005.

¹⁸ Art. 16(2) Universal Declaration: ‘Marriage shall be entered only with the free and full consent of the intending spouses’. Also, United Nations, Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, adopted 7 November 1962, 32 UNTS 231; United Nations, General Assembly, Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, Resolution 1912, adopted 1 November 1965, UN Doc. A/6014.

¹⁹ For an overview: Schmidt, G.E. and Rijken, C.R.J.J., *Juridische aspecten van gedwongen huwelijken [Judicial Aspects of Forced Marriages]*, Asser Institute, The Hague, 2005. Also: Boerefijn, I., ‘Domestic Violence Against Women in International Law’, in: Westendorp, I. and Wolleswinkel, R., *Violence in the Domestic Sphere*, Intersentia, Antwerp/Oxford, 2005, pp. 35–59, at p. 44, referring to CEDAW observations which state forced marriage to be incompatible with the Women’s Convention.

²⁰ Rudge-Antoine, E., *Forced Marriages in Council of Europe Member States: A Comparative Study of Legislations and Political Initiatives*, Council of Europe, Strasbourg, Directorate General of Human Rights, 2005, at p. 14.

right to consent is the point of departure, the presence of a specific cultural context can imply a need to be alert to social pressure embedded within this specific cultural context.²¹ Relevant instructions can be found in international rules,²² as well as in European rules,²³ the most recent one being Article 37 of Convention 2011.

Nonetheless, the key question is whether the cultural context exerts undue influence, harming voluntariness and reciprocity. Clearly, the framing of a definition does not solve the problem of its application. Do the intending spouses sincerely consent to the marriage, or are they caught in familiar obligations, trapped in a web of loyalty towards their parents and families, being left no or only marginal room to follow their own preferences? Findings in the Netherlands suggest forced marriages to be present in cases of a so-called ‘arranged marriage’ (the parents choose the marriage candidates without consulting the intending spouses) or a ‘delegate marriage’ (the minors are given some room to put forward their preferences, but it is up to the parents to take their preferences into account).²⁴ Clearly, both types of marriages indicate parental approval to be an important condition.

Parental approval being a regular preference of the ‘mainstream marriages’ as well, the difference lies in the presence of clear subordination of the spouses consent. Apart from the clear cases, like indications of force (such as the use of physical violence or taking away personal documents as a means to prevent the victim to return home), the assessment of a marriage being forced will depend on an evaluation of ‘the case as a whole’. Voices from ethnic minority members indicate that transnational power-relations have an influence on the choice of whom to marry, while findings in the Netherlands show that the majority of the marriages amongst minors of ethnic minorities are a result of social pressure in the domestic sphere, rather than the product of explicit force.²⁵

²¹ *Ibidem*, at p. 14 and 21.

²² Boerefijn, *op.cit.* Note the United Nations to have put forward multiple documents on the elimination of violence against women, including forced marriages, e.g. the 1993 Declaration on the Elimination of Violence against Women (UN Doc. A/Res/48/104). A more specific angle lies within the 1979 Convention on the Elimination All Forms of Discrimination against Women (UN, Doc. A/Res/34/180), elaborated upon in the General Recommendation No. 19 of the CEDAW Committee (Recommendation No. 19, Violence against Women, adopted on 30 January 1992, UN Doc. A/47/38), defining violence against women in terms of discrimination, thus stressing the gender-based nature of violence against women, the latter being reflected in the tradition of forced marriages.

²³ For an overview: Rudge-Antoine, *op.cit.* See also at p. 58, holding a recommendation for penalisation of forced marriages.

²⁴ Storms and Bartels, *op.cit.*, at p. 11; these findings are based upon fieldwork among ethnic minorities in Amsterdam. Two other types of non-forced marriages were observed as well: ‘the mutual marriage’ (parents and youngsters are both being active in the search for a marriage candidate, dating is allowed) and ‘marrying on one’s own initiative’ (the minors choose their partner and ask the parents for their consent).

²⁵ De Koning, M. and Bartels, E., *Over het huwelijk gesproken: partnerkeuze en gedwongen huwelijken onder Marokkaanse, Turkse en Hindostaanse Nederlanders* [Speaking of Marriage: The Choice of Partner and Forced Marriages among Dutch Nationals of Moroccan, Turkish and Hindu Origin], Vrije Universiteit, Amsterdam, 2005; these findings show the majority of the Turkish and Moroccan minors living in the Netherlands to support the starting point that marriage must be based upon

In contemporary Dutch debate the following definition of forced marriages is used: 'A [religious or] legal marriage of which the (preparatory activities) have been performed against the free will of at least one of the marriage candidates, and to which activities have been consented to under influence of some kind of force'.²⁶ This definition builds upon a definition provided by the Adviescommissie voor Vreemdelingenzaken (Advisory Board for Immigration Issues; ACV) excluding however the element 'eigen zeggenschap' ('personal say') as it was judged to be too vague.²⁷

Nevertheless, the latter is the central element in human rights law, where consent is framed in legal terms referring to the use of physical violence, as well as all kinds of psychological abuse. Moreover, having a 'personal say' is in line with the 'romantic' Western concept of marriage, underlying human rights law, interpreting marriage as a bond of love, implying a voluntary, reciprocal commitment.²⁸ Thus, the definition of forced marriages used in the European public debate rests pre-eminently upon Western standards, the latter relying for support on human rights law. As a result, not being hindered by the absence of a clear definition or wider insights regarding the nature of the phenomenon as found in practice in Europe, politicians and feminists, with some support of representatives from ethnic minorities, have presented an imagery of forced marriages as a violation of human rights, that need to be combated by the law.²⁹

consent. Related to this, the respondents report that they experience familiar pressure to consent to marriage. On the other hand, irrespective of the presence of social pressure, these minors state to have a preference to marry someone from a mutual cultural background, especially from a mutual religious background; Storms and Bartels, *op.cit.* Similar findings were reported by: Sterckx, L. and Bouw, C., *Liefde op Maat, partnerkeuze van Turkse en Marokkaanse jongeren [Tailor-made Love: The Choice of Partner among Turkish and Moroccan Youngsters]*, Het Spinhuis, Amsterdam, 2005.

²⁶ Cornelissens, A., Kuppens, J. and Ferweda, H., *Huwelijksdwang: Een verbintenis voor het leven? Een verkenning van de aard en aanpak van gedwongen huwelijken in Nederland [Forced to Marry. A Lifetime Commitment? An Exploration of the Nature and Approach of Forced Marriages in the Netherlands]*, Wetenschappelijk Onderzoek en Documentatie Centrum/ Beke-reeks, The Hague, 2009, at p. 10. The brackets are there to indicate the focus of the paper is on legal marriage. Nonetheless, the definition provided by Cornelissens, Kuppens and Ferweda being leading within the Netherlands, I have opted to use the full definition.

²⁷ Note the ACV to include physical and psychological threat in its definition; ACV, *op.cit.*, at p. 22.

²⁸ E.g. Council of Europe, Parliamentary Assembly, Forced Marriages and Child Marriages, Resolution 1468 (2005)1, Resolution 1468 holds the following definition of forced marriage: 'the union of two persons at least one of whom has not given their full consent to the marriage' (at para. 4). Also: Ratia and Walter, *op.cit.*, at p. 4; Storms and Bartels, *op.cit.*, at pp. 14–20.

