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Wissenschaftlicher Beirat:
Hans-Joachim Hoffmann-Nowotny (†), Leo Lucassen,
Günter Renner, Werner Schiffauer, Thomas Straubhaar,
Dietrich Thränhardt, Andreas Wimmer

Sarah van Walsum

The Dynamics of Emancipation and Exclusion. Changing Family Norms and Dutch Family Migration Policies

Since Dutch nationality law was first introduced in the early nineteenth century, family norms have played a role in determining the parameters of the Dutch nation, next to or in combination with principles of territory and/or ethnic belonging. Both parental descent and marriage have formed important ports of entry into the Dutch nation. The question of how, for whom and to what extent parental descent and marriage have formed such a port of entry has been answered differently in different historical contexts. This article explores how Dutch family migration law has changed over the past four decades, a period that has witnessed revolutionary changes within Dutch family norms, triggered by, among other things, the ›second wave‹ in women's emancipation and the sexual revolution.

The question addressed is how changes in Dutch family norms have been reflected in rules that facilitate or hinder the establishment of transnational family units within the Netherlands. The term ›transnational family‹ can be defined as follows: family units formed by Dutch nationals or by legally resident immigrants with a foreign (marriage) partner and/or (step-) child. As the liberalisation of Dutch family norms has had its most immediate and most marked effect on nationality law, that area of law shall be discussed before immigration law is brought into the picture.

The Impact of Changing Family Norms upon Dutch Law

Changes in Dutch family norms have been clearly reflected in Dutch family law. In the course of the 1970s, non-marital relationships in the Netherlands gradually came to be treated on a par with marriage¹, while unwed mothers and illegitimate children lost much of their stigma.² Family relationships

1 Anne M. van de Wiel, *Samenleven buiten huwelijk. Over het juridisch lot van concubine en concubijn in binnen-en buitenland*, Deventer 1974.

2 Nora Holtrust, *De geschiedenis van de afstandsmoeder*. Dikke bult, eigen schuld, in: Carla van Splunteren (ed.), *Publiek geheim. De privatisering van het vrouwenleven*, Amsterdam 1995.

came to be seen more in terms of contractual arrangements between free and equal individuals, and less in terms of the strictly regulated and religiously sanctioned hierarchical institution of the 1950s and 1960s.³

In the course of the 1980s and 1990s, the right to respect for family life, as guaranteed by Article 8 of the European Convention of Human Rights, proved a powerful instrument for unmarried and divorced fathers. By appealing to this fundamental human right, they acquired the right to recognise children born out of wedlock even when the mother refused permission, gained visiting rights automatically after divorce or separation and could share custody and parental authority with a child's mother outside of marriage without the intervention of the court.⁴

In Dutch nationality law, preserving the unity of the male-headed family remained a dominant principle until 1985. The assumption was that Dutch men should be able to build up a future, including family life, in their country of nationality. Consequently, their wives and children had easy access to admittance, to protected status and, ultimately, to Dutch citizenship. Dutch wives and (step-)children who joined the family of a foreign male, however, were assumed to have joined his nation and, if necessary, to follow him ›back home«. In fact, up until 1965, a Dutch woman automatically lost her Dutch nationality upon marrying a foreigner. So while Dutch men enjoyed the security that immediate access to Dutch nationality was provided for their family members, namely the unassailable right to enter and reside in the Netherlands, Dutch women ran the risk of having their foreign family members deported or refused entry. Up until 1965, they actually faced that same risk themselves.⁵

In 1985, Dutch nationality law was reformed, eliminating all forms of sexual discrimination. In terms of nationality law, marriage now had the same consequences for men as for women. Married and also unmarried couples were treated more equally. Not only the spouses, but also the unmarried partners of Dutch citizens came to enjoy a (modest) advantage when applying for naturalisation. Moreover, Dutch mothers could now pass on their nationality to their children at birth, on the same basis as Dutch fathers.

