Dutch Judges Deciding Multicultural Legal Cases

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A few years ago I started my empirical research on the multiculturalization of law in the Netherlands with a simple observation. Here it is:

> In contrast to criminal law, there doesn't seem to be a big issue with the idea of 'culture' in other areas of law.[1] Not only is there no big issue, there hardly seems to be any 'cultural issue' at all. When we examine the Dutch legal literature in the field of family law, contract law etc., we can come up with maybe 20 to 25 legal cases in the past 40 years where cultural arguments concerning immigrant minorities have been explicitly accepted or rejected as being relevant. How come? Is culture only rarely relevant? Or is it not perceived as relevant? Why is the cultural issue not dealt with more, and more explicitly, in legal decisions?

As a legal anthropologist and sociologist I put my cards on the 'hunch' that there must be much more culture in legal cases than actually transpired in official legal decisions. I decided to focus on actual legal cases in the field of family and labour law. It indeed turned out that there was much more culture than people talked about. Especially much more implicit assumptions about what immigrant minorities' culture consists of.[2] These cultural arguments and factors concerning immigrant minorities are tacitly accepted or rejected as being relevant. One might therefore say that the visible adaptation of Dutch legal culture to recent changes in society is complemented by invisible adaptations.

The legal culture of a country adapts at different levels due to changes in the cultural composition of society. When the focus is on the internal legal culture

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1 In criminal law there is considerable debate as to whether defendants have a right to a 'cultural defence', that is: to bring forward mitigating circumstances, strongly put 'my culture made me do it', in order to attract a lower sentence (Dundes-Renteln 2004). In the Netherlands there is no formal prohibition on a cultural defence. Lawyers and defendants are free to say whatever they like. Informally, however, today it is not thought very wise to do so. 'Culture' in the form of social pressure to revenge honour, for example, is likely to lead to a harsher sentence: 'That part of your culture we don't like, so the higher sentence is a signal to your community you have to stop it'. At least this is the impression of defence lawyers (Siesling 2006).

2 I partly follow up on a paper I have written with André Hoekema as a contribution to a symposion in Brussels, 2006, organized by and in celebration of Marie-Claire Foblets. That paper is entitled: 'Empirical conflict rules in Dutch cases of cultural diversity', to be published in Foblets, Gaudreault-Desbiens and Dundes Renteln (2008). I am grateful to Hoekema for allowing me to draw on our common work. My empirical research was commissioned by the Raad voor de Rechtspraak, the Dutch Council for the Judiciary.

(Friedman 1975), the legislator may change the law to allow or proscribe a specific minority cultural practice or value, or the administration may change its internal policy with regard to a certain minority custom. This article focuses, however, on the behaviour of judges when deciding multicultural legal cases. In the next section 'Context, central question and method' I will distinguish these levels of adaptation, and set out the central question and research method in order to specify the particular focus of the research. In the section 'Two empirical illustrations of Dutch judges deciding on multicultural legal cases' I will present two actual legal cases in which arguments related to the ethnic background of the parties played a role. I present my analysis and conclusions in the last section.

Context, central question and method

Context: levels of adaptation of Dutch law to multicultural society

Migration leads to the fact that every society today harbours many culturally different communities. We now not only have countries with first nations (indigenous peoples) and with national minorities, but also with immigrant communities – and some countries have all of this. In this article I focus on the communities we 'talk about' in the Netherlands these days and who are 'seen as' culturally different. 'Culture' and 'culturally different' in this sense means that they are socially constructed categories. In the routine of daily life the question is not so much whether members of ethnic minorities 'really' differ in values and social behaviour, but that it is perceived as such (Baumann 1999). This perception, of course, is not without consequences, since people also act on perceptions.

When talk in the Netherlands is about cultural differences, the talk is not about originally Dutch orthodox Protestants, but usually about Turkish and Moroccan immigrants. The Dutch Central Bureau of Statistics classifies them as 'non-western allochthonous people' because most of them fall under the definition that one of their parents was born in a non-western country. Considering that the official number of non-western citizens in the Netherlands amounts to around 1.5 million people[3], the law must inevitably deal with the question of the relevance of cultural arguments. At least three levels can be discerned: changes in the law, policy changes in standard interpretations, and court rulings. Although the focus of this article is on the third level of court rulings – actually on the behaviour of judges when deciding – it is informative to clarify what this article is not about. Naturally in the following subsections I will dwell the longest on this third level.

The first level of adaptation is the most visible because it is a change in the law itself.[4] In the Netherlands there have been some cases of a change in statute

3 Connected with Moluccan origin: 35,000, with Moroccan: 320,000, with Turkish: 360,000, with Surinamese: 330,000, with Asian: 200,000, with African: 100,000, and with Antillean and Aruban: 125,000.

4 Another visible change is the recent trend of the legal profession becoming culturally diverse. More and more practising lawyers have their background in

law. One example is the Law on Funerals, which was changed to accommodate the Islamic practice of burials without a coffin. The same is true for the ritual slaughtering of animals (Wiersinga 1997).

