CHAPTER FOUR

DUTCH NATIONALITY AND IMMIGRATION LAW IN A NEW NORMATIVE ORDER: 1990-2000

By 1990 the Dutch economy was on its way towards recovery, and unemployment rates dropped to 6%.[1] However, while ethnic minorities benefited to some extent, their rate of unemployment remained high, averaging 18%.[2] Since the number of families with a single earner and numerous children was higher among ethnic minority families (particularly of Turkish and Moroccan origin) than among the rest of the population,[3] in their case a single salary often had to support more people than in others. Hence many ethnic minority families, although not dependent of social benefits, none the less lived in relative poverty. Moreover, consistent with a general trend towards the geographical segregation of rich and poor, the ethnic minority population had become quite concentrated. More than 40% lived in the four major cities, particularly in the neighbourhoods with low-cost social housing.[4] While there had been a drop in immigration rates in the mid 1980's, by 1990 there was a sharp new increase.[5]

The continuing high rate of immigration was seen as an important contributing factor towards the relatively disadvantaged position of ethnic minorities in the Netherlands.[6] The growth in the number of asylum seekers, in particular, gave cause for considerable political debate.[7] While the

[1] CBS Statline (www.cbs.nl/statline), searchterm '*Geregistreerde werkloosheid*'.
[2] Stichting van de Arbeid 1998. The quoted figures are based on CBS-Enquête beroepsbevolking 1997, tabel 3A
[3] Hooghiemstra & Niphuis Nell 1995 p. 355.
[4] Mulder 1993, p. 9-12.
[5] WRR 2001, p. 49.
[6] Speech Prime Minister Lubbers, *Handelingen II*, 1992/93, 9-483.
[7] In 1980 less than 1,000 asked for asylum in the Netherlands. By 1990 this number had increased to more than 21,000, and in subsequent years it would increase even more, peaking at more than 52,000 in 1994, WRR 2001, p. 59.

undiminished incidence of family migration formed cause for concern, the initial assumption continued to be that this would decrease as the second generation reached maturity.[8]

Many of the initial changes introduced in Dutch immigration law during the 1990's were motivated by a desire to increase control over asylum seekers. In 1994 immigration law procedure in the Netherlands was radically changed, partly in the context of a broader reform of Dutch administrative law, but also with the intention of diminishing the backlog that was building up in asylum law cases. One of the major changes effected was the elimination of appeal before the Administrative Jurisdiction Division of the Dutch Council of State. From 1994 onwards, the Administrative Chamber of the Regional Court of The Hague was to be the adjudicator in first and last instance in all immigration and asylum law cases.

Because the case load in immigration and asylum law was far too large for one Regional Court, the jurisdiction of the Regional Court of The Hague was divided over the Immigration Law Chambers of five regional courts: Amsterdam, Harlem, Zwolle, Den Bosch and The Hague. In order to ensure some degree of uniformity in their case law, these five Regional Courts established a unique institution, an ad hoc court involving judges from all five Regional Courts, and presided over by a member of the Regional Court of The Hague. This court was to decide on controversial cases selected ahead of time by the five Regional Courts. The hope was that it would provide decisive judgements on issues that might otherwise cause divergence. The name that was given to this improvised institution was the Rechtseenheidskamer (REK literally: chamber for legal unity). It was to continue to function as unofficial court of last instance until the Administrative Jurisdiction Division of the Dutch Council of State was re-instated in 2001 as highest court of appeal in immigration law cases.[9]

At the same time, more than had been the case in preceding years, immigration policies came to be seen as an integral element of integration policies. This can be partly explained by the growth in the number of immigrants applying for admission. But there was also a growing tendency to see ethnic minority cultures as threatening Dutch culture which was increasingly being conceived of as an identifiable and coherent whole, very different from the cacophony of contested norms resonating throughout the 1970's and 1980's. In the course of the 1990's, the regulation of

[8] CBS 1992.
[9] For a detailed history of this unique chapter in the history of Dutch jurisprudence, see Terlouw 2003.

immigration to the Netherlands came to be related more and more to issues of integration and to the re-determination of what it meant to be a citizen of the Netherlands.