²⁹ E.g. Holtmaat, R., 'Article 5 CEDAW and Religion, Culture and Tradition', in: Holtmaat, R. and Boerefijn, I. (eds.), *Women's Human Rights and Culture/Religion/Tradition: International Standards as Guidelines for Discussion?*, Utrecht University, SIM special 32, Utrecht, 2009, pp. 9–15. As for legal definitions: UN Division for the Advancement of Women, Handbook for Legislation on Violence Against Women, United Nations, New York, 2009, available at: <http://www.un.org/womenwatch/daw/vaw/v-handbook.htm>; UN Division for the Advancement of Women/UN Economic Commission for Africa, Good Practices in Legislation on "Harmful Practices" Against Women: Report of the Expert Group Meeting, New York, 2009, para. 3.7; Ratia and Walker, *op.cit.*, at pp. 40–44. Moreover, the obligation to combat domestic violence against women results from

2.3. CLASSIFICATION AS HARMFUL CULTURAL PRACTICE?

As mentioned above, the international opinion is that forced marriages represent a harmful cultural tradition. Justification based upon custom, tradition of religious consideration being renounced, thus framing forced marriages to be of a negative cultural status.³⁰ The human rights law documents unanimously reflect this position.³¹ This denomination is of the utmost importance, for it implies that forced marriages are a violation of the 'common opinion of the civilized nations',³² which indicates a notion of penalisation. Moreover, it implies a universal application of the criminal law to be appropriate. In the European context, a referral to Article 7(2) ECHR is often made, holding an exception to the rule that penalisation may not be invoked retrospectively. The punishable nature of the repudiated act flowing from the common opinion of the civilized nations, the absence of a preceding penalisation is irrelevant.³³

However, one may wonder whether such a labelling of social practices found in Europe is correct. Surely, some cultural practices can carry this weight, for instance the marrying off of young girls to adult men in different regions in Asia.³⁴ What is disputed here is whether the practice of forced marriage in use by ethnic minorities living in Europe should be defined as harmful cultural traditions.³⁵ As noted, findings related to the Netherlands show that young ethnic minorities are often subject to distinct types of social pressure, while there is no clear consensus whether the label of forced marriage to their marriage practices is justified. Moreover, referring to the

the jurisprudence of the European Court of Human Rights (ECtHR); e.g. ECtHR, *Opuz v. Turkey*, 9 June 2009 (Appl.no. 33401/02), as well as from the jurisprudence of the CEDAW Committee (e.g. CEDAW Committee, Communication No. 2/2003, *A.T. v. Hungary*, views of 25 January 2005). E.g. Ratia and Walker, *op.cit.*, at pp. 4–6; Razack, *op.cit.*

³⁰ E.g. Art. 4 1993 Declaration on the Elimination of Violence against Women; Art. 37 Convention 2011; Holtmaat, *op.cit.*, at p. 22, in reference to the CEDAW Committee's standard consideration that '[...] the preservation of negative cultural practices and traditional attitudes serves to perpetuate women's subordination in the family and society and constitutes a serious obstacle to women's enjoyment of their fundamental rights.'

³¹ E.g. Boerefijn, *op.cit.*; Ratia and Walker, *op.cit.*, at pp. 4–6; Razack, *op.cit.* However, Holtmaat observes a gradual shift in the CEDAW Committee's position 'from outward rejection (...) towards a cautious and strategic approach that has an open eye for the sensitivities of the issue': Holtmaat, *op.cit.*, at p. 31.

³² Parliamentary Papers 2010–2011, 32 840, No. 3, at p. 9–10.

³³ Note the Dutch government to have appealed to this argument in the pending Dutch draft on the penalisation of forced marriages (see para. 4.2).

³⁴ E.g. United Nations, Economic and Social Commission for Asia and the Pacific, *Violence Against Women: Harmful and Traditional Practices in the Asian and Pacific Region*, 2007. In addition, the 'regular' types of forced marriages need to be distinct from the concept of forced marriage as 'a crime against humanity' used within international criminal law; e.g. Jain, N., 'Forced Marriage as a Crime against Humanity', *Journal of International Criminal Justice*, Vol. 6, 2008, pp. 1013–1032.

³⁵ E.g. Cornelissens, Kuppens and Ferweda, *op.cit.*, at p. 29; Cornelissens, Kuppens and Ferweda state that forced marriages represent an ambiguous phenomenon, which must not be limited to punishable types of force. Also: Ratia and Walter, *op.cit.*, at p. 79; de Boer, M. and Amajoud, S., *Huwelijksdwang in Noord-Holland [Forced Marriages in the Province of North Holland]*, ABC Kenniscentrum, Amsterdam, 2010, at p. 23.

prohibition of forced marriage in the Islamic faith, several authors stress that social pressure may not be taken as a synonym for cultural tradition.³⁶ In addition, some of these authors state that the use of family pressure must be understood in the wider social and cultural context in which immigrants have to negotiate economic and social constraint.³⁷ They stress the importance of viewing the use of force within forced marriages as being of a continuous nature, questioning whether it is appropriate to focus on the entry point, the preparatory activities and the wedding performance.³⁸ Based upon field-studies among female ethnic minorities, these authors underline the importance of allowing a (modest) multiculturalist perspective.

It is not my intention to deny that legitimate marriages can be performed as a result of social pressure.³⁹ Nor do I deny forced marriages may be a substantial social problem. However, as adequate registration is lacking and we are in need of empirical evidence, the exact nature and extent of the social practices qualified as forced marriage remains unclear.⁴⁰ Admittedly, however, findings suggest that minors from ethnic minorities are under pressure, or are even in conflict with their families regarding the issue of marriage.⁴¹ Nevertheless, one can question the dominant European perspective that the whole range of 'forced' marriages as found among minorities in Europe should be classified as a harmful cultural tradition as it is referred to in human rights law. In line with this approach, Europe's call for penalisation may also be questioned.

3. PENALISATION OF FORCED MARRIAGE IN EUROPE

To date, the obligation to penalise forced marriage embodied in Article 37 of Convention 2011 serves as a benchmark for Europe's policy regarding forced marriages. Although this benchmark represents political consensus regarding the

³⁶ E.g. Gangoli, G., Razack, A. and McCarry, M., *Forced Marriage and Domestic Violence among South Asian Communities in North East England*, Bristol, School for Policy Studies, 2006; Khanum, N., *Forced Marriage, Family Cohesion and Community Engagement: National Learning through a Case Study of Luton*, Equality in Diversity, 2008; Storms and Bartels *op.cit.*, at p. 12; Ratia and Walker *op.cit.*, at p. 12.

³⁷ Razack, *op.cit.*, at p. 43 and 160; Gangoli, Razack and McCarry, *op.cit.*, at p. 9; Ertürk, *op.cit.*, at p. 72.

³⁸ E.g. Chantler, Gangoli, and Hester, *op.cit.*, at p. 587; the respondents mentioned in this study explicitly expressed a need to broaden the concept of forced marriage towards the inability to escape it (at p. 606). Also: Khanum, *op.cit.*, at p. 49.

³⁹ Note Storms and Bartels are of the opinion forced marriage can be qualified as 'psychological abuse'; Storms and Bartels, *op.cit.*, at p. 35. Moreover, Art. 33 Convention 2011 provides an optional penalisation of psychological violence.

⁴⁰ Based upon self-report, the issue of forced marriages is of a substantial nature. The House of Commons provides an estimation of 300 to 400 cases annually; House of Commons, Home Affairs Committee, *Forced Marriages: Eight Report of Session 2010–2012*, London, 2011, at p. 4. Although, the Forced Marriage Unit (FMU) Statistics hold a much higher amount of cases (January to May 2012: 549 cases), these figures refer to cases in which the FMU has given advice or support, which does not necessarily imply a forced marriage to have been executed. Available at: www.number10.gov.uk/news/forced-marriage-to-become-criminal-offence.