Dutch immigration law did not react as promptly to changing family norms as did Dutch nationality law. As a result, although Dutch women

3 Gerrit Kooy, *Gezinsleven en recht in naoorlogse Nederland*, in: *RM Themis*, 4. 1997, pp. 123–129.

4 See for example: Nora Holtrust, *Aan moeders knie. De juridisch afstammingsrelatie tussen moeder en kind*, Nijmegen 1993; and: Caroline Forder, *Legal Establishment of the Parent-Child Relationship. Constitutional Principles*, Maastricht 1995.

5 Betty de Hart, *Maria Toet en andere verhalen. De gehuwde vrouw en de constructie van de natiestaat*, in: *Tijdschrift voor Sociale Geschiedenis*, 25. 1999, no. 2, pp. 183–206.

marrying a foreigner could keep their Dutch citizenship after 1965, it would take until 1979 before their foreign family members were granted the same rights under immigration law as the foreign family members of Dutch men. By the same token, up until 1979 foreign men and children coming to the Netherlands to join a foreign woman who had settled there did not enjoy the same rights under Dutch immigration law as the family members of a male immigrant.⁶ Differences between married and unmarried couples also remained greater in immigration law than in nationality law. It would take until the end of the millennium before the most salient aspects of this form of inequality would be resolved.

Equal Treatment Through Levelling Down

By now, in the early years of the twenty-first century, equal treatment of men and women and of married and unmarried couples has to a large extent been realised, both in nationality and immigration law. However, these reforms have had their price. In the end, the equal treatment of men and women in Dutch nationality and immigration law has not resulted in more security for Dutch women with foreign family members, but in a levelling down: of men with regard to women; of married couples with regard to unmarried couples; of Dutch citizens with foreign family members with regard to immigrants with foreign family members.

For example, until 1985, the foreign family members of Dutch men had easy access to the unassailable right to residence provided by Dutch nationality. After 1985, Dutch men's foreign wives and step-children had to apply for naturalisation on the same basis as the foreign family members of Dutch women. However, a special status still applied to all the family members of Dutch citizens and permanently settled immigrants, protecting them against deportation on whatever grounds as long as the family bond lasted. Since January 1994, however, no foreign family members enjoy any such protected status any longer.

A second example involves the relationship between parents and children. While Dutch mothers can now pass on their nationality to their children at birth on the same basis as Dutch fathers, a foreign mother's marriage to a Dutchman no longer paves the way to the admittance of her children. Between 1982 and 2002, the policies regarding the admission of (step-)children as well as the rules regarding their naturalisation have been modified.

6 Margaret Chotkowski, *Baby's kunnen we niet huisvesten, moeder en kind willen we niet scheiden. De rekrutering door Nederland van vrouwelijke arbeidskrachten uit Joegoslavië, 1966–1979*, in: *Tijdschrift voor Sociale Geschiedenis*, 26. 2000, no. 1, pp. 76–100; Betty de Hart, *Onbezonnen vrouwen. Gemengde relaties in het nationaliteitsrecht en het vreemdelingenrecht*, Amsterdam 2003.

The net result has been that (step-)parents who, for whatever reason, have delayed applying for family reunification and who have, in the meantime, left their foreign (step-)children in the care of their family abroad, are assumed to no longer have a family bond with those children. Under present policies, children will only be admitted if they have been separated from their parent(s) for less than five years.⁷ And since children can now only share in the naturalisation of a parent *after* they have been legally admitted to the Netherlands⁸, even the naturalisation of a parent will not confer the right to enter the country legally to (step-)children who have been separated for more than five years from their parent(s).