The second level is that of officially approved changes in the interpretation of certain legal terms. One example is that of the 'incorporation' of the Islamic 'kafala'. The Child Benefit Act entitles parents to a financial benefit for their own children they effectively raise and pay for. Adopted children and, under certain circumstances, foster children also qualify for this allowance. The Moroccan Mudawwanah, which is Islam-based codified law, does not allow for adoption but has its own legal institution, the kafala contract. The contract obliges a family to take care of children from other parents and to pay for all the expenses, but without the biological parents losing the right to custody. No official family relations must develop between a kafala child and the kafala parents (Wortmann 2006: 189-190). Kafala children, until recently, did not qualify as adopted children within the terms of the Child Benefit Act, and neither as foster children, precisely because biological parents retain custody in the case of kafala. This interpretation of the law changed around 2002, when the Social Security Bank which implements this law informally changed its policy and started to reason more substantially. The Bank started looking at whether the biological parents 'actually' did or did not interfere, and at whether the kafala parents 'in fact raised the children as their own' and did this on a 'durable' basis. Interference by the head of legal affairs of the Social Security Bank led to a codification of the policy (Vonk and Ydema-Gutjahr 2002: 357-367; SVB Beleidsregels & Algemeen Verbindende Voorschriften 2005). In other words: an informal policy of interpretation was followed by formal recognition. The law did not change, but its implementation has changed in a multicultural direction.

The third level is that of court rulings, where 'open legal concepts' or 'open-ended norms' especially attract the attention of lawyers with an interest in multicultural society. Since Wittgenstein, one could say that all words are 'open'. The meaning of words and in particular their connotation, depends on their everyday use. There is no 'definite' answer to what a certain word means. In this sense maybe only mathematical terms like 'square' and 'circle' are closed. But even these terms are open when used in ordinary life. The fact that most concepts are open is thus a truism. The same holds true for the law. Legal philosophers point out that legal words, the words used in legal clauses and legal acts, have no determinate meaning. Legal concepts and terms thus can only to a certain extent provide for legal certainty; legal practice and common interpretations take care of this for another part. Still, lawyers usually contrast 'strict provisions' with 'open legal concepts' or 'open-ended norms', usually referring to terms like 'reasonable' and 'in good faith' (Smits 2007). Especially these open concepts allow judges in actual cases to take multicultural

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Turkey or Morocco (no figures are available, maybe 150 today). The Council for the Judiciary has just appointed a 'diversity manager' in order to promote allochthonous legal professionals to opt for a career as a judge (figures: today maybe 15 allochthonous judges in all; See Böcker & De Groot-van Leeuwen 2006: 118, 121).

arguments into account, because what is 'reasonable' behaviour differs from one context and culture to another. When Max Gluckman analyzed the legal procedure of the Lozi in what is now called Zambia, he discovered that they used the concept of the 'reasonable man' to try cases (Gluckman 1955; Schreiner 1999). Of course, the content of what exactly is considered as the behaviour of a reasonable man differed at that time in Great Britain when compared to Loziland. The term 'reasonable' is culture and context-bound. The same holds true for the concept of 'equality'. Most legal systems prefer to treat like cases alike and all persons the same. What 'like' means and what 'the same' means, however, might differ from the one legal culture to the other.

Some Supreme Court cases deal with culturally different meanings of the open legal concept of 'reasonable', or with conflictingly valued circumstances meaning that the judiciary decide what is 'in the interest' of a party. For example, in 1983 the Dutch Supreme Court ruled in a case of a Dutch/Chinese employer and employee. They had quarrelled over whether there was a labour contract between them or not. In general, people are bound by a contract they have agreed upon. How does one know that they have agreed? For this a judge has to assess whether a party may reasonably have inferred from the behaviour of the other party that they agreed, which is a two-way process. The legal question in the case of the Dutch/Chinese parties was: 'Is it possible that this two-way process of reasonably inferring agreement from behaviour is different among two Dutch/Chinese people?' The lower court said 'no', the Supreme Court said 'yes'. Which means 'agreeing on a contract' in the Netherlands is culture-specific (HR 18 November 1983, NJ 1984, 345; see Nieuwenhuis 2001: 338-339).[5]

Another 'open concept' that allows for the entry of different cultural norms is the term 'irretrievable breach', which is legally the ground for divorce. This criterion is extremely liberal, because it relies entirely on self-definition. If one of the partners alleges such a breach, the breach is already a legal fact. For a long time judges, especially higher court judges, did not want to hear of any 'cultural colouring' of the concept. There was a case in which a woman of Moroccan origin (dual nationality, living in the Netherlands) did not want her Moroccan/Dutch partner to divorce her. The man wanted a divorce because he wanted to marry another woman. She said that in her culture the fact that the man enters into a second marriage does not count as a sign of an irretrievable breach of the marriage. The Supreme Court however ruled 'a court cannot dismiss a request for divorce on grounds unknown to the law'.[6] From my interviews with lawyers and judges it becomes clear, however, that today a sensibility concerning these kinds of arguments seems to be developing. Lawyers mentioned Dutch cases involving Turkish and Moroccan couples, in which

5 This may come as no surprise, since the standard legal interpretation requires taking the professional knowledge and common understanding of the parties, for example businessmen, into account.

6 NJ (Nederlandse Jurisprudentie) 2000, 452. (This is a periodical on legal decisions in civil and criminal law.)

judges stay the divorce and try mediation on the ground that they are unsure if there is an irretrievable breach.