Multiculturalism Under Attack

While the Policy Paper on Ethnic Minorities of 1983 had typified Dutch society as geographically contained but normatively pluralist, the national image projected in policy documents of the 1990's was that of an indigenous core (the "autochthons"), distinct from but in open connection with the rest of the world. Although no clear description was given of the nation's core, the implicit suggestion was that it was not pluralist but homogenous, characterised by a single specific normative order, marked by an official stamp of approval. In this new perception, the fabric of the nation was unravelling at the borders. Part of it was being picked up and woven into that of a globalising world of travel, trade and transnational transactions. Another part, however, threatened to disintegrate under the pressure of persons seen as alien to the national core: radicalised subjects, maladjusted minorities, juvenile delinquents, non-acclimatised newcomers, and clandestine intruders.

If persons perceived of as alien had, to varying degrees, passed through the nation's borders, due to external attributes, normative deviance and/or legal status, they remained in a state of normative quarantine. They could not (yet) be absorbed into the nation's core. Although the policy documents of the 1990's distinguished race, culture, behaviour and legal status as separate issues, they also suggested that delinquency, cultural maladjustment, clandestine residence and racial/ethnic tensions were all related in that each formed an obstruction to fully-fledged citizenship, be it substantively and/or formally defined. This suggestion was reinforced by the fact that the terms "newcomers", "ethnic minorities", "migrants" and "outsiders (allochtonen[10])" were used alternatively and indiscriminately.

The first initiative in this new direction was taken by the WRR, which brought out a new report in 1989 on Dutch immigration policies.[11] The

[10] To my knowledge, there is no exact English translation of this term. For lack of a better alternative, I shall use the terms "foreigner" or "outsider", however neither is really correct since an "allochtoon" can be a Dutch national and is in any case resident in the Netherlands. The official definition of an "allochtoon" is anyone with at least one parent born outside of the Netherlands. The term thus includes people originating from the Dutch Antilles (who in formal terms have full Dutch citizenship), Dutch people with dual citizenship and naturalised foreigners.

[11] WRR 1989.

Dutch cabinet, still under the leadership of the Christian Democrat Lubbers, had asked for an evaluation of its integration policies, following political debates regarding the increasingly marginal position of ethnic minorities within Dutch society. Reported increases in crime among the younger generation formed a particular source of public concern.[12]

In its report the WRR cast a critical eye over a number of the underlying assumptions behind the ethnic minorities policies of the 1980's. It concluded that immigration should no longer be viewed as a temporary phenomenon. Policies should be based on the assumption that immigration had become a structural phenomenon.[13] A second major conclusion was that the existing minorities policies, premised as they were on the cultural rights of specific minorities had, in fact, acted as an obstacle to those minorities' successful integration into the mainstream of Dutch society.

On the basis of its observations, the WRR advised a shift in assumptions and priorities. The government should no longer spend its money and energy on actively maintaining the cultural identity of the specific minority groups that it had targeted in 1983, but should instead concentrate on encouraging all new arrivals and any other culturally divergent individuals to participate more fully in Dutch society.[14] Concretely, this meant teaching them Dutch, offering them possibilities to improve their general level of education and actively engaging them in paid labour. Instead of targeting "cultural minorities", the government should focus on "outsiders": all those individuals who were not (yet) able to fully participate in Dutch society, either as a result of racial tensions, because of their own cultural deficiencies, or through a combination of both.[15]

In its initial response to the WRR report, the Dutch cabinet rejected this new definition of the target group of integration policies. Referring to its historical obligations toward the groups listed in the Minorities Paper of 1983, it maintained that policies should continue to privilege these groups.[16] However, political developments would soon force a change of perspective.

[12] Mulder 1993, p. 7.
[13] WRR 1989, p. 9-10.
[14] Ibid. p. 23.
[15] Ibid. p. 10.
[16] Ibid. p. 9.

In September 1991, Frits Bolkestein, leader of the liberal VVD,[17] gave a speech in Lucerne at an international meeting of Liberal politicians. In his talk he stated that Islam formed a threat to European civilisation, and that it impeded the integration of immigrants into Western European societies. An extended version of his talk was subsequently published in the Dutch daily *De Volkskrant*[18] (12 September 1991), setting off a heated national debate concerning the pros and cons of multiculturalism.