A third example deals with income requirements that apply both with regard to the admittance of (marriage) partners, and to the admittance of children. Since 1 April 2004, no distinction is made any longer between married and unmarried couples but, at the same time, Dutch citizens can no longer be exempted from these requirements. Thus we see that not only the distinctions between men and women and between married and unmarried couples have disappeared, but also the privileges of Dutch citizens with foreign family members vis-à-vis newly admitted foreigners. The only significant remaining advantages enjoyed by Dutch citizens is that their (marriage) partners can apply for naturalisation after a shorter period of residence than other immigrants, and that objections related to public safety weigh less heavily against the admission of their (marriage) partners than against those of foreign immigrants.⁹

Diverging Family Norms

During the past few decades, feminist lawyers in the Netherlands have been lobbying – without success – to have visiting rights, custody and the right to shared parental authority explicitly linked to demonstrated day-to-day care. While formal equality between men and women has been reached in Dutch family law, substantive inequalities persist within Dutch society. Women still possess fewer positions of power than men, work less hours and earn less per hour. Feminist lawyers worry that, unless the substantive implications of

7 Tussentijds Bericht Vreemdelingen-circulaire 2002/4. Exceptions can be made for children who would otherwise be left without sufficient care and for children who could not be located sooner due to extreme circumstances such as war.

8 Article 11 of the Dutch nationality law of 1985 stipulated that children follow in the naturalisation of their parents, depending however on certain conditions. An administrative circular of 31 March 1992 introduced as a general condition that the child must have been admitted to the Netherlands.

9 Betty de Hart, *Onbezonnen Vrouwen. Gemengde Relaties in het Nationaliteitsrecht en het Vreemdelingenrecht*, in: *Nemesis*, 3. 2003, pp. 54–62.

women's caring responsibilities are somehow accounted for in family law, the growing protection of family life against state interference will benefit fathers more than mothers.

The Dutch legislature, however, has ruled that proof of effective care should not be a criterion for entitlement to parental rights.¹⁰ In this they have followed Dutch court decisions that making parental rights dependent on actual involvement in day-to-day care amounts to discrimination.¹¹ Consequently, divorced or separated fathers are entitled to parental rights irrespective of the amount of financial support that they provide for their children or the extent of their involvement in day-to-day care. Only under very exceptional circumstances will they be denied visiting rights or the right to shared parental authority.

While feminist lawyers have expressed their disappointment over these developments¹², mainstream human rights lawyers have been positive in their reactions. In their view, fathers and mothers are rightly being treated as mature adults, capable of making their own choices and decisions in the best interests of their children. »It is undesirable to impose stereotypes upon the parents [...] Furthermore, a child's needs are not static but dynamic and disparate. In short, a legal response to the concern expressed by [feminist authors; S.v.W.] would necessarily involve an intensified regulation of custody, when what is needed, in the interests of being able to respond to the individual needs of each child, is greater de-regulation.«¹³

The prospect of policing the involvement of parents in the care of their children has, then, been rejected in Dutch family law. But as we saw above, in Dutch immigration law Dutch authorities are actually required to control the extent to which parents have been involved in the day-to-day care of their foreign (step-)children. What is more, since Dutch civil law was changed in 1994, anyone in the Netherlands wishing to marry a non-EU spouse must have his or her marriage motives screened by public officials ahead of time. That is to say, he or she must convince both immigration officials and the authorities charged with conducting civil law weddings that the marriage is motivated by affection, and not (solely) by the wish to provide the foreign spouse entry into the Netherlands. At the same time, however, in Dutch society in general, government investigation into the nature of a rela-

10 Kamerstukken II, 1996/97, 23 714, no. 11, p. 12. See also: Eric J. Nicolai, *De Juridische Positie van de Niet-Verzorgende Ouder na Echtscheiding*, in: *Nederlands Juristen Blad (NJB)*, 15. 1998, pp. 695–699, here p. 696.

11 See for example: Hoge Raad 21 maart 1986, NJ 1986 585; 588.

12 See for instance: Carla van Wamelen, *De eerbiediging van een zorgrelatie. De rol van zorg bij echtscheiding*, in: *Nemesis*, 3. 1996, pp. 76–82.