Sometimes we can find court rulings that allow for the entry of different cultural practices even when the legal norm leaves no room for this. Such a case[7] involves an unmarried Moroccan couple where both parents had Moroccan and Dutch nationality. The mother asked the court to officially declare the man to be the father of the child (which was granted) as well as to order that their child should have the father's name. The woman alleged that the fact that her child had her name (which in these cases is the legal rule) suggested that she was not virtuous. The child therefore ran the palpable risk of being mistreated by classmates and would not be accepted by the Moroccan family. A request for such a change of name is legally admissible, provided it comes from both parents. Although the father refused, the lower court nevertheless granted the request, thereby balancing the interests of the child versus the interests of the father. The higher court ruled, however, that the legal rule had a strict character and did not leave any room for a balancing of interests. The legislator's intention being clear, the request had to be turned down.[8]

Apart from 'the clear intention of the legislator', important legal principles may stand in the way of a cultural colouring of legal norms. The Islamic institution of 'repudiation' is not accepted as part of domestic Dutch law for reasons of equality between the marriage partners as well as (other) considerations of public order.[9] The equality principle will also stand in the way of a Roma who asks the court to endorse an inheritance regime according to 'Romaniye' (Roma law) that favours male descendants. A Dutch judge decided[10]:

> A preponderant concern in these matters is the principle of equality, while the Dutch inheritance laws are rather complete and strictly formulated. The legislator has not left us with some meaningful degree of discretionary power and expressed clearly the principle that all children have to obtain equal shares, which in itself follows from the general principle of equality.

Other fundamental principles enter into the legal reasoning in, for instance, a case in which the parents of a child wanted to bar a marriage between partners-to-be who in terms of a typically Moluccan kinship system (based on 'adat') are defined as brother and sister. If the judge had upheld the argument, it would have meant a violation of the human right to marry. The same holds true for persons who want to obey the far stricter Islamic requirements of marriage, for

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7 Court of The Hague, 16 February 2005, LJN AS6769.

8 A case like this shows how delicate borderline cases are. Moreover, when there is no appeal in these kinds of cases the rulings of lower courts are binding.

9 In Dutch private international law, repudiation (in view of important changes in the foreign procedures in some countries) is now accepted more readily than before (Rutten 2005b).

10 This is a fictitious case presented to a group of judges in a round-table discussion in which I was present.

example the rule that a Muslim woman cannot marry a non-Muslim man.[11] In these kinds of cases, there is no room whatsoever to interpret or change the law to adapt to the 'new Dutch cultures'.[12]

Central question

The focus in these three levels of the adaptation of Dutch legal culture to immigrant cultural arguments concerns, one might say, the visible part of multiculturalization (or its rejection). As said in the introduction, I suspected that much more cultural arguments and factors play an implicit role on the 'invisible level' of court rulings so to speak.[13]

Not every argument or factor finds its explicit way into the actual wordings of legal decisions.[14] The central question is thus how arguments and factors that judges and other professionals involved in a legal case somehow perceive as

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11 In terms of legislation, opposition to deviant regimes is very vociferous. State legal pluralism in the sense of legally recognizing distinct legal systems is rejected. It is widely felt that a regime allowing specific religious/cultural minorities to follow their specific proper personal law, like family law, and on that basis to be recognized as married, divorced, etc. in the Dutch legal order on a par with the dominant family law should not be introduced in the Netherlands, partly for a host of practical reasons, but more fundamentally because then the state would have to define what groups qualify as religious/cultural communities which it is not the function of the secular state to determine (Van der Velden 2004). As is clear, in individual cases and within the boundaries of fundamental principles, legal pluralism is not principally rejected.

12 According to some authors the legislator may change the law in some instances. Van der Velden (2004), does not find much room for the judicial acknowledgement of distinct cultural elements in matters of marriage, divorce and the like, but advocates some legislative amendments, for example the rules for the matrimonial settlement of property (common property or separation of property, the latter being normal in the Muslim world). Why force Muslim couples to go to the notary to contract a special arrangement and not allow them a simple choice? Also in the name of the right to freedom of religion, he asks for some changes in the adoption law. The revocation of adoption is nowadays only possible between the age of 20 and 23 years (plus a judicial test). A 25-year-old adopted person, who recently converted to Islam where adoption is not permitted, should be allowed to have his earlier adoption revoked. Also Susan Rutten (2005a) says that legal institutions unknown to Dutch family law cannot enter our legal order by court decisions and refers explicitly to the kafala. As we have seen, it was the administration that allowed it to enter into Dutch law by way of a change in the standard interpretation of the law.

13 There are more invisible levels. Judges, for example, have the option of attending courses in 'Dutch Multicural Society', of which there are two each year allowing for some 30 judges. One course focuses on Turkish and Moroccan immigrants, the other on people from the Antilles and Surinam. The courses give basic historical information about the largest minority communities in the Netherlands, some very basic concepts of Islamic law are discussed, and attention is largely devoted to criminal behaviour. The availability of these courses could be seen as an 'invisible' (to the external legal culture) adaptation of the internal legal culture to a changing cultural composition of Dutch society.

14 I am not arguing that this should be the case. Court rulings have many different functions and only one of them is to provide a justification for the decision.

being related to ethnic immigrant cultures are dealt with. To answer this question I focus in detail on two cases. The two cases, apart from the legal field, differ in several respects. The family law case concerns the open legal concept of 'the interest of the child', in which there is at least the theoretical possibility that 'interest' can be viewed differently from different cultural perspectives. In this case the focus is on the judge having to deal with conflicting cultural values, while the issue of factual influence of the cultural background on the behaviour of the parties also comes to the fore. The labour law case focuses on the interpretation of evidence, in which the judge takes the Moroccan background of one of the parties into account to weigh a factor in the evidence. The labour law case focuses on the judge having to deal with culture as factually influencing the behaviour of one the parties.