⁴¹ E.g. Kzimirski A. et al., *Forced Marriages: Prevalence and Service Response*, National Centre for Social Research, DCFS RR128, 2008. Chantler, Gangoli, and Hester, *op.cit.*, at pp. 588–589.

legitimacy of the use of the criminal law to combat forced marriage, opinions differ as how to implement Article 37 of Convention 2011 on the national level. To have a full understanding of these differences in opinion, one has to take a closer look at national policy. What features in the policies of the European nations involved, how do their national policies relate to their 'legal' cultures and which (f)actors have contributed to the elevation of forced marriage as a social problem, to be regulated by the law?⁴²

Clearly, the driving force behind the penalisation of forced marriage has been the social concern regarding the consequences of ongoing immigration within Europe. Searching for ways to control the ongoing flow of immigrants into Europe, national governments have become concerned about 'bogus marriages', indicating situations where marriage is used by potential immigrants as a vehicle to acquire residence permits. In order to prevent these so-called 'marriages of convenience', next to restrained immigration rules, civil rules were introduced. For example, France has adopted a law obligation indicating the intending spouses to inform the authorities and ask permission to marry, the banns being published by the registrar,⁴³ and England and Wales⁴⁴ has introduced civil protection orders.⁴⁵ As for England these provisions were felt to be insufficient later on, and a tendency rose to penalise forced marriages. Due to the influence of the women's movement, representing a major political (f)actor in national policy, forced marriages were qualified as a gendered cultural tradition, indicating a fundamental violation of human rights. Concurring opinions within the women's movement stating penalisation not serving the victim's interest could not, except in the case of France, prevent this preference (for the maintenance of) penalisation.

Nevertheless, in spite of the clear preference for an introduction of a specific penal provision, mirrored in international and European documents,⁴⁶ only four European countries have explicitly penalised forced marriages: Sweden, Norway, Belgium and most recently Scotland.⁴⁷ In the near future forced marriages are to become an offence in England and Wales as well.⁴⁸ However, the English/Welsh case being somewhat

⁴² This paper taking a special interest in the case of the Netherlands, the overview is tailored to the profile of West-European countries. For information on Central and Eastern Europe: Thomas, C./ United Nations, *Forced and Early Marriage: A Focus on Central and Eastern Europe and Former Soviet Union Countries with Selected Laws from other Countries*, expert paper, UN Doc. EGM/ GPLHP/2009/EP.08, 19 June 2009.

⁴³ Article 63(1) Civil Code; Clark and Richard, *op.cit.*, at p. 509.

⁴⁴ Being different territories, England and Wales have common legislation. In this paper I will refer to 'England' as the common denominator for both territories.

⁴⁵ Civil Protection Orders (CPO's) imply the application of prohibitions, restrictions or any other requirement appropriate to protect a person against harmful acts by other individuals. Application is to be requested by the civil court. In case a CPO has been breached, a (criminal) arrest can be made, leading towards sanctioning by a criminal court.

⁴⁶ Among others: Council of Europe, Resolution 1468, *supra* note 26; Council of Europe, Convention 2011, *supra* note 3; UN Division for the Advancement of Women/UN Economic Commission for Africa, *op.cit.*, at p. 24.

⁴⁷ For an overview: Rudge-Antoine, *op.cit.*

⁴⁸ www.home-office.gov.uk/media-centre/news/forced-marriage-new-law.

peculiar, it will be elaborated upon below. First, we will have a closer look at the motives for introducing a specific penal provision in the four countries mentioned.

Due to having strong feministic roots, the Scandinavian countries were the first to penalise forced marriage. In Sweden forced marriage was penalised as early as 1998, followed by Norway in 2003. As for the Norwegian Penal Code, Article 222(2) of the Norwegian Penal Code prohibits the use of force through recourse of violence, deprivation of liberty, undue pressure or other unlawful behaviour, or through the threat of such behaviour against an individual in order to press this person to marriage. To my knowledge, to date only two cases have been prosecuted in Norway, as for Sweden no figures are known to me.⁴⁹

In Belgium the specific penal provision regarding forced marriage was introduced in 2007. In contrast with the Scandinavian countries, the politicians were the driving force behind this legislative change. Driven by a major concern regarding the social consequences of increasing immigration, one was of the opinion that there was a pressing need for clear standards stating that forced marriage was incompatible with traditional values within Belgian society. Similar to Norway, politics focused initially on the issue of marriages of convenience, leading towards the introduction of the Marriage of Convenience Act (1999) enabling civil authorities to notify the Public Prosecution Service in case of doubts regarding the intending spouses consent for the purpose of the marriage. Later, the public debate turned, and forced marriages became criminalised, with Article 391*sexies* of the Belgian Penal Code (BPC) providing for criminal liability for those who compel someone into marriage by using force or threatening to do so. Article 391 BPC needs to be comprehended with civil provisions regarding the dissolution of marriages. Originally, subtle types of familiar pressure, causing reverential fear, did not constitute sufficient grounds for the dissolution of a marriage. However, since 2007 the criterion to judge the validity of a marriage is the presence of internal consent, noticeable resistance not being required to dissolve the marriage, and the possibility that proceedings may be initiated by both the Public Prosecution Service and (one of) the spouse(s).

It should be mentioned that there were contrasting opinions in Belgium about whether to penalise forced marriages. Within the women's movement voices were heard that argued that penalisation would not be in the best interest of the victims and would represent the oppression of ethnic minority groups. However, these objections were swept away by the strong political consensus calling for clear public standards, requiring a legislative change. To date, to my knowledge, no criminal case has been brought forward. Nevertheless, the national authorities have stated that the number

⁴⁹ Enoksen, E., *Dealing with Forced Marriage in United Kingdom and Norway*, Zuyd University, Maastricht, 2006, available at: www.maccess.nl. Enoksen mentions prosecution to have been initiated in one case until 2006. This case ended with a conviction, however, in the end the victim returned to her family. Recently, in 2011, another case of forced marriage was prosecuted, giving way to severe sentences of imprisonment; 'Crushing sentence for rape and forced marriage', 6 March 2011, available at: www.norway.no/News_and_Events.

of reported forced marriages have decreased sharply, though the reliability of these figures has been disputed.⁵⁰

Finally, Scotland just recently introduced a specific penal provision on forced marriage (2011). Although, in the wake of immigration issues, forced marriages were viewed as a social problem for a number of decades, with a preference for dealing with it on a regular basis within criminal law, using the civil law as a vehicle for supervision and prevention by means of civil protection orders. The breach of such a civil protection order would constitute contempt of court, giving way to sanctioning. The authorities were reluctant to create a substantive specific penal provision, considering marriage an issue to be free from government intervention. Thus, the preferred solution was a procedural one. Nevertheless, being confronted with a rising number of applications for Forced Marriage Protection Orders, as well as with inadequate enforcement by the police, in 2011 the Scottish government decided to introduce a specific penal provision to be in place.⁵¹ Due to the recent introduction of the provision no cases have yet been prosecuted.

Unlike the abovementioned examples, other (West-)European States have not chosen to make forced marriage an offence, and there are no intentions to do so in near future. As for Germany, the public debate on forced marriages has been dominated by politicians, on the one hand, and active representatives of ethnic women's interest groups, on the other hand, with the focal point being the protection of human rights and the need to combat gender violence.⁵² Given the consensus concerning the need for criminal law intervention, the debate is dominated by the judiciary, which argues that regular penal provisions suffice. In line with the preference of the judiciary forced marriages are qualified as domestic violence and are prosecuted under the heading of 'Nötigung', implying a wrongful use of force in order to make someone 'consent' to marry which leads to a rise of the maximum level of punishment.

Similar developments can be found in Switzerland. Although Switzerland, not being a member of the Council of Europe, cannot be held to implement Article 37 of Convention 2011, it too must deal with the problem of forced marriages. Like the Germans, the Swiss now strongly object to introducing what is felt to be superfluous legislation.⁵³ Initially being in favour of specific penalisation, objections by criminal lawyers caused the Swiss Federal Council to withdraw the proposal and to explore the opportunities for prosecution based upon the present provisions. As we will see, the Dutch authorities presently opt for a similar position.

⁵⁰ Based upon these figures, Ratia and Walker suggest a *hausse* of forced marriages situated in the eighties and nineties of the last century, especially among Turkish and Moroccan immigrants; Ratia and Walker, *op.cit.*, at pp. 48–49.

⁵¹ The Forced Marriage Protection and Jurisdiction (Scotland) Act 2011, implemented 28 November 20112, *available at*: www.legislation.gov.uk.

⁵² Ratia and Walker, *op.cit.*, at p. 11.