13 Forder, *Legal Establishment*, p. 405.

tionship between cohabiting adults has become increasingly taboo. This has been particularly evident in the field of Dutch social security law.¹⁴

When it comes to the enjoyment of the freedoms protected by Article 8 of the European Convention, men may be more equal than women; single nationality Dutch families are definitely more equal than transnational ones.

Towards a More Ethnically¹⁵ Motivated Mode of Exclusion

This normative discrepancy between Dutch family law and Dutch immigration law parallels the ideological distinction that is presently being drawn between Dutch ›autochthons‹ and ›non-western allochthons‹. The terms ›autochthon‹ and ›allochthon‹ were first introduced in the 1970s to distinguish between Dutch citizens of European origin and those (former) Dutch citizens who had, in the 1950s and 1960s, been repatriated from the former Dutch colony of the Dutch East Indies, now Indonesia.¹⁶ Later, the term ›allochthon‹ was also used to refer to foreign immigrants.

By the early 1980s, however, this term was replaced by the term ›ethnic minorities‹, which fitted better in the then dominant ideology of a multicultural society in which the relative social disadvantage of certain ethnic groups was primarily attributed to economic rather than to cultural factors. But by the early 1990s, culture once more came to be viewed as a possible significant cause of social disadvantage. The focus of integration policies now shifted away from disadvantaged ethnic groups to those individuals of foreign origin who might lack the necessary skills and moral qualities required to succeed in an increasingly competitive, market-oriented society. The terminology of ›allochthons‹ and ›autochthons‹ was re-introduced.¹⁷

14 See for example: Wilhelmus Bouwens, *Het gezin in de sociale zekerheid*, in: *RM Themis*, 4. 1997, pp. 155–164; and Mies Westerveld, *Comment on Centrale Raad van Beroep 3 oktober 2000*, in: *Nemesis*, 5. 2001, pp. 29–32.

15 I use the term ›ethnicity‹ in the same sense as Anthias. That is to say, I perceive ethnicity as an identity which, within a specific historical context, is attributed to a specific group of people, or which that group attributes to itself. What characterises an ethnic group is not the fact that all its members take part in a specific culture, but that they are all assumed to share a common origin. Cf. Floya Anthias, *Ethnicity, Class, Gender and Migration. Greek-Cypriots in Britain*, Hants 1992, pp. 11–32.

16 Hilda Verwey-Jonker (ed.), *Allochtonen in Nederland. Beschouwingen over de gerepatrieerden, Ambonezen, Surinamers, Antillianen, buitenlandse werknemers, Chinezen, vluchtelingen, buitenlandse studenten in onze samenleving*, The Hague 1971.

17 Presently, in official documents the term ›allochtoon‹ refers to people who reside in the Netherlands but who were born outside of the Netherlands, or who were born in the Netherlands but who have one or more parent born outside of the Netherlands. The term ›autochtoon‹ refers to people born inside or outside of the Netherlands, of

At the same time the Dutch government's attitude towards immigration was also shifting. Immigration as such was no longer considered as problematic. Only certain forms of immigration needed to be restricted, namely those involving foreigners who were unlikely to adapt easily to Dutch society.¹⁸ In line with this reasoning, it has become common practice to distinguish between ›western allochthons‹, such as EU-citizens, who are assumed to be able to adjust easily to Dutch society, and ›non-western allochthons‹, typically originating from Third-World countries, who are assumed not to adapt easily.¹⁹

This attitude is not limited to policy papers. It is also reflected in public discussions regarding cultural differences in the Netherlands, immigration and integration policies. What is striking is that, in the context of this debate, Dutch culture in particular and ›western culture‹ in general are seen to be exemplified by the liberal and secular norms that currently shape Dutch family law: universal human rights, equal treatment of men and women and individual freedom. In contrast to these norms, the cultural norms of non-western immigrants, and of Islamic immigrants in particular, are perceived, again according to a selective caricature, to be religiously inspired, patriarchal, and with no place for the emancipated woman, representative of modern western liberalism. Frequently cited examples of deviant non-western norms are: arranged marriages, codes of shame and honour, double standards regarding the sexuality of men and women, an overly lenient attitude towards the upbringing of young boys and an overly restrictive attitude towards the upbringing of young girls.²⁰ These assumed ethnic differences, and the desire to prevent ethnic deviance, can serve to legitimate the policing of family relations in the context of immigration law.

parents who were both born in the Netherlands; cf. Silvia Dominguez Martinez et al., *Integratiemonitor 2002*, Rotterdam 2002, p. 9.