In 1994 a socialist-liberal coalition came into power, the first coalition since the First World War not to include a confessional party. Initially the CDA, as opposition party, continued to champion multiculturalism, while the liberal VVD party in particular pressed for more state control over immigrant children's upbringing. Among other things the VVD pressed for measures to prevent immigrant parents from sending their children to school in their countries of origin, and for more restrictions on family reunification.[19]

By 2000, the confessional parties had also embraced the position that the Judeo-Christian tradition shaped the dominant norms of Dutch society and that immigrants and ethnic minorities should orient themselves towards that tradition.[20] Among other things, they warned against fundamentalism in Islamic schools.[21] Members of the Dutch Labour Party displayed an increasingly critical attitude towards multiculturalism as well. In January 2000, the political scientist and member of the Dutch Labour party, Paul Scheffer, published his article "The Multicultural Drama" in which he picked up on the same themes that had been addressed by Frits Bolkestein nine years before.[22]

Scheffer expressed his concerns regarding the failed integration of ethnic minorities into Dutch society. In his view, too little attention had been paid to educating immigrants in the Dutch language and in Dutch cultural values. As a result, Dutch society had become divided between the

[17] Other than its name (Volkspartij voor Vrijheid en Democratie: Popular Party for Freedom and Democracy) implies, the VVD lies right of centre on the Dutch political spectrum and includes a strong nationalist contingent that found its spokesman in Bolkenstein and, ten years later, in Rita Verdonk, the Minister for Immigration and Integration Affairs under the second and third Balkenende cabinets.

[18] Bolkestein 1991.

[19] Parlementaire behandeling Jaaroverzicht integratiebeleid 1998. *Kamerstukken II* 1997-98, 25 6000 VII en 25 601, nr. 26.

[20] *Handelingen II* 1999/00, 4700-4728; 4371-4761; 4763-4792.

[21] *Kamerstukken II* 1998/99, 26200, nr. 44, chapter VII; *Kamerstukken II* 1998/99, 26333, nr. 9.

[22] Scheffer 2000.

socially successful "autochthons" (i.e. natives) and the socially disadvantaged "outsiders" (or, in Dutch: allochtonen[23]). This division was in itself a threat to social cohesion in the Netherlands. Equally troubling, in Scheffer's view, was the threat that foreign values (and particularly Islamic mores) posed to what he saw as "traditional Dutch values".[24]

Judging from the response to his article, Scheffer hit some sensitive nerves. Particularly the fear for the cultural integrity of Dutch society resonated in many of the letters to the editor that were published in reaction to his piece. On the whole, Islamic family values, perceived of as being hierarchical and explicitly discriminatory towards women and homosexuals, were repeatedly named as a major threat to liberal Dutch values, which by then were being claimed as part of the Christian tradition.[25] The CDA warned against the danger of fundamentalism in Islamic schools and a couple of motions were passed by Dutch parliament condemning homophobic tendencies among ethnic minorities.[26]

Significantly, by the end of the twentieth century, official publications were distinguishing between "western" and "non-western" outsiders.[27] The latter, typically originating from Third-World countries–and particularly from Islamic ones–were generally assumed to experience (and cause) the most problems in terms of integration. By contrast, Dutch culture in particular and "western culture" in general, was being depicted as exemplary of the liberal and secular norms that had come to 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, were being depicted–again according to a selective caricature–as religiously inspired, patriarchal and violent. Frequently cited examples of deviant non-western norms were: arranged marriages, codes of shame and honour, double standards regarding the sexuality of men and women, homophobia,

[23] See note 692, above, for an explanation of the meaning of this term.

[24] Scheffer's article was published in the *NRC Handelsblad* on 29 January 2000. In a second article, published in the same newspaper on 25 March 2000, he summarised the reactions to his piece, and formulated a response.

[25] See for example: Brugman 1998, Cliteur 1999, Schnabel 2000, Prins 2000.

[26] *Kamerstukken II* 1996/97, 25001, nr. 11; *Kamerstukken II* 1996/97, 25001, nr. 25; *Kamerstukken II* 2000/01, 27412, nr. 2.