Research method

The empirical research took place in 2005 and 2006. In this research I collected specific cases, which were selected after a time-consuming search of lawyers' offices and a local lower court in one of the larger cities. During 2005 more than twenty lawyers who regularly deal with legal cases with parties from ethnic minorities were extensively interviewed about their own experiences in multicultural cases. Most of them were further interviewed by telephone every month about their latest experiences. I asked specifically for actual cases (preferably not yet 'closed') with a potential for distinct cultural institutions, concepts or practices having an influence on the legal decision or on the legal process. Did the lawyers come across new cases in which they had the idea that cultural issues regarding their client might come to play a role? How did they assess that role, and in which way might culture be juridically relevant? Did they hear of cases from other lawyers that were somehow 'culture-related'? Some lawyers were willing to allow me to browse through all of the previous year's files at the office, and to be interviewed about them. Apart from lawyers' offices, cases were collected at a local court in the family section and the 'sub district' section.[15] At this latter section all the completed files covering the first half of 2005 were analyzed, and when relevant the deciding judge was contacted for an interview. All judges in the family section were interviewed in a round-table discussion, during which several cases came to the fore. The files of these cases were analyzed and the judges who delivered the decisions in these cases were extensively interviewed about the relevance of cultural issues for the decision. Several cases could be reconstructed in detail by means of an in-depth interview with the party or parties, the lawyers, the judge and other officials, and occasionally agencies like the Child Care and Protection Board. The focus on actual cases was to prevent lawyers and judges from becoming too idealistic in the interviews – the well-known problem of 'what people say they would do is not necessarily the same as what people actually do'. The focus on cases not yet 'closed' was because judges interviewed a couple of

15 A subdistrict court has a single judge who is allowed to decide inter alia on all labour law cases, and on cases in which the amount of money which the plaintiff claims does not exceed € 5,000.

months after having taken their decision, often cannot remember the precise ins and outs of the case. Now I could interview them very shortly after their ruling.

Apart from these sources, I was present at several discussion sessions with judges and prosecutors about the relevance of cultural issues. Judgments of Dutch courts are available as well, as are state of the art reviews from the last decade regarding the direction in which Dutch legal culture is heading when it comes to multiculturalization.

In the final report (Van Rossum 2007) that was written for the Dutch judiciary, I reconstruct five cases.[16] I extensively describe and analyze the cases from the different perspectives of the participants, and focus on the way 'culture' is constructed and is seen as juridically relevant (or not).[17] 'Culture' plays a role in all five cases, be it on the level of communication and interpretation or on the level of differences in norms and values. Most of the time the relevance of cultural arguments or factors remains implicit. It plays a role on the level of assumptions and unspoken value judgments. But even when they are implicit, different assumptions about 'culture' add up to and finally influence the legal decision.

Two empirical illustrations of Dutch judges deciding on multicultural legal cases

Family law – the case of Hamid

Hamid's case involves a divorce between a couple of Turkish origin, in which the contested points were the determination of custody and the place of residence of their two children (both wanted to live and raise their children in The Netherlands). Meryem, his wife, had been living in the Netherlands for quite some time, the husband Hamid was 'imported' from Turkey for the wedding. It was an arranged marriage. After six years when her second baby was born, the wife became depressed, the couple started to argue, and finally Meryem left their mutual home without the children for an unknown destination. The report by the Child Care and Protection Board stated that the wife wanted to 'integrate into Dutch culture' while the husband wanted her to 'stay true to Turkish culture'. Meryem did not show up for one and a half years, during which time the children were living with a sister of Hamid and – for over a year – with his parents in Turkey. Hamid commenced divorce proceedings, Dutch law was applicable, and he obtained the divorce in due course. Meanwhile Meryem had claimed custody over the children and wanted to have the children live permanently with her and no longer with the father. Both ex-spouses had found a new partner, Hamid a young woman from Turkey, Meryem a Dutch man of Turkish origin.

16 'Only' five cases means that this is a qualitative empirical research. I rely on Geertz (1983) when it comes to describing and analyzing the 'frames of reference' of the participants in the case, and on Garfinkel (1967) when it comes to the influence of routine like behaviour and general assumptions in social interaction.

17 The description of two of the cases has been greatly reduced for this article.

Regarding the matter of custody and other decisions to be taken, the judge postponed the decision and ordered the Child Care and Protection Board to produce a report on the situation to evaluate how best to serve 'the interests of the children', the major criterion which is decisive in these cases.[18] The Board officer wrote the report after having spoken to Hamid, and after having observed interactions between the two children and their mother and her new partner.

Legally speaking the report and advice of the Board is nothing more than it is: an advice. The judge can accept the advice, reject it, or ask for another report. In most cases judges do follow the advice.