- 18 See for example the policy paper: *Integratie in de context van immigratie*, Kamerstukken II, 2001/02, 28 198, no. 2. This shift in thinking was also evident in the earlier policy paper: *Nota integratiebeleid etnische minderheden* of 1994, Kamerstukken II, 1993/94, 23 684, no. 2. For a discussion of this document see: Sarah van Walsum, *De schaduw van de grens. Het Nederlandse vreemdelingenrecht en de sociale zekerheid van Javaanse Surinamers*, Deventer 2000, pp. 114–117.
- 19 An explicit distinction is made between western and non-western allochthons in a recent publication issued by the Dutch national Bureau of Statistics (CBS), *Allochtonen in Nederland*, Voorburg 2001.
- 20 See for example: Sawitri Saharso, *Over de grens. Zwarte, migranten- en vluchtelingenvrouwen in het debat over multiculturaliteit*, in: Rikki Holtmaat (ed.), *Een Verdrag voor alle Vrouwen. Verkenningen van de betekenis van het VN-Vrouwenverdrag voor de multiculturele samenleving*, The Hague 2002, pp. 41–56; Renée Römkens, *Over cultuurbarrieren gesproken. Geweld tegen vrouwen en het debat over multiculturaliteit*, in: Rikki Holtmaat (ed.), *Een verdrag voor alle vrouwen*, pp. 29–40.

Concern for Ethnic Cohesion Versus Concern for Family Life

While family migration law used to delineate the nation along the lines of gender and legal family bonds, present distinctions run along the lines of ethnicity and family relations defined as much in cultural as in legal terms: in addition to a marriage certificate, one must provide proof of romantic affection; in addition to a child's birth certificate, one must provide proof of direct involvement in day-to-day care.

Where the concern to protect the integrity of the male-headed family previously led to a line being drawn *between* transnational families – leading to the inclusion of those transnational families that were headed by a Dutch male and the exclusion of those that were not – the present concern to protect the integrity of the Dutch ethnic identity has led to a line being drawn *through* transnational families – leading to the inclusion of those foreign family members who are viewed as ethnically similar to the ›autochthonous‹ Dutch, and the exclusion of those who are not.

Significantly, other aspects of Dutch immigration law also target foreign family members of non-western origin more emphatically than those of western origin. Visa requirements, for example, are on the whole stricter for family members originating from Africa, Asia or South America than for those originating from Europe, North America or Australia. Also, increasingly strict income requirements indirectly discriminate against family migrants from Third-World countries. As it turns out, those people living in the Netherlands who have family members in, or originating from, non-western nations are mostly ›autochthonous‹ Dutch women or ›non-western allochthonous‹ men and women.²¹ On the whole, these groups will have more difficulties meeting strict income requirements than ›autochthonous‹ Dutch men because they earn less and are less likely to have permanent employment. Autochthonous Dutch men for their part, who on the whole have the best job security and earn the highest salaries and hence can most easily meet strict income requirements, generally have foreign family members in, or originating from, western nations.²²

In this light, it is also interesting to note that proposals have been made to restrict the admittance of children older than 12 years of age who are considered unlikely to integrate successfully into Dutch society. Similarly, plans to limit the admission of foreign partners are also being motivated in terms of

21 Carel Harmsen, Cross-cultural Marriages, in: Maandstatistiek van de bevolking, 47, 2001, no. 12, pp. 17–20.

22 Saskia Keuzenkamp/Ko Oudhof, Emancipatiemonitor 2000, The Hague 2000, chapter 4; and Jacobus Dagevos, Rapportage Minderheden 2001. Deel II: Meer werk, The Hague 2001, p. 57.