⁵³ For the Swiss debate: http://humanrights.ch/en/Switzerland/Human-Rights-in-Internal-Affairs/Protection-Private-Violence/Forced-marriages/idart_5902-content.html?zur=1039.

France and England both are somewhat different to the other cases presented. The French still hold on to the 'administrative position', having extended the application of administrative law with the option of prosecution in cases of violation of the administrative legal rules. This policy follows from the strict separation of religion and State (the so-called 'laïcité') in French society.⁵⁴ In France, forced marriages are primarily linked to the Muslim culture and therefore to religion. Immigration being a public issue, indicating a strict separation of public and religious issues, the French government introduced strict rules in immigration law in order to prevent marriages of convenience. Notwithstanding this type of marriage being penalised (Article 21*quater* of the French Penal Code), the underlying motive is of an administrative nature: to support strict immigration rules. In line with this approach, the age of consent for marriage was raised to 18. The French having a sharp eye for 'bogus marriages', the administrative law provides the opportunity for private individuals as well as public authorities to bring forward objections in case of an alleged forced marriage. In order to enable individuals or authorities to object in time, the intended marriage has to be announced publicly. The initiative to enforce corrective measures, however, lies with the State.⁵⁵

The last case to be discussed is the case of England and Wales. What catches the eye is the 'discomfort' levels surrounding the public debate on multiculturalism in United Kingdom, specifically in England.⁵⁶ Being the motherland of the 'British Empire', featuring a history of colonisation, England has a long history of immigration. As a result, English society⁵⁷ features a highly sensitive attitude towards racism, specifically amongst ethnic minority groups, resulting in the strong criticism by ethnic minorities of past proposals to penalise forced marriages.⁵⁸ In opposition to

⁵⁴ McGoldrick, D., 'Multiculturalism and its Discontent', *Human Rights Law Review*, Vol. 5, No. 1, 2005, pp. 27–56; Guiné, A. and Moreno Fuentes, F.J., 'Engendering Redistribution, Recognition, and Representation: The case of Female Genital Mutilation (FGM) in the United Kingdom and France', *Politics Society*, Vol. 35, No. 3, 2007, pp. 477–519. France even has a High Court of Integration (Haut Conseil de l'Intégration).

⁵⁵ Clark and Richards, *loc.cit.*, at pp. 508–512; Ratia and Walker, *op.cit.*, at p. 66.

⁵⁶ In the United Kingdom ('Britain') a fierce debate is going on regarding Britain's multicultural identity. According to the influential Parekh-committee the 'British' identity reflects a positive identity towards multiculturalism, whereas the 'English' identity reflects a negative identity, featuring racism. In this paper I will not elaborate upon distinct 'identities'. For a clear analysis of Britain's contemporary struggle with multiculturalism: Fortier, A.-M., 'Multiculturalism and the New Face of Britain', Department of Sociology, Lancaster, 2000, available at: www.lancs.ac.uk/fass.sociology/pares/fortier-multiculturalism.pdf and Fortier, A.-M., 'Pride Politics and Multiculturalist Citizenship', *Ethnic and Racial Studies*, Vol. 28, No. 3, 2005, pp. 559–578. Fortier discusses the Parekh-report; Runnymede Trust, *The future of Multi-Ethnic Britain*, 2000, available at: www.runnymedetrust.org. Also: Poulter, S., 'Ethnic Minority Customs, English Law and Human Rights', *International and Comparative Law Quarterly*, Vol. 36, No. 3, 1986, pp. 589–615.

⁵⁷ Note studies refer explicitly to the English society as being troubled by racism. Similar notions regarding the Welsh society are absent. Therefore, with regard to this issue, my comments are addressed to English society only.

⁵⁸ Enoksen, *op.cit.*; Ratia and Walker, *op.cit.*

the classification of forced marriages representing a cultural problem, as put forward by politicians, active ethnic women's interest-groups, together with representatives of Asian and Muslim communities, claimed that forced marriages represent gender violence rather than ethnic violence.⁵⁹ In their opinion, penalisation reflects racist politics. Moreover, it is felt to be of no value to victims and to relate to privacy issues, requiring a private initiative to prevent forced marriages.⁶⁰

As a result, the English government decided not to pursue penalisation, the starting point of English policy being forced marriages represent a global cultural practice, not to be qualified as a harmful cultural tradition.⁶¹ Instead, forced marriages were qualified as domestic violence, falling within the general policy on domestic violence. To enable victims to organise protection, the Forced Marriage (Civil Protection) Act⁶² was introduced, providing victims a right to appeal for a civil protection order. The application of a CPO indicates minors to be entitled to support by the police and the social services generating protection towards family pressure to consent to an arranged marriage. The Forced Marriage Unit (FMU) was founded in 2007 to coordinate the activities involved in addressing the practice. For the past few years, figures have shown a substantial amount of forced marriages registered annually by the FMU.⁶³ Nevertheless, the Forced Marriage (Civil Protection) Act recently was evaluated negatively, observing a shortfall of the judicial and civil authorities. Specifically, the police, having a pivotal role in the enforcement of the civil protection orders, were felt to have responded inadequately.⁶⁴ As a result, the government, after having put forward a consultation paper,⁶⁵ recently decided to make forced marriage a criminal offence. This legislative change is to be expected in 2013.

⁵⁹ With regard to the issue of gender respectively forced marriage: Mirza, H.S., 'Multiculturalism and the Gender Gap: The Visibility and Invisibility of Muslim Women in Britain', in: Ahmad, W.I.U. and Sardar, Z., *Muslims in Britain: Making Social and Political Space*, Routledge, Abingdon, 2012, pp. 120–39.

⁶⁰ E.g. Wilson, A., 'The Forced Marriage Debate and the British State', *Race & Class*, Vol. 49, No. 1, 2007, pp. 25–38; House of Commons, *op.cit.* Also: Clark and Richards, *op.cit.*, at pp. 513–520; Equality and Human Rights Commission, Response to the Consultation, 4 April 2012, comment No. 10, *available at*: www.equalityhumanrights.com.

⁶¹ According to Ratia and Walker, the English policy represents a coordinated view, England being the only European country to have full understanding of the complexity of forced marriages, English policy reflecting a 'victims centred human rights approach'; Ratia and Walker, *op.cit.*, at pp. 12–13 and 32.

⁶² Forced Marriage (Civil Protection) Act 2007, www.legislation.gov.uk/ukpga/2007.

⁶³ From its enactment in 2007 until February 2011, 293 Forced Marriage Protection Orders have been imposed. In five cases a breach was reported, but only in one case – referring to a mother rejecting her son's repatriation – a jail sentence was handed down; House of Commons, *op.cit.*

⁶⁴ It has been stated the civil services and the police fear to appear racist; House of Commons, *op.cit.*, at p. 20 and 33.

⁶⁵ Home Office, Forced Marriage Consultation, December 2011, *available at*: <http://www.homeoffice.gov.uk>; Consultation was open until March 2012. In response (amongst others), the Equality and Human Rights Commission was not in favour; Equality and Human Rights Commission, *op.cit.*

Although the presented overview is rather brief, it marks the lines along which West-European nations have come to penalise forced marriage, a similar position being reflected in Article 37 of Convention 2011. Notwithstanding the fact that the solutions opted for on the national level differ, the common denominator lies in Europe's struggle on how to handle the consequences of immigration and the gendered violence following in its wake.⁶⁶ For the past few decades, politicians and (ethnic) women's interest-groups, together with some representative sections of ethnic minority groups, have made significant efforts to achieve political acknowledgment for the need to combat forced marriages. In light of the outcomes of this section, I will now elaborate upon the case of the Netherlands and how the Dutch policy on forced marriages relates to the above presented 'European discourse'.