The report said that Hamid had 'mainly looked after his own interests and had neglected the interest of his children'. According to the Board Hamid 'is not able to take on the primary task of raising his children'. The Board attributed Hamid's behaviour to his Turkish cultural background in which 'his honour was damaged'. This damage to Hamid's honour was also the reason, according to the report, for the violent threats to his wife which she accused him of (there were no police reports, however). Hamid had also once written a nasty letter to his wife after her new partner had phoned Hamid's family in Turkey and threatened that they should let the children go. Furthermore, Meryem reported to the Board's officers that she was scared. Moreover, from the behaviour of the children when they were at the Board's premises, the reporting officer 'had the feeling' that the young children did relate very well to the mother (notwithstanding that they had not seen her for years, while the youngest did not even know his mother) and that they were somehow fearful of their father. There were hardly any clear patterns to corroborate this view, especially since Hamid never personally took the children to the Board. Nevertheless, this interpretation of 'damaged honour' and consequent 'possible violent revenge' and even 'the abduction of the children' remained (and later the judge also adopted it). Hamid was apparently not able to provide enough evidence to the Board and in court to create a contrary interpretation, even though 'he behaved correctly' according to the judge.

In the end, custody over the children was awarded to Meryem and their regular place of residence was to be that of the mother. Neither the judge nor the Board's report mentioned any doubt about the mother's years of absence in relation to the children having to switch from the father's home to that of the mother.

I will now focus on the question of the meaning of the open legal concept 'in the interest of the child' when it comes to the decision on custody. While his 'taking care of the children' was not denied, the judge in my interview with her reproached Hamid for his lack of affectionate behaviour. Further, there was no reference to the possibility that in other cultures other patterns of child rearing could be common, like when an aunt or a grandmother cares for children and men go out to earn the necessary money. In the interviews the general tendency

18 The law in article 251 of Book 1 of the Dutch civil code provides legal custody to both parents after a divorce. The judge may deviate from this rule 'in the interest of the child'.

was that pedagogy had objectively sorted out what was in the interest of children. Hamid's lawyer, however, had developed a sense of cultural sensitivity and said in the interview that a pattern of raising children in an 'extended family' is 'quite common' in Turkish culture. She was convinced that Hamid in his own eyes and in the Turkish perspective had acted as a good father and she had also brought these arguments in court. Dominant however was her pragmatic argument that Hamid, because he had to go to work, could not have acted otherwise. According to the judge the interest of the children was not served by moving them back and forth between Turkey and the Netherlands and from one family to another. This amounted to 'a culture shock', said the judge, which would once again be the case if the children were placed in Hamid's household, also because the new wife was a young Turkish woman who was not a biological parent. She did not (yet) speak Dutch, but the judge said that this had no influence on her decision.

The Child Care and Protection Board

Because judges seem to be in some sort of double bind between 'doing justice in the case at hand' and the Board's report that contains 'just an advice' that in practice is 'hard to ignore or evade', I would like to pay special attention to some relational aspects. Regularly, Dutch professional authorities[19] come across children 'at serious risk'. In serious cases, the Board steps in and may order the supervision of the child without divesting parents of their custody or requiring the child to live in a foster parents' home. Usually an employee of the Youth Care Agency (Bureau Jeugdzorg) supervises the upbringing of the child by giving advice, visiting the parents, seeing the child and monitoring specific measure(s) which it suggests to the parents. Each year the Board has to report to the judge about the progress made. If the situation deteriorates, the Board may require the child to be removed from the parents' home and to be fostered.

Dealing with these children sometimes poses problems of how to deal with typical practices in Turkish or Moroccan families living in the Netherlands. Problems are sometimes framed in terms of 'culture'. Practices that professionals report in interviews concern, for example, a mentally handicapped child or a child with severe health problems.[20] The parents are sometimes reported to be 'unwilling' to accept the fact that the child has the handicap or the illness, or 'refusing' to accept treatment. This puts the child at risk. The parents instead want to send the child to their country of origin where there are supposedly really effective remedies. The Board may interpret such cases as one of a general pattern having a cultural connotation. It is 'a typical Turkish/Moroccan habit'. The Board then requires the supervision of the child and the judge has to decide on the merits of the arguments, of which some are 'culturally coloured'.

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19 Authorities like physicians, teachers, child-care agencies, specialized police branches, etc.

20 There are also cases in which other specific communities in the Netherlands refuse vaccination for a child or other treatment against some serious illnesses, like the members of a dogmatic Christian denomination. In these cases the child protection agency steps in as well, and often supervision is granted by a judge.

What meaning should be given to the parents' protests and wishes and potential decisions? The juvenile court judge can hardly be expected to know every subcultural situation or to engage in an investigation into these matters. Sometimes when parents do not protest coherently or their lawyer does not raise the specific issues while the Board does, the case is practically settled and the Board's interpretation prevails. But even in cases where a more balanced presentation of the situation is given, judges are not in a position to evaluate the 'typical cultural pattern' method of arguing. A judge is empty-handed, apart from a single optional course on 'multicultural society and law'. Whether or not specific doctors in the country of origin, or specific schools, extended family structures or specific local institutions may deal adequately with children with some specific problem, a judge cannot easily obtain and/or evaluate the knowledge in order to feel comfortable with an alternative, non-routine treatment (and accept it as a serious approach which shows the parents' full responsibility). In one of the interviews, a judge stated this as follows:

> When Moroccan or Turkish parents show no insight whatsoever into the problems and also refuse to cooperate with agencies offering help, and further deny there is even a problem, then you think, 'well, this makes no sense'. Because there will be quite a possibility that things will go wrong, and then you just rely on your discretionary powers to place the child somewhere else. Even if you know you cannot get a grip on cases like these. You don't know what's behind it all, we don't know how to find out. But in case of Dutch families, you talk, you ask, you probe for hidden conflicts, and of course we have a general idea of how such a family works. With these other cultures, we have no clues. We have no idea what the social pressure in these families is like, what social ties there are, what networks. We can't come up to the mark, because we don't know how best to intervene in a strange culture.