[27] CBS 2001. The distinction between western and non-western allochthons was introduced around 2000. "Non-western" allochtons included all persons with at least one parent born in Africa or Asia (with the notable exceptions of Japan and Indonesia), Latin America and Turkey.

an overly lenient attitude towards the upbringing of young boys and an overly restrictive attitude towards the upbringing of young girls.[28]

In 2000, the same year that Scheffer published his article rejecting multiculturalism as a legitimate foundation for integration policies, the Dutch Minister for Urban Issues and Integration Policies under the Dutch Labour Party Prime Minister Kok, Van Boxtel, indicated that admission policies would henceforth become more linked to integration policies.[29] A year later, the WRR was to bring out its third report on immigration and integration in the Netherlands. In this report it would draw attention to the fact that second generation immigrants showed a tendency to marry partners originating from their parents' countries of origin. As a result, new contingents of first generation immigrants were becoming involved in the upbringing of subsequent generations. The WRR expressed its concern that this would retard the integration process. While in 1989 the WRR had still been of the opinion that family reunification was beneficial to immigrants' integration into Dutch society,[30] by the end of the century it was clearly suggesting that family migration was actually undermining the integration process.[31]

Thus it can be seen how, in the course of the 1990's, controlling immigration came to be about more than just controlling numbers. Increasingly, it became a means for controlling behaviour, social dynamics and political perceptions. While a distinction can still be made between the two policy fields, they did come to overlap in their perception of certain categories of transnational families as a potential threat to social cohesion in the Netherlands. In the rest of this chapter, the merging of these two fields of regulation will be reviewed twice: first by reviewing how restrictions on family migration came to form part of integration policy, and then by reviewing how integration issues came to form part of family migration policy.

A: New Lessons in Citizenship

In the course of the 1990's, first under the Christian Democrat Lubbers and subsequently under the Purple (i.e. labour/liberal) cabinets led by Kok, successive policy papers came to reflect the political shift from promoting

[28] See for example: Saharso 2002, p. 41-56. Römkens 2002, p. 29-40, Prins 2000, p. 37-44.
[29] *Kamerstukken II* 2000/01, 27412 nr. 2 p. 5; 12.
[30] WRR 2001, p. 27.
[31] Ibid. p. 148-149; 225.

multiculturalism to monitoring integration. Although the cultural freedoms of minorities were to be respected, the Dutch government no longer saw it as its task to actively support them in maintaining their cultural identities. Instead, combating social marginalisation became the main policy objective.[32] The provision of courses in minority languages and cultures, for example, was no longer seen as a national responsibility, but was left to the municipalities.[33] Similarly, categorical welfare services targeting specific minorities were no longer deemed to be appropriate. Specific measures would be taken to integrate new arrivals, but issues relating to housing, education, health care or work were now to be dealt with in a general and not in a group specific fashion.[34] The term "minority policies" came to be replaced by "integration policies".[35]

While still accepting the principle of cultural pluralism and religious freedom, the last Lubbers cabinet already took the position that everyone residing in the Netherlands should adhere to a number of principles presented as the benchmarks of a shared normative order in the Netherlands: rule of law, freedom of speech, individual freedom, equality between the sexes, separation of Church and State.[36] As long as they adhered to this shared normative order, all individuals were free to give expression to a specific culture, but in their own time and for their own account.[37] NGO's grounded in the specific cultural communities targeted by the former minorities policy consequently lost their claim to government subsidy. They were replaced by a single national organisation of professionals specialised in the fields of immigration and integration.[38]

In the context of these new integration policies, a number of pilot projects offering Dutch language and social orientation programmes was set up and subsequently introduced throughout the country. To some degree, the relatively high level of unemployment among ethnic minorities had been traced back to a lack of language skills. In 1992 it was reported that more than 11,000 people were still on the waiting list for adult education–80% of whom was of foreign origin.[39] The new projects were partly meant to alleviate this problem. At the same time they were also

[32] Mulder 1993, p.8.
[33] Nota Sociale Vernieuwing, *Kamerstukken II* 1990/91, 21 455, nr. 4.
[34] Integratiebeleid etnische minderheden, *Kamerstukken II* 1993/94, 23 684, nr. 2, p. 22; 46.
[35] Ibid.
[36] Ibid. p. 24-25.
[37] Ibid. p. 46.
[38] Ministerie van WVC 1994.
[39] *Kamerstukken II* 1991-1992, 22 656, nr.1: Bijlage.