4. THE CASE OF THE NETHERLANDS

4.1. THE DUTCH POLITICAL DISCOURSE

As is the case elsewhere in Europe, forced marriages have been debated for some time in the Netherlands. However, compared to other European countries, political attention paid to the issue in the Netherlands is recent. Confronted with increasing immigration, the Dutch government for a long time disregarded its consequences for society. Until the 1990s, the assumption was that immigrants would return to their country of origin, so there was no need for a specific integration policy.⁶⁷ The latter may be explained in light of the so-called 'politics of pillarization' that dominated Dutch society and politics most of the twentieth century. In those days, politics and social life were intertwined. Dutch citizens were organized in so-called pillars, such as Labour and Christians (the majority being Roman Catholics and Liberals), with group-standards and norms determining social as well as political life. Each 'pillar' claimed sovereignty, and the State restrained from intervention. Notwithstanding the decline, since the 1970s, of the 'politics of pillarization', it made an impact upon Dutch culture, which is evident in today's debate on immigration and integration.⁶⁸

Initially the Dutch displayed a rather open attitude towards immigration and integration, working with the concept of multicultural society and the policy of

⁶⁶ Rudge-Antoine, *op.cit.*; Ratia and Walker, *op.cit.*, at pp. 76–80.

⁶⁷ Entzinger, H.B., *Het minderhedenbeleid: Dilemma's voor de overheid in Nederland en zes andere immigratielanden in Europa* [*The Policy on Ethnic Minorities. The Dilemmas of the Government in the Netherlands and Six Other Immigration Countries in Europe*], Boom, Meppel/Amsterdam, 1984.

⁶⁸ According to Bovenkerk, Dutch society features 'a principle of "homogeneous cultural identity"'; Bovenkerk, F., 'Multiculturele misdaad en Nederlands strafrecht' ['Multicultural Crime in the Context of Dutch Penal Law'], *Justitiële Verkenningen*, Vol. 58, No. 5, 2002, pp. 50–61, at p. 51. In the same issue: Galenkamp referring to a 'thick Dutch identity' being a consequence of 'pillarisation'; Galenkamp, M., 'De multiculturele samenleving in het geding' ['The Issue of the Multicultural Society'], at p. 80. In similar terms: Entzinger, *op.cit.*, 2006; Feteke, *op.cit.*, 2006, pp. 75–85, at p. 4; Ghorasi, *op.cit.*, at p. 4; Raad voor de Maatschappelijke Ontwikkeling, *op.cit.*

‘integration while keeping identity’. However, given the fact that Dutch national identity is largely shaped by longstanding Western traditions, when the welfare state was in decline the position of immigrants in Dutch society was increasingly felt to be problematic, which gave way to a rise of populism. Cultural differences came to be portrayed as a threat to genuine national Dutch identity, turning the focal point in Dutch immigration policy towards a need for integration.⁶⁹ Clearly, a substantial number of the immigrants have a different religious background (Islam), which together with the rise of Muslim-terrorism⁷⁰ contributed to the framing of immigrants as a (potential) threat towards Dutch society. Moreover, several cases of deadly honour-related violence against minority women provided an important boost for the Dutch government to develop a specific policy.⁷¹ In the present discourse, ‘allochtoons’,⁷² which refers to individuals with at least one parent originating from another country, including those who were born and raised in the Netherlands, are pictured as ‘eternal strangers’, as opposite to the ‘genuine Dutch’, featuring a ‘white’, Jewish-Christian orientation.⁷³ Picturing ‘allochtoons’ as ‘(eternal) strangers’ within Dutch society, to date repression is promoted as a means to further integration, while at the same time disseminating the image of ‘hostile’, ‘foreign’ cultural practices.

As for the issue of gender violence in ethnic minority groups, it is important to note that the need to combat gender violence was stressed by a number of stakeholders. While gender violence is the common denominator, different social agents participate in focusing political attention on the position of ethnic minority women. Left-wing political parties, representatives from the women’s movement (mainstream as well as specific ethnic minority women’s interest groups) and key figures from ethnic minorities joined forces with right-wing politicians, to put ethnic-related gender violence on the political agenda. However, notwithstanding the political attention present in the 1990s, it took until 2006 to set up an interdepartmental policy.⁷⁴

This Dutch policy has been carried across different lines. The focal point initially was on the ethnic aspects of honour-related crime, but later the focal point shifted towards ethnicity as a predictor for domestic violence. Today, honour-related gender

⁶⁹ E.g. Entzinger, *op.cit.*, at p. 136; Ghorashi, *op.cit.*, at p. 44.

⁷⁰ E.g. the murder of film-maker and writer Theo van Gogh in 2004 by Mohammed B., being a second generation Moroccan immigrant.

⁷¹ E.g. Hofstede, G., ‘Culturele diversiteit in de Nederlandse samenleving’ [‘Cultural Diversity in the Netherlands’], *Justitiële Verkenningen*, Vol. 58, No. 5, 2002, at p. 16. According to Hofstede the Dutch identity features two cultural dimensions: femininity and individualism, both giving way to a human rights centred approach.

⁷² The opposite term, used in the Dutch debate, is ‘autochtoons’ (in Dutch: autochtonen), referring to the ‘original’ Dutch population.

⁷³ Ghorasi, *op.cit.*, at pp. 47–49. Indeed, as described in para. 3, the Netherlands is not the only society to feature such a ‘thick, superior identity’. The majority of the European States show similar features, the story of immigration being told as a story of ‘guests and hosts’ (Razack, *op.cit.*, at p. 146).

⁷⁴ In 2006 the programme *Eergerelateerd geweld* [Honour related violence] was launched, coordinated by the department of Public Health, Welfare and Sports. The programme came to an end in 2011; Parliamentary Papers 2010/11, 30 388, No. 40.

violence falls within the range of the coordinated policy on domestic violence, forced marriages included.⁷⁵ Nevertheless, forced marriages still generate specific political concern. In November 2009, a resolution requesting penalisation of forced marriages was put forward to the Dutch parliament, signed by members of left-wing political parties as well as representatives of right-wing populist parties.⁷⁶ The resolution followed from reports stating that young girls from ethnic minority groups in the Netherlands were abducted during summer holidays in order to be wedded in the country of the family's origin.

In this context the project 'Hand in hand tegen huwelijksdwang' was initiated in the Rotterdam region in 2008.⁷⁷ Local authorities, youth services, school authorities and ethnic women's interest groups joined forces in order to prevent forced marriages. Families who were suspected of planning a marriage for their daughter or son during summer holidays were obliged to sign a contract in which they were held responsible for the child's safe return.⁷⁸ Also, a pilot was started, providing shelter to victims.⁷⁹ Although no case of forced marriage was reported in the end, this initiative did have an impact on national politics, governmental papers being brought forward. The story illustrates the support for the Dutch approach on forced marriages by different interest groups, acting from different motives as diverse as the pursuit to combat (ethnic-related) gender violence to the protection of national identity, the latter indicating the presence of xenophobia. In light of this specific political and cultural climate a draft was introduced to penalise forced marriages.

4.2. MODE OF PENALISATION

There were several causes for the introduction of the draft, Article 37 of Convention 2011 being one of them.⁸⁰ Preceding a resolution had been accepted by Dutch parliament in 2009, instructing the Dutch government to bring forward a draft-proposal to penalise forced marriages.⁸¹ Related to this resolution, the Dutch government promised to take into consideration the outcomes of a study on the necessity to penalize forced marriage.⁸² Thereupon, the draft was committed to parliament.

⁷⁵ Kromhout, M.H.C. et al., 2007.

⁷⁶ Parliamentary Papers 2009/10, 32 123 XVIII, No. 47.

⁷⁷ Stichting Platform Islamitische Organisaties Rijnmond, *Hand in hand tegen huwelijksdwang [Link Hands Against Forced Marriages]*, Rotterdam, 2008.

⁷⁸ De Boer and Amajoud, *op.cit.*, at p. 12; SPIOR, *op.cit.*

⁷⁹ To date, the Department of Public Health, Welfare and Sports (VWS) finances two such shelter pilots. Due to these pilots providing shelter for all kinds of honour related crime, a shortage in capacity is reported.

⁸⁰ Parliamentary Papers 2010/11, 32 840, No. 3, at p. 2. The Convention came into force on 1 July 2011. To date (September 2012) 16 Member States have signed the Convention, the Dutch government being not among them.