So, practically speaking, judges in this kind of case cannot but accept the Board's interpretation, perceive the situation as serious, and order (or prolong) the supervision. As we have seen in Hamid's case, the Board's interpretation in official reports is by and large based on the dominant Dutch culture. It would require empirical research to be able to establish the way the Board comes to define the situation of the child and its family. One research in the field of youth and criminal law was recently carried out by the anthropologist Oude Breuil (2005). She was struck by the contrast between the data from the interviews with employees of the Board, on the one hand, and the written reports she studied. In the interviews these employees often took a liberal and open stance toward taking different cultural practices into account. In the reports, however, 'culture' only came to the fore in the form of 'labels' and 'typologies' re-enforcing a static, deterministic view of cultural backgrounds. The researcher explains this result by referring to the standardised way of Board investigations and reporting, to preconceptions about 'what culture is', to jargon and to preconceived ideas of what judges expect (Oude Breuil 2005: 60-61). Because of these aspects, individual circumstances and cultural patterns specific to a family are not strongly presented. I recognise these factors in my empirical data. It means that 'labels' or 'clichés' of 'typically Turkish/Moroc-

can cultural patterns' circulate and are re-enforced in each case. One family law judge, apparently also speaking for her colleagues ('we'), specifically mentioned this issue in the interview:

> When we consider the role of the Child Care and Protection Board, we don't think they pay a lot of attention to cultural differences. They basically have a quite uniform approach, 'the Dutch way' so to speak. They are scared as hell of one notion, and that is revenge for honour. You see that quite often, like 'oh, gee! Honour!'

The Board's standard way of reporting, and quite routine use of 'the Dutch approach' while also using 'cultural clichés' together with the use of specialized language and anticipation on the perceived expectations of judges, lead to legal advices that lag behind recent cultural changes in society. Dutch judges as far as I know complain about lacking up to date knowledge, and not having enough opportunities to gather new knowledge about different cultures. Taken together this strongly points in one direction: In family law cases in which semi-legal professional organisations are involved, judges follow the Dutch dominant cultural meaning given to legal rules and concepts in the reports and advice given by these professionals.

Labour law – the case of Mohammed

In the case of Mohammed I will focus on the interpretation of evidence in order to show how cultural factors play a role at this level. The case shows how the judge almost routinely tried to take these factors into account. The substantive legal rule states that an employment contract can be annulled if 'it cannot reasonably be expected from the employer to continue the employment contract'. This rule clearly contains an open legal concept, which provides the judge with discretion to decide what is 'reasonable' in the case at hand. The rule, however, has to be interpreted in the context of a body of law that offers a high level of protection to the employee. Judges therefore do not conclude lightly against the employee. The procedural law stipulates that the assessment of evidence is up to the judge, that allegations by parties have to be proven by the respective party, and that 'facts or circumstances of common knowledge' as well as 'general rules of experience' do not need proof. Again, discretion is accorded to the judge.

Mohammed was born in Morocco some 35 years ago, had married a Moroccan wife (15 years ago) in the Netherlands, has a family of four children, and has worked at a Dutch company as a truck driver for over four years 'completely satisfactory'. One evening the police arrest Mohammed. He remains in custody for two days and is not allowed to contact anybody. Upon his arrest, however, he manages to hand over his cell phone to his nephew, telling him 'to call his employer'. That same night the nephew calls the employer to tell him what has happened. After his release, Mohammed talks with the human resources manager of the company, to whom he says that he

was 'accused falsely'.[21] Without going any further, they decide to let the case rest. Mohammed does not receive his salary for the two days he spent at the police station.

Two weeks later Mohammed is half an hour late for work. After working for an hour, he reports himself ill. That same morning the 'control doctor' visits him at his house, but Mohammed is not at home (which is contrary to the rules). The employer calls Mohammed later that day on his cell phone, and it turns out that Mohammed had moved some time before, but forgot to report it. Mohammed receives an 'official warning' from his employer.

After a few weeks in which nothing special happens, Mohammed agreed with his employer to have a three-week holiday. He wanted to visit his hometown in Morocco. Almost at the end of the holiday, Mohammed reports himself ill by telephone. He visits the CNSS, the official Moroccan organisation that deals with these kinds of issues. The doctor at the CNSS reports that Mohammed 'has to rest for three weeks because he is suffering from stomach trouble'. This report is sent to the employer by fax.

The employer sends Mohammed a formal letter to his home address in the Netherlands and asks him to supply more information regarding his illness. Mohammed does not reply. In a letter two weeks later, the employer announces the suspension of his salary. A few days later, Mohammed is back in the Netherlands. He reports to the control doctor, who declares him healthy enough to return to work. Next day Mohammed tries to work, but after half an hour he reports ill. The employer writes a letter to Mohammed that same day asking him to explain 'what is going on'. No reply is forthcoming.