›integration risks‹.²³ The most far-reaching proposal so far has been to require foreign family members to pass language exams in their country of origin, before allowing them to enter the Netherlands on the basis of family reunification and to require them to pass a citizenship exam before they can receive a definite status.²⁴

A number of recent judgements by the European Court of Human Rights pose interesting challenges to this new ethnic mode of distinction. In these decisions, the European Court has integrated family norms previously explicated in family law decisions into decisions regarding family reunification. Particularly the notion that states must allow parents and children the freedom to enjoy each other's company has been emphasised.²⁵ Moreover, this recent jurisprudence stresses the need to respect the right of both married and unmarried couples to be able to continue to cohabit, even when issues of immigration and/or public order are at stake.²⁶ In the eyes of the European Court, certain core-rights protected by Article 8 of the European Convention of Human Rights are not ethnically determined, but apply universally and must be respected, even when immigration control is at issue.²⁷ Thus restrictive family migration policies, and the assumed ethnic differences that they are based on, can be limited by international human rights law and its underlying assumption of universalism.

Reconciling Emancipation with Exclusion: an Exercise in Contradiction

While men and women have acquired at least formal equality within Dutch family law, and while national and international courts have explicated a space of freedom from state involvement within family relations, the developments within immigration law have been less emancipatory. Although formal equality has been reached between men and women, this has been achieved through levelling down or reducing the security of Dutch men with foreign family members rather than increasing that of Dutch women. In the process, most of the privileges that (male) Dutch citizens previously enjoyed

23 Strategisch akkoord Balkenende I, 26.06.2002. Similar arguments have also been put forward in the recently published Directive of the European Council on the Right to Family Reunification, Official Journal of the European Union, 3.10.2003.

24 Miljoenennota, The Hague 2003, chapter 3.7: Immigratie en Integratie.

25 ECHR 11 July 2000, *Ciliz vs. The Netherlands*, RV 2000/20; ECHR 21 December 2001, *Sen vs. the Netherlands*, RV 2001/24.

26 ECHR 2 August 2001, *Boultif vs. Switzerland*, JV 2001/254.

27 Sarah van Walsum, Artikel 8 EVRM als toetsingskader voor het Nederlandse vreemdelingenrecht, in: Frank van Ommeren/Sjoerd Zijlstra (eds.), *De rechtsstaat als toetsingskader*, The Hague 2003, pp. 159–172.

vis-à-vis newly arrived immigrants when it came to establishing family life in the Netherlands have been eliminated. Moreover, as the principle of protecting family unity has become less prominent, the scope for state interference in transnational family relations has increased, involving the policing of the relationship between (marriage) partners, and between parents and children. The former concern for the integrity of a family headed by a Dutch male has given way to a present concern for the ethnic integrity of the Dutch nation. As the explicitly differentiating role of gender has lessened, the differentiating role of ethnically labelled skills and norms has become more pronounced.

Indirectly, however, gendered family norms do continue to play a role. Not only do the substantive positions of men and women in Dutch society continue to differ. Ethnic differences are actually being drawn along lines defined by perceived differences in gendered family norms. Dutch ethnic identity is seen to be exemplified by equality between the sexes and a high level of freedom for men and women in determining how to fulfil their mutual commitments and their responsibilities towards their children. By contrast, non-western immigrants are assumed to still adhere to traditional, religiously determined patriarchal family norms, providing little space for individual responsibility.

As the Dutch government becomes more explicit in naming the defence of national cultural identity as one of the main goals for immigration policy, it also raises more barriers against establishing family units in the Netherlands with (marriage) partners or children originating from non-western countries. Recent international jurisprudence indicates, however, that these barriers raise serious questions in the sphere of universal human rights. The irony is that the normative identity that Dutch family migration policies are meant to defend is exemplified by the very freedoms that those policies threaten to undermine.