⁸¹ Parliamentary Papers 2009/10, 32 123 XVIII, No. 47 (resolution Dibi).

⁸² Cornelissens, Kuppens and Ferweda, *op.cit.*

In the consultation round of the draft critical comments were to be heard, mostly referring to the problem of enforcement and emphasizing the principle of restraint when using the criminal law. The Dutch Board of Prosecutors General called upon the legislator to provide for ‘a realistic perspective of what can and might be expected of the criminal law’.⁸³

4.2.1. Substantive law

Due to the nature of Dutch criminal law, which features a preference for generic provisions, a specific penal provision is not under consideration.⁸⁴ The proposal is to widen the present provision on the use of force, Article 284 of the Dutch Penal Code (DPC). This provision holds a generic penalisation of persuading someone to act, by using force against him/her or any other person, or threatening to do so in order to persuade someone to act. The open wording indicates that Article 284 DPC may relate to a wide range of acts, from the use of physical abuse to exertion by means of psychological force.⁸⁵ The provision is recorded in Title XVIII, holding the offences against the freedom of the individual. It is the basic provision other specified penalised acts of force are derived from.⁸⁶

In the past decades, Article 284 DPC was regularly applied, mostly to violent threats. As a result of the open wording, a body of jurisprudence has been constituted, particularly regarding the interpretation of the element ‘force’ and the causal relation between the (threat to) use (of) force and the act committed or endured by the victim. According to Lindenberg, the condition of causality is fulfilled in cases where the victim, at least at the particular moment and under the particular circumstances

⁸³ Parliamentary Papers 2010/11, 32 840, No. 4, Attachments; Board of Prosecutors-general, Doc. PaG/B&S/21, January 2011, at p. 3.

⁸⁴ Parliamentary Papers 2010/11, 32 840, No. 3, p. 6. Within the Dutch criminal law policy, special issues are commonly arranged by bringing forward a Directive, drawn up by the Board of Prosecutors General. This is the case for honour related crime, which has been taken care of within the Aanwijzing huiselijk geweld en eengerelateerd geweld [Directive on domestic violence and honour related crime] of 1 June 2010, *Staatscourant* [Official Gazette] 2010, No. 6462. The issue of forced marriages is not explicitly mentioned within this Directive. Note the appeal to a cultural defence is being rejected within the Directive. By contrast, also according to the Directive, the presence of a culture related motive does not imply aggravating circumstances.

⁸⁵ Note Article 284(1) DPC to use a broad definition of force. Next to physical force, it encompasses manipulative acts, indicating unequal (power) relations between the perpetrator and the victim. The latter being referred to as ‘een andere feitelijkheid’. The wording of Article 284(1) DPC goes as follows: ‘Met gevangenisstraf van ten hoogste negen maanden of geldboete van de derde categorie wordt gestraft: 1. hij die een ander door geweld of enige andere feitelijkheid of door bedreiging met geweld of enige andere feitelijkheid, gericht tegen hetzij tegen die ander, hetzij tegen derden, wederrechtelijk dwingt iets te doen, niet te doen of te dulden.’ [‘Imprisonment of maximum nine months or a fine of the third category (7,400 euro) is imposed upon: 1. he who by the use of violence or any other matter of fact, directed towards that other person whether towards third parties, unlawfully forces a person to act, not to act or to endure an act or an omission to act’].

⁸⁶ E.g. the deprivation of liberty (Art. 282 DPC), extortion (Art. 317 DPC) or rape (Art. 242 DPC).

mentioned in the indictment, would not have committed or endured the act.⁸⁷ However, the criterion mentioned in the draft is of a more objective, and possibly limited nature, stating that the force used must imply acts to be of a substantial nature, which means that the force in the given circumstances could not be resisted.⁸⁸

The proposal calls upon an even more problematic element: the perpetrator's intent. In order to determine criminal liability, there has to be proof of the perpetrator having acted knowingly and acceptingly. Indeed, this presupposes the perpetrator to have been able to note the absence of consent. In Dutch criminal law, the minimum standard for intent (*mens rea*) is the so-called 'conditional intent', meaning the suspect must have knowingly and willingly accepted the chance that the victim does not consent to (endure the) act.⁸⁹ Whether such intent is proven, depends on the circumstances of the case, related to the nature of the offence. Clearly, the capacities of the victim to resist the pressure put forward by the perpetrator, or his accomplices, will have to be taken into consideration. Unsurprisingly, a solid body of jurisprudence exists on the issue of conditional intent.

No alterations being proposed regarding the wording of Article 284 DPC, the government has indicated that it may raise the maximum punishment.⁹⁰ Although the government has acknowledged the importance of judicial authorities to be able to weigh the casuistry, it is felt that the present maximum sentence does not reflect the serious nature of the offence.⁹¹ Indeed, a rise of the punishment rate would deter potential perpetrators. The proposal is to replace the maximum punishment rate of nine months or a fine of maximum 7,400 EUR, by a maximum of two years of imprisonment or a maximum fine of 18,500 EUR.

4.2.2. Procedural law

Next, Article 284 DPC is to be added to the list of special offences mentioned in Article 67(1) under the Dutch Code of Penal Procedure (DCPP). As a result, pre-trial detention and the special investigation methods are applicable.⁹² In Dutch criminal procedural law, the applicability of special investigation methods is related to the

⁸⁷ Lindenberg, K., *Strafbare dwang: Over het bestanddeel 'dwingen' en strafbaarstellingen van dwang in het bijzonder art. 284 Sr* [Punishable Force. About the Element 'to Force' and the Penalisation of Punishable Force, Particularly Article 284 Dutch Penal Code], Maklu, Apeldoorn/Antwerp, 2007, at p. 136.

⁸⁸ Parliamentary Papers, 2010/11, 32 840, No. 3, at pp. 5–6.

⁸⁹ Note paragraph 156 Explanatory Report of the Convention 2011 to state a legally valid consent may lift the criminal liability. The concept of a legally valid consent is, however, not elaborated upon; a referral is made to the general principles of criminal law applied by the Member States.

⁹⁰ Note the Dutch government is of the opinion that the wrongful use of force is in need of a rise of the maximum punishment per se, thus regarding all forms of force; Parliamentary Papers 2010/11, 32 840, No. 3, p. 4.

⁹¹ Parliamentary Papers 2010/11, 32 840, No. 4, at p. 7. Note the option to introduce distinct legal categories of forces with related punishment rates was rejected.

⁹² The special investigation methods referred to are recorded in Book 1, Title V DCPP.

applicability of pre-trial detention, the latter being applicable for offences which provide for a punishment of four years minimum only. However, an exception to this rule has been provided for in Article 67(1), holding a list of offences with a minor punishment rate. By adding Article 284 DPC to this list, the judicial authorities are entitled to make use of the special investigation methods. More specifically, the intention is to enable telephone taps (Article 126n and 126 and DCPD).⁹³

Another important procedural aspect is the extension of the statute of limitations provided in Article 71 DPC. The underlying thought, for cases concerning the forced marriage of a minor, is that the minor's dependency upon his or her parents may hinder the filing of a report to the judicial authorities. Therefore, the statute of limitation will start at the moment that the victim has reached the age of 18, which in the Netherlands is the age of adulthood.⁹⁴ This extension of the statute of limitations is in line with the regime that counts for sexual violence against minors and female genital mutilation against minors.

4.2.3. *Jurisdictional aspects*

A third object of the draft is to widen the jurisdiction of the Dutch criminal law. This is in line with a previous extension of the jurisdiction which came into force in 2002 with the introduction of Article 5a DPC. Based on this provision, the Dutch authorities may prosecute individuals who do not possess the Dutch nationality but do reside in the Netherlands, and who are suspected of having committed serious crimes.⁹⁵ Bringing Article 284 DPC under the range of Article 5a DPC would enable the Dutch authorities to prosecute forced marriages that were concluded abroad. Moreover, the requirement of double criminality is to be abolished, in order to create applicability of the Dutch Penal Code regarding forced marriages performed in countries that do not penalise forced marriages.