intended to initiate newcomers into certain basic aspects of life in the Netherlands. Increasingly, these courses were also meant to instruct newcomers and ethnic minorities in a normative catechism for citizenship in the Netherlands.[40]

Under the leadership of Kok, the theme of secular individualism as the new national identity was further developed. Those belonging to cultural minorities were expected to start behaving less like members of an ethnic group and more like responsible individuals and loyal citizens.[41] In 1998 a new law was implemented providing for compulsory language and social orientation courses for newly arrived immigrants. Anyone coming to settle in the Netherlands–including Dutch nationals–would henceforth be subjected to a "citizenship test". Those who failed to pass would be required to take part in the new integration programmes. Fines could be imposed on those who failed to comply.[42]

Significantly, certain categories of foreigners were made exempt from these integration requirements, namely those whose presence in the Netherlands served (international) economic interests: labour migrants granted a work permit at the request of their employer; foreign consumers of services in the Netherlands–particularly in the fields of medicine and education–and EU citizens making use of their right to freedom of movement.[43]

In 1999, the newly implemented integration programme for newcomers and settled members of ethnic minorities was evaluated. When it appeared that barely half of those who were required to participate had actually done so, suggestions were made for more forceful measures. The CDA suggested that people should be required to start with integration programmes in their country of origin and that sanctions should be taken against those who failed to pass their tests at the end of the programmes, and not just against those who failed to participate. Members of the liberal democratic party D-66 suggested that immigrants be denied permanent residence status until they succeeded in passing their citizenship tests.[44]

[40] Integratiebeleid etnische minderheden, *Kamerstukken II* 1993/94, 23 684, nr. 2, p.25.
[41] Rapportage Integratiebeleid Etnische Minderheden 1999, *Kamerstukken II* 1999/00, 26815, nrs. 1-2, p. 12.
[42] Article 12 in conjuction with 18 Wet Inburgering Nieuwkomers, *Stb.* 1998, 261.
[43] Article 1 Wet Inburgering Nieuwkomers, *Stb.* 1998, 261
[44] *Handelingen II* 1999/00 4700-4728; 4371-4761- 4763-4792.

Individual Responsibility

The stated aim of the newly instigated integration programmes was to ensure that everyone permanently resident in the Netherlands would be able to look after his or her own interests. Consistent with the ideas already presented in 1990 in the Policy Paper on Social Renewal[45] (already discussed in Chapter One), resolving the poverty issues of immigrants and ethnic minorities was no longer seen as a public responsibility, but as an individual one. Like the disadvantaged generally, newcomers and settled immigrants too were expected to take on "their personal and social responsibilities" and to "develop themselves into informed and articulate citizens, capable of fending for themselves within a competitive Dutch society".[46] Soon after the new law on integrating newcomers had been implemented in 1998, the Dutch cabinet announced its intention to increase the scope of compulsory integration programmes to include all unemployed immigrants and ethnic minorities, and not just new arrivals.[47]

In concrete terms, the concept of individual responsibility meant being willing and able to participate in paid labour. The subsidised work programmes introduced as part of the "Social Renewal" policies of the early 1990's largely targeted the unemployed among the immigrant and ethnic minority populations.[48] Unfortunately, the subsidised work programmes as a whole did not have the desired effect of integrating the unemployed into the mainstream of the Dutch labour market, let alone the programmes targeting ethnic minorities.[49] In fact, processes of de-skilling and casualisation were creating a growing rift between workers with a regular full-time job and those on part-time, temporary and incidental contracts.[50] Subsidised "welfare-to-work" programmes did little to

[45] Nota Sociale vernieuwing, *Kamerstukken II* 1989/90, 21455, nr. 4.
[46] Integratiebeleid Etnische minderheden, *Kamerstukken II* 1993/94, 23684, nr. 2, p. 24.
[47] NRC webpage 21-07-1998: www.nrc.nl/wz/Nieuws/1998/07/21/Vp/VI.html#1.
[48] Nota Sociale vernieuwing, *Kamerstukken II* 1989/90, 21455, nr. 4, p. 14-15.
[49] An evaluation of the policies, presented to the Dutch parliament, indicated that 42% of the employers in the Netherlands were unaware of agreements to reintegrate long-term unemployed (ethnic minority) workers; of the 63% that was aware of the agreements, only 3% had taken positive action. 7% were passively receptive to the agreements; 90% did nothing at all.. None the less, appeals from the left to introduce contract compliance were rejected once again, *Kamerstukken II* 1990/91, 21 943, nr. 1.
[50] De Gier et al. 1991, p. 69-77.

counteract this tendency towards further polarisation. On the contrary, they simply initiated a new category of dead-end jobs.