More letters follow, which gradually become more ominous. One day Mohammed contacts his employer saying he has asked for a second opinion concerning his illness. The employer inquires about this with the organisation that has been contacted for this second opinion. They know nothing about it. Thereupon the employer initiates court proceedings in order to have Mohammed's contract annulled. The court dismisses the employer's request. Mohammed (gradually, because of his illness) goes back to work.

Many issues in this case ask for interpretation, some possibly connected with Mohammed's cultural background. Central, however, is the 'common sense notion' of both the judge and Mohammed's legal aid officer[22] that becoming ill on one of the last days of a holiday 'is typically Moroccan'. The judge, for example, said in the interview that Mohammed's case was one of several she saw every autumn: 'It begins with problems at work – then a holiday in Morocco – then reporting ill from Morocco – then the question of whether you can trust official documents from Morocco – then not showing up at work once they're back – it's standard, this whole thing. We see that

21 Nobody else but Mohammed and his family knew what had actually happened. His employer knew that there were 'family related problems'. I only learned afterwards from Mohammed what had actually happened.

22 She worked at one of the labour unions. These legal aid officers may help members of the union on several law related problems, one of which is legal aid in court even though these officers are not appointed lawyers.

regularly'. The legal aid officer confirmed this view in my interview with her. In court she argued very plainly, while trying to make the facts seem less important. The judge followed her example. Against the common sense notion of a 'typically Moroccan report of illness', the judge had to determine the merits of the facts of the case at hand, which pretty much came down to establishing Mohammed's 'trustworthiness'. How did she do that? Did she take into account Mohammed's cultural background, and in what sense? The official verdict (of course) does not say anything on this issue. The verdict merely says that 'all circumstances considered' the employer's request has to be dismissed.

From the interview with the judge it is clear that 'details taken together' led to her interpretation of Mohammed as a man 'to be trusted' and thus to turning down the employer's interpretation of the facts. The judge described this as 'a package' in which the weight of separate factors and interests cannot be singled out. First, there is his arrest, at which moment, the judge says, 'Mohammed thought of his job' because of the instructions to his nephew to call the company. Second, there is the omission of reporting his change of address, about which the judge says that she understood 'there was some family trouble' which probably led to disorientation 'for a man of Moroccan descent like Mohammed, for whom family and honour are of much greater importance than for Dutch people'. Third, there is the issue of Mohammed not reacting to letters from his employer, which in the eyes of the judge is understandable 'because at the court session it became clear that the routine was to just call someone on his cell phone'. Fourth, there is the question of whether Mohammed really did ask for a second opinion. If he did, he might legally still consider himself 'ill'; if he did not, he should have gone back to work. The problem of course was that the form with which Mohammed had asked for the second opinion could not be found at the organisation. During the court session Mohammed replied to the judge's questions concerning this issue, in which he, according to the judge, made the gestures of writing and putting a stamp on the envelope. Moreover, the judge said, Mohammed came across as a 'beaten man' in the courtroom. This led to her interpretation that 'he really did ask for a second opinion'.

Analysis

In Hamid's case affective harmony, radiating from a biological parent who is permanently available in a steady household, is apparently used as the criterion for the decision on custody and in which household the children should be placed.[23] These elements were thought to be better guaranteed by Meryem's new household (with her new partner), rather than by Hamid who at least in the past had not shown that he could provide them. This criterion in my opinion consists of preconceptions that have excluded the possibility of Hamid giving

23 The primary and most important decisive factor to determine 'the interest of the child' is 'continuity', which comes down to the rule 'if the children are okay, then don't change the household they are living in'. In Hamid's case, however, there was doubt about the children being 'okay', which opened the door to a possible change of household.

his meaning to the open legal concept of 'the interest of the child'. Hamid's lawyer was not very clear and straightforward in her argument that Hamid had acted in the interest of his children as well – only seen through the perspective of his Turkish cultural background. But even if she would have been clear and straightforward, I believe it wouldn't have helped Hamid. The dominant view on raising children was in the report of a professional organization, so this would be hard to circumvent or question, both for Hamid and his lawyer as well as for the judge. But if the lawyer had been very straight, this would at least have meant that the judge should have had to be explicit about her assumptions. This does not mean that her decision should have been otherwise, only that it could have been argued more explicitly.

The same goes for the issue of the 'culture shock'. The judge was of the opinion that moving the children between Turkey and the Netherlands amounted to a culture shock. This assessment is problematic for several reasons. The most important is that nobody knew what the social and economic situation of Hamid's parents in Turkey was. Were they rich or poor people? Educated or not? Living in the city or not? The answers to these kinds of questions make a difference. Second is that nobody knew what the social conditions of Hamid living in the Netherlands were. What kind of life did he lead, who were his friends, what sort of newspapers did he read, which television channels did he watch regularly? If Hamid was leading 'a Turkish way of life' while living in the Netherlands and his parents were doing the same in Turkey, should one then speak of a culture shock? The problem is that nobody could even have guessed the answers to the questions; in fact nobody asked them. Further, underlying the assessment of a culture shock is the culturally coloured assumption that 'steadiness' is a normal and desirable state of living. A biological parent preferably being permanently available for the children backs this assumption (gaining weight by means of article 7 of the Convention of the Rights of the Child). Last but not least I would argue that the judge reproaching Hamid for a lack of 'affectionate behaviour' towards his children, forgets that gender roles differ between cultures. To make this assessment, one would at least need to know more about what is normally expected of fathers like Hamid. Again, I am not arguing that the decision to award custody to Meryem was wrong, but that the decision was based at least partly on implicit assumptions. Being aware of these assumptions could make a better-argued decision. Put strongly, I would say that the unquestioned and internalized common sense meaning among the officers of the Board and subsequently the judge effectively prevented the adaptation – multiculturalization or an explicit rejection of a cultural colouring of the open legal concept 'the interest of the child' – of the Dutch internal legal culture to the external legal culture.[24]