Surely, one can imagine the problems underlying such an extension of the Dutch penal jurisdiction. Next to issues of legality, problems of evidence are foreseeable. Although the legislator is aware of the potential legal drawbacks, the extension is felt to be legitimate because of the clear signal: no Dutch national or resident will go unpunished for acts that are felt to be fundamentally wrong by the majority of Dutch society. Moreover, the Minister of Security and Justice is of the opinion that forced marriages fall within the category 'offences in violation of the common beliefs of the civilised peoples'. The latter holding an exception to the rule that penalisation

⁹³ Parliamentary Papers 2010/11, 32 840, No. 3, at p. 14.

⁹⁴ Note Art. 18(4) Convention 2011 prescribes that victims are not to be pressed to bring forward charges or to testify against the perpetrator. Also: ACV, *op.cit.*, at p. 48.

⁹⁵ The latter including, amongst others, female genital mutilation committed against victims under eighteen years old. In line with the systematic preference of the Dutch DPC for generic provisions, female genital mutilation falls within the regular provisions of assault (Art. 300 and further DPC).

may not be invoked retrospectively.⁹⁶ The argument that the proposed extension is in violation of the *nulla poena* principle, which was mentioned by the Dutch Council of State, was rejected.⁹⁷ Such a reservation would harm ‘the established need’ to combat forced marriages effectively.⁹⁸ As for the risk of foreign authorities to be reluctant to cooperate, the Dutch government has high hopes this will not be the case.⁹⁹

4.3. THE NEED TO BEWARE OF LEGAL DRAWBACKS

As mentioned, advisory bodies strongly objected to the proposed penalisation of forced marriages. Bearing in mind the complex nature of forced marriages, recourse to the criminal law was questioned. Notwithstanding the principle of restraint of the use of the criminal law being explicitly acknowledged,¹⁰⁰ including critical notions regarding the constituting elements as well as to the criminal liability being limited to a clear use of force,¹⁰¹ the draft still reflects a strong belief in the capacities of the criminal law.

⁹⁶ Parliamentary Papers 2010/11, 32 840, No. 3, at p. 9: the Minister of Security and Justice states: ‘De Nederlandse strafwetgeving dient het signaal af te geven dat zij [Nederlandse onderdanen en ingezetenen] deze voor de eigen rechtsorde fundamentele norm [de vrije huwelijkskeuze] niet alleen in eigen land maar ook in het buitenland behoren te respecteren. Niet eerbiediging van deze norm kan niet zonder gevolgen blijven [‘The Dutch criminal law must provide for a signal that they [Dutch nationals and inhabitants] must respect such a, for the national legal order fundamental value [the right to be free whom to marry], not just in their home-country, but also abroad. Non-compliance shall not be without consequences’]. Also: Parliamentary Papers 2010/11, 32 840, No. 4, at p. 7 and Parliamentary Papers 2011/12, 32 840, No. 6, at p. 19.

⁹⁷ According to the Dutch Council of State, it is doubtful whether forced marriages fall within the ambit of Art. 7(2) ECHR. As a result, the extension of the Dutch jurisdiction towards forced marriages having been conducted in States that did not penalise such acts could be in violation of the *nulla poena* principle as the perpetrator could not have been aware of his acts being punishable. This argument was, as mentioned, rejected by the Minister of Security and Justice, Parliamentary Papers 2010/11, 32 840, No. 4, at p. 5: ‘Naar mijn overtuiging volgt uit de huidige stand van de rechtsontwikkeling genoegzaam dat huwelijksdwang kan worden aangemerkt als misdrijf overeenkomstig de rechtsbeginselen die door beschaafde volkeren worden erkend, als bedoeld in de uitzondering van artikel 7, tweede lid EVRM’ [‘It is my firm belief that under the actual rule of law forced marriages are to be regarded as an offence according to the principles of law acknowledged by the civilized peoples, as referred to in Article 7(2) ECHR’].

⁹⁸ Parliamentary Papers 2010/11, 32 840, No. 4, at p. 5.

⁹⁹ Parliamentary Papers 2010/11, 32 840, No. 4, at p. 7; Parliamentary Papers 2011–2012, 32 840, No. 6, at pp. 6–7.

¹⁰⁰ Parliamentary Papers 2010/2011, 32 840, No. 3, at p. 1: ‘Tot de bescherming die de overheid kan bieden, behoort ook de strafrechtelijke bescherming. Het strafrecht is waar het gaat om de aanpak van huwelijksdwang dan ook een belangrijk en noodzakelijk sluitstuk, maar *ultimum remedium*’ [‘As for the State protection, this includes the use of the criminal law. Regarding the approach towards forced marriages, the criminal law is an important and necessary final piece, but *ultimum remedium*’].

¹⁰¹ Parliamentary Papers 2010/11, 32 840, No. 3, at p. 1: ‘Motieven voor het huwelijk zijn talrijk. Romantische overwegingen zijn lang niet altijd de standaard. Niet zelden spelen economische en sociaal-culturele overwegingen een rol. In een groot deel van de wereld bestaat het gebruik dat huwelijken worden gearrangeerd door ouders en familie (...) Daar kleeft op zich niet strafwaardigs aan’ [‘There are multiple motives to marry. Not always are romantic notions the standard. Often,

Calling upon human rights law, as well as upon the international consensus to combat ethnically-related gender violence, the penalisation of forced marriages is presented as a necessary measure to preserve the common beliefs of civilised peoples.¹⁰²

However, one can cast doubt on this strong belief. There are, at least in the Dutch region, but assumingly also for the European region as a whole, no empirical findings present to support such a pressing need.¹⁰³ Empirical findings regarding the extent of forced marriages executed in the Netherlands, or – in cases where the wedding is executed abroad – enforced upon Dutch inhabitants elsewhere, are not available.

Findings indicate the use of distinct forms of social pressure in order to urge young people to consent to marriage.¹⁰⁴ Indeed, findings also support the assumption that such marriages pre-indicate domestic violence as well.¹⁰⁵ Yet, the problems observed are of a multiple nature, flowing from the struggle of cultural minorities to deal with the consequences of immigration and the related pressure to integrate. The major problem lies in the ‘clash between cultures’, indicating the wish to preserve ethnic cultural identity, on the one hand (particularly related to religion), and the social and political pressure to adapt to the standards of the ‘Dutch’ society, on the other hand. Moreover, with the lapse of time, the nature of the social pressure experienced by minors from ethnic minorities is subject to change.¹⁰⁶ To date, the majority of the cases relate to ‘arranged marriages’, which maybe indicates that the ultimate type of forced marriage is replaced by more acceptable forms.

These observations support the conclusion that ‘forced marriages’ as found in the European as well as in the Dutch context represent ‘(relatively) harmful social practices’,¹⁰⁷ rather than ‘harmful cultural traditions’ as referred to in human rights law. Indeed, the latter being an exclusive category, shallow comparisons devalue its legal status. As the Dutch draft relies heavily on the assumption that forced marriages

economical and social-cultural aspects are considered. In a large part of the world it is common to have a marriage arranged by the parents and the family (...). This, in itself, does not imply punishability’].

¹⁰² Parliamentary Papers 2010/11, 32 840, No. 3, at p. 10: ‘Hierboven heb ik – onder verwijzing naar een aantal internationale mensenrechtenverdragen en rechtsinstrumenten – gewezen op het feit dat er internationaal steeds meer overeenstemming bestaat over de verwerpelijkheid en strafwaardigheid van huwelijksdwang’ [‘Above, I have already mentioned – referring to a number of international human rights conventions and judicial instruments – the growing consensus at the international level as to the reprehensible nature and punishability of forced marriages’]. Also: Parliamentary Papers, 2010/11, 32 840, No. 4, at p. 5, the Minister of Security and Justice stating there to be ‘an established need for penalisation’.