Some measures were taken to encourage employers to take on more employees from the ethnic minorities and to offer them regular full-time jobs. The most important of these was the establishment of an equal opportunities tribunal that could bring out (non-binding) decisions regarding individual complaints against discriminatory practices.[51] But for the rest, neither the right-wing coalitions under Lubbers nor the more progressive ones under Kok did any more than appeal to the conscience and civic responsibility of employers. Repeated evaluations revealed that such measures had little or no effect. Suggestions, made by left-wing parties, to introduce more forceful measures such as contract compliance were consistently dismissed as unrealistic.[52] The government's response was that employers wouldn't easily accept such incursions upon their freedom, while employees might experience such forms of positive action as stigmatising. Even the publication of a critical report by the Internaional Labour Organisation (ILO) on discrimination on the Dutch labour market[53]could not move the Kok cabinet to take more assertive measures.[54] This circumspect treatment of employers in the Netherlands was in sharp contrast with the growing pressure being exerted upon the ethnic minorities to better equip themselves to meet the needs of the Dutch labour market.

Immigrant Children as Future Citizens

Already under Lubbers, the Dutch government proved more assertive in tackling the growing gap in performance between more and less advantaged children within the Dutch school system. Schools with a high percentage of children from ethnic minorities were granted extra funds so that they could invest in smaller classes and provide extra language instruction.[55] Special pre-school programmes were developed for disadvantaged children and extra facilities were provided so that children could be accommodated before and after school hours. Although such programmes were not exclusively intended for immigrant and ethnic minority children, these did form an important target group.

[51] Algemene Wet Gelijke Behandeling, *Stb.* 1994, 230.
[52] *Kamerstukken II* 1990/91, 21 943, nr. 1; *Kamerstukken II 1994*/95, 23 901, nr. 2, *Kamerstukken II 1994*/95, 23 901, nr. 6; *Kamerstukken II* 1995/96, 24 401, nr. 15.
[53] Bovenkerk et al. 1995.
[54] *Kamerstukken II* 1995/96, 23 901, nr. 24.
[55] Ministerie van WVC 1994; See also: Verwey-Jonker Instituut 2003, p. 48.

This concern for the education of immigrant and ethnic minority children was not only motivated by the desire to improve their chances within the Dutch school system. Certainly as important was the concern that they should be brought up to become responsible members of Dutch society. Particularly under the Purple Coalitions led by Kok, educational programmes like those described above came to be associated with crime prevention schemes. In 1997, following the publication of a report on the involvement of ethnic minorities in internationally organised drug trafficking, Kok's cabinet launched an integral crime prevention scheme: Crime Related to Ethnic Minorities (CRIEM).[56] Given the nature of the report that had led to this initiative, one might expect it to address issues related to the control of international trade and financial transactions. Instead, the plans that were presented dealt with juvenile delinquency, truancy and the involvement of non Dutch speaking parents in their children's (pre)school education. Explicitly, juvenile delinquency among ethnic minorities was associated with the immigrant background of the young offenders' parents:

> "While the causes of the relatively high level of criminal behaviour among ethnic minorities can partly be explained by "classical" crime causing factors such as social-economic position, age and living conditions, such explanations alone cannot suffice. They cannot account for the high incidence of criminal behaviour, nor for the differences distinguishing the various ethnic groups. Further explanatory causes must be sought in the socio-cultural background of minority groups and the resulting integration and acculturation problems that these groups experience: norms and values originating from the socio-cultural situation in the mother country, regarding children's upbringing for example, are not always suited to Dutch society." (my translation SvW)[57]

In 1999, in the context of this crime prevention scheme, the Kok cabinet further announced its plans to increase the number of subsidised childcare places available in the Netherlands by 71,000.[58] National subsidised childcare had finally made it back onto the political agenda–not to facilitate women's involvement in paid labour, but to increase state control over the upbringing of immigrant and minority children.