From Mohammed's case I infer a way of legal reasoning that is quite different from that in Hamid's case. In Mohammed's case the judge without hesitation asserted that his Moroccan background played a role, while in Hamid's case this seemed to be much more restricted. To assess this difference we have

24 See Friedman 1975. Actually I should refer to 'external legal cultures' because of some differing orientations toward the law among dominant and minority groups.

to take into account that in Hamid's case a cultural value was at stake (how best to raise a child), while in Mohammed's case (and also in Hamid's case) the focus was on the judge interpreting culture as factually influencing Mohammed's (and Hamid's) behaviour (family and honour influencing his psychological stability because of him being Moroccan; honour in Hamid's case possibly leading to violence and influencing his behaviour towards Meryem). Judges are probably more willing to accept 'culture as fact' as compared to 'culture as value'.

A second factor that might explain the difference between the two cases is the position of a weaker party. Dutch labour law in general protects the weak as against the stronger, which is the employee as against the employer. Since 'culture' is more often 'that what employees have', decisions taken could maybe generally be in favour of the allochthonous employee. In Hamid's case, the children could be viewed as the weaker parties in need of protection. The values concerning child-rearing dominant in Dutch society are concerned with guarding the welfare of the child. There is even a professional organization like the Child Care and Protection Board to investigate and guard the interest of children. Their protection apparently requires the application of dominant, not of minority values.

A third factor accounting for the difference between Mohammed's and Hamid's case is that labour law judges are much freer to assess the relevant circumstances of the case at hand, and have much more leeway to take the values and practices of different cultural communities into account. In family law and in case the Child Care and Protection Board reports, their advice practically restricts the freedom of the judge.

Like in Hamid's case, assumptions of the judge eventually build up to the court decision in Mohammed's case. The assumption that for Mohammed family problems impacted harder for example is not supported by facts, and his lawyer did not even hint at it during the court session. How should a judge know in general that among Moroccans this is the case, and how could she know in Mohammed's case? Nobody asked him, and nobody asked what kind of problems he had with his family. The same goes for his 'Moroccan honour'. Why would his honour, in combination with family problems, lead to his forgetting a notice to his employer that he moved? And why did Mohammed in court come across as 'beaten'? Because of the way he sat in his chair? Judges should be careful about these interpretations (Van Rossum 1998).

Compared to ordinary cases, the cases of Hamid and of Mohammed are not very exceptional. Ex-spouses often quarrel over the interest of their children. New is only the possible 'cultural component' of the case. Not only people with a different education, social background, and income may differ over how to raise their children, but also people with a different cultural background. Employer and employee have always differed in court cases whether their contract should be terminated, but today a judge also has to assess a cultural perspective on the facts that 'as a package' should or should not allow for a termination of a contract.

Conclusion

The idea of cultural diversity making its way into Dutch law by means of open legal concepts or open ended norms is appealing at first sight (see section 'Context'), but has to be nuanced. When the law makes use of open legal concepts like 'reasonable' and 'in the interest of X', we may start out with the expectation of the entry into the law of values and practices of distinct cultures. This entry however depends on factors and circumstances like the nature of the specific legal complex (protective towards weaker parties or not), the wish for legal certainty, the interests of third parties, the stereotypes of judges, and the 'interference' of extrajudicial organizations. Further, a tendency towards stereotyped reasoning and producing standard decisions sneaks in the moment judges adhere to the notion that establishing the meaning of open-ended norms is 'a matter of fact'. The circumstances that fill in 'the interest of the child' may be perceived as 'just facts' that 'everybody know', and by the way are 'scientifically proven'. Nowadays, multicultural society makes clear that even these 'facts' are a culture-specific matter of choice.

The basic argument of this contribution is that judges should be aware that even if there is wide agreement in society about what the law entails, people differ culturally in their value attached to common sense notions related to law. I am not arguing that arguments related to minority cultural values and practices, when put forward, should always be accepted. I would say however that when legal professionals are aware of the possibility of there being different cultural values at stake, there is a duty to investigate and to explicitly accept or reject these values. In other words, when the cultural values underlying the law become apparent, there is the duty to adapt: To adjust the law and make room, or to reject different value perspectives and to defend the prevalent ones.

When a legal culture adjusts to new social situations, the words of the law often do not change because they are flexible enough to adapt to and cover new social circumstances (Rosen 2006: 92-93). Legally speaking, this process is not interesting, because 'the law' does not change. Yet sociologically law does change, because social practice and circumstances to which the words of the law refer and reflect do adapt to new circumstances. In both Hamid's case and Mohammed's case none of the judicial reasoning in regard to cultural arguments or factors ended up in the wordings of the court rulings. Their cases did not change Dutch law, but they did change Dutch legal culture.

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