¹⁰³ As mentioned in para. 2.3, findings for other regions in the world, especially Asia and the Caribbean region, support the existence of types of forced marriages that do qualify as harmful cultural practice.

¹⁰⁴ De Koning and Bartels, *op.cit.*; Storms and Bartels, *op.cit.*

¹⁰⁵ Parliamentary Papers 2010–2011, 32 840, No. 3, at p. 2; Kromhout et al., *op.cit.*; Storms and Bartels, *op.cit.*

¹⁰⁶ E.g. Young, J., *The exclusive society*, Sage, London, 1999, at pp. 179–183; Young stresses the need for ‘adaptive transformation’ mechanisms, in order to handle immigration issues.

¹⁰⁷ Sterckx and Bouw, *op.cit.*; Storms and Bartels, *op.cit.*

fall within this exclusive category, the impression from this assumption raises the argument that it is 'misused' to support the political aspirations of a society in fear of cultural change.¹⁰⁸

In addition, there are more causes for worry than the abovementioned theoretical legal drawbacks, for the penalisation of forced marriages also provokes practical problems. Penalisation implies effective protection, meaning the States are obliged to provide for adequate penal provisions, as well as adequate enforcement. Even though I will not elaborate upon this issue extensively, it is clear that the open wording is problematic in light of the principle of legality, causing problems with regard to the definition of force, as well as causality. Indeed, it indicates that such a 'force' constitutes a denial of the free will of (one of) the intending spouse(s), implying minors to be 'muted', not being able to adequately resist familial pressure. Providing evidence for such a 'force' in terms of the criminal law is highly problematic, and the low amount of prosecutions regarding forced marriages in Europe supports this observation.¹⁰⁹ Last, but not least, voices from ethnic minorities show that the majority of the women involved reject the related victim-status.¹¹⁰

5. COMPLETION

This paper was written in the context of the research project 'Framing multicultural issues in terms of human rights: solution or problem?'. Using forced marriages as a starting point, the growing appeal on human rights as a means towards repression was questioned. In Europe, human rights law and criminal law are consolidated in order to protect women and other socially vulnerable groups from gender violence. The appeal towards human rights law in itself is understandable and justifiable, but the inherent tendency to provide for protection by means of repression is not.

This position does not indicate a denial of situations in which improper pressure is placed upon minors from ethnic minorities, urging them to consent to marry the candidate preferred by the family. Neither must the nature and extent of such social pressure be underestimated. Depending on the casuistry, intervention by the criminal justice system may even be called for. However, penalisation, whether by the introduction of a specific penal provision or by broadening the range of present

¹⁰⁸ Note none of the Dutch studies mentioned justifies penalisation based on the argument that forced marriages must be qualified as a harmful cultural tradition.

¹⁰⁹ This is best illustrated by the lack of enforcement in England and Wales (House of Commons, *op.cit.*). Although the English problems do not relate to the enforcement of a penal provision, but to the enforcement of the civil protection orders, the problems mentioned are of a common nature, related to the nature of the phenomenon. Similar problems, or even more serious problems, can be expected in case of enforcement of penal provisions. Moreover, the fact that two cases have been prosecuted in Norway and none in Belgium supports the assessment that problems regarding the enforcement can be expected.

¹¹⁰ E.g. De Koning and Bartels, *op.cit.*; Gangoli, *op.cit.*; Storms and Bartels, *op.cit.*

provisions, is another issue. In light of the findings regarding the extent and nature of forced marriages found in Europe, the political appeal to human rights law becomes uncertain.

This is most certainly true for the applicability of the category ‘harmful traditional practices’. Indeed, representatives from ethnic minorities within Europe stress that there is no basis within culture or religion to qualify forced marriages as a cultural practice. Moreover, in the absence of such a ‘cultural tradition’, the argument that penalisation is necessary in order to create a clear public standard is also of less importance. The relationship between cultural practices and the right to consent to marriage is therefore strained, but this does not imply that penalisation is the best option to communicate the standard regarding consensual marriage.¹¹¹ Indeed, even if one is of the opinion that the introduction of a penal provision is a vital element of such a public message, it needs to be embedded in a broader policy.¹¹² The latter being acknowledged in national policies, as well as in the Convention 2011, and both tending to exaggerate repression as a means to protect human rights. To be sure, the Convention 2011, as well as other human rights documents mentioned in this paper, spread the message that human rights and criminal law make a good pair, inviting national governments to make an uncritical use of the prerogative to penalise human behaviour.

Moreover, human rights documents, particularly the Convention 2011, relate this prerogative to cultural issues, paying no notice to the social sensibility featuring cultural issues in European societies. Aiming at an approximation of national law, Article 37 Convention 2011 paves the way for a policy featuring repression and exclusion of social practices, which are felt to be incompatible to Europe’s (overall still nation-state based) identity.¹¹³ Taking the human rights standard of ‘adequate and effective protection’ as the point of reference, the preferred option is to penalise forced marriages. Thus, the message spread by those documents is doubly false. First, it wrongly suggests current practices imply serious violations of human rights. Second, it stirs up the obvious social anxiety over multicultural issues present within European societies. This resonance of ‘cultural rightness’ appeals to the feelings of discomfort,

¹¹¹ I will not elaborate upon the question whether the application of a special provision would be preferable. In the end such a discussion is rather irrelevant for it is the results that count, not the way how to achieve the results. However, note the introduction of a special provision to be in strain with the system of the Dutch criminal law: Kool, R.S.B., ‘Drassige gronden voor strafbaarstelling: Het wetsvoorstel ter verruiming van de strafrechtelijke aanpak van huwelijksdwang’ [‘Boggy Basis for Penalisation. The Draft to Extend the Criminal Combat of Forced Marriages’], *Delikt en Delinkwent*, Vol. 42, No. 1, 2011, pp. 21–36. Note also paragraph 155 Explanatory Notes of the Convention 2011 not to prescribe an introduction of specific penal provisions, as well as the empirical data to not support a clear need for a special provision.

¹¹² E.g. Khanum, *op.cit.*, at p. 62.

¹¹³ For a critical analysis of this profile also: Kool, R., ‘Het Verdrag van de Raad van Europa ter bestrijding tegen vrouwen: reden voor een feestje?’, [The Council of Europe’s Convention on Combating Violence Against Women: A Reason to Celebrate?], *NJCM*, Vol. 36, No. 6/7, 2011, pp. 639–657.

or perhaps betters latent and explicit xenophobia present within European societies, presenting open invitation to the national governments to frame their policy in terms of the human rights rhetoric.

Clearly, the Dutch draft can serve as an example where such human rights rhetoric may lead us. Indeed, it illustrates how an honest appeal to human rights law can have a reverse effect, the human rights law being used as fuel for populist policy.¹¹⁴ The lesson to be taken is that what one wished for by appealing to human rights law is not necessarily what one gets. Being aware that xenophobia is lying in ambush, critical reflections are needed as to the moral assumptions of cultural practices being incompatible to the 'national' culture.¹¹⁵ Both culture and human rights are 'men made products', representing a result of social construction, implying no claim of truth. Surely, this leaves us with the responsibility to handle the familiar social pressure experienced by minors from ethnic minorities. Indeed, the right to consent freely and fully to marriage is at stake. The decision to penalise such types of familiar social pressure believed to represent harmful cultural traditions, however, is a bridge too far.

¹¹⁴ E.g. Parliamentary Papers 2010/11, 32 840, No. 3, at p. 1, the Minister of Security and Justices stating: 'Huwelijksdwang staat bovendien in de weg aan integratie in de Nederlandse samenleving' ['Moreover, forced marriages hinder the assimilation into Dutch society'].

¹¹⁵ Ertürk uses the term 'cultural negotiation' (Ertürk, *op.cit.*, at p. 52), whereas Ghorasi recommends an 'epoch', referring to the need to create an interspace, providing a mutual ground for discussion in order to take a step forward to develop new concepts of 'nationality' (Ghorasi, *op.cit.*, at p. 46–48).