[56] Criminaliteitspreventie in Relatie tot Etnische Minderheden, *Kamerstukken II* 1997/98, 25 726, nr. 1.
[57] Ibid. p. 19-20.
[58] Tussenstand "kansen krijgen, kansen pakken", *Kamerstukken II 1999/00,* 27083, nr. (bijlage).

By then, the Purple Coalition had also announced its intention to extend the compulsory integration programmes to include all settled immigrant and ethnic minority parents directly involved in the upbringing of children.[59] While multiculturalism was being relegated to the private lives of immigrants and ethnic minorities, those private lives were, at the same time, being brought into the ambit of a normative sphere associated with citizenship and public virtue and hence subject to state supervision.

Thus we see how a singe state-determined model of citizenship came to replace normative pluralism as the leading concept for Dutch integration policies. While the minorities policy of the 1980's had been largely about protecting cultural minorities against the majority of the population, the new integration policies were largely about protecting the dominant majority against specific minorities defined as suspect on the basis of legal status, cultural attributes and/or involvement in racist tensions.

Dangerous Liaisons

In 1992, still under the regime of the Christian Democrat Lubbers, a first comprehensive study on family migration to the Netherlands was published, at the initiative of the Ministry of Justice.[60] On the basis of the conducted research, it was estimated that 70% of the people who had entered the Netherlands between September 1988 and September 1989 had come as family migrants. This represented a total of 42.250 people.[61] Moreover, it was estimated that nearly two thirds of these family migrants were not coming to rejoin a first generation spouse or parent, but were entering as the prospective spouse or partner of a Dutch citizen, often one of (second generation) immigrant origin.[62]

A subsequent report, published in 1994, confirmed the impression that marriage migration was becoming more significant than family reunification.[63] This suggested that chain migration (i.e. foreign spouses coming over to join second generation immigrants) was becoming a fact and that family migration was therefore not likely to end within the near future. Moreover, figures also indicated that many marriage migrants

[59] Coalition agreement (Regeerakkoord) 1998.After some discussion, the Dutch government decided not to include parent-support projects in the compulsory integration programmes, *Kamerstukken II* 1997/98, 25 601, nr. 22.
[60] Naborn 1992.
[61] Ibid. p. 13.
[62] Ibid. p. 29.
[63] Schoorl et al. 1994.

(roughly 30%) were coming to join ethnically Dutch citizens.[64] Given the ongoing restrictions on labour migration from outside of the EU, and the increasingly stern refugee policies,[65] the general consensus was that family migration was becoming the major port of entry into the Netherlands.[66]

Although many restrictive immigration policies introduced in the 1990's were primarily intended to streamline asylum procedure and discourage overstaying and clandestine labour migration, they were also linked to a growing desire to better contol family migration. A number of these measures were introduced with the explicit intention of preventing rejected asylum seekers, over-stayers and clandestine labour migrants from establishing family bonds with Dutch citizens or settled immigrants and thus acquiring a right to stay.[67] However, these measures also affected people who already had established family bonds in the Netherlands. The effect of these measures in their case was not to prevent the establishment of family relations, but to render these relationships more precarious while increasing their interdependent nature.

Besides wanting to discourage people from establishing family ties–and hence acquiring leave to stay–on the basis of unregulated residence, there was also an abiding pressure to prevent people from acquiring legal residence on the basis of fraudulent family ties. In the course of the 1990's, a number of measures were introduced to further prevent the abuse of family relations for the purpose of acquiring residence status. Such measures targeted both the documents involved in proving identity and personal status, and the substantive nature of the relationships involved.

Discouraging Transnational Bonds

In October of 1992, while presenting his cabinet's plans for the coming year, Prime Minister Ruud Lubbers announced that: "it should no longer be possible to reside here illegally and build up a life that will, in the end, provide the basis for a legal state of residence."[68] One of the measures taken was to ensure that neither second asylum applications, put in after a first one had been rejected, nor requests for administrative review would have the effect of automatically staying expulsion. In more instances than

[64] Nicolaas et al. 2004, p. 39.
[65] WRR 2001, p. 62-64.
[66] Naborn 1992, p. 13.
[67] *Handelingen II* 1993/94, p. 91-6790, 8 September 1993.
[68] *Handelingen II* 1992/93, p. 9-483, 14 October 1992.

before, immigrants would now have to appeal to the courts for a staying order.

Another, more drastic measure, was the sharpening of the extended entry visa requirement. Officially, up until 1994, immigrants applying for a residence permit already had to be in possession of an extended entry visa provided for by the Dutch consular authorities in their countries of origin. These extende entry visa were only issued once the Dutch immigration authorities had confirmed that the person in question would qualify for a residence permit. The purpose of the extended entry visa was to ensure that no one would enter the country with the intention of staying, unless they were entitled to do so. In practice however many immigrants staying in the Netherlands without any claim to residence, did manage to regularise their stay–often on the basis of family ties with a Dutch citizen or settled immigrant–without first having gone to the Dutch consulate in their country of origin. The Administrative Jurisdiction Division of the Dutch Council of State had namely determined in a ruling of 1978 that immigration authorities could not, in all reasonableness, refuse a residence permit solely on the grounds that the person in question had not applied for the extended entry visa in advance.[69] The measure introduced in 1994 was meant to enable the immigration authorities to do just that.

In 1995 the REK ruled that such a change in policy would be too far-reaching in its implications to warrant introduction without some form of statutory basis.[70] The Dutch legislature promptly reacted by passing a motion requesting new legislation that would empower the immigration authorities to reject applications out of hand when these were not accompanied by an extended entry visa emitted in the immigrant's country of origin.[71] Such a law was subsequently passed and came into effect as of 11 December 1998.[72]

It should be noted that not all foreigners had to comply with this visa requirement. Asylum seekers were exempt for obvious reasons. Exempt too were all citizens of the EU,[73] along with their family members (regardless of their country of origin) since this requirement would hinder their freedom of movement within the EU. Also exempt were the citizens of a number of other nations with which the Netherlands had cultural ties (due for example to the massive Dutch emigration in the 1950's) and/or

[69] ABRvS 26 June 1978, *RV* 1978/24.
[70] REK 16 March 1995, *RV* 1995/39.
[71] *Kamerstukken II* 1995/96, 24544, nr. 3, p.1-2.
[72] *Stb.* 1998,497.
[73] In 1993 the Treaty of Maastricht had been signed, transforming the former European Community into the more strongly institutionalised European Union.

with whom the Netherlands wished to maintain close economic links: the members of the European Economic Space, Australia, Canada, Japan, Monaco, new Zealand, the Vatican, the US and Switzerland.[74]

In this same period, the successive Lubbers and Kok cabinets also took steps to limit the number of immigrants entitled to social insurance and welfare benefits. As of 1991, for instance, it was no longer possible to apply for a social security number without providing proof of legal residence.[75] This measure was meant to exclude undocumented workers from social insurances. Following the publication of a circular in 1993, immigrants engaged in revision or appeal procedures could no longer qualify for welfare benefits unless the immigration authorities had determined that their case was a strong one.[76]

Up until then, immigrants putting in a second application for admission or applying for extension of their right to stay had been entitled to welfare benefits as long as they were allowed to sit out the admission procedure, administrative review and judicial appeal in the Netherlands–often until a ruling had been made by the court in last instance. Now their rights to welfare benefits would depend on how the immigration authorities advised the welfare officials at the start of the chain of procedures as to the merits of the case. Previously, people still involved in procedures concerning their residence status were assumed to be legally resident until proven otherwise. Now the reverse was the case.

In 1995 the Purple Coalition led by Kok put forward a proposal to definitively exclude immigrants without status from all forms of publicly financed benefits.[77] Although some distinctions were made between immigrants lacking any claim at all to legal status and those still in procedure, the effect was to move those still involved in (re)applying for legal status closer to the edge of the Dutch Welfare State. These proposals were accepted by the Dutch legislature and became effective as of 11 December 1998.[78]

[74] Kuijer & Steenbergen 1992, p. 114.
[75] Circular of Ministry of Social Affairs, 11 November 1991, 157522/91/DVZ/SBO, published in *Migrantenrecht* 1992-4, p. 88-91.
[76] Circular of the Deputy Minister of State, 29 June 1993, 375336/93/DVZ/SBO. See also: De Miranda 1995.
[77] Voorstel Koppelingswet, *Kamerstukken II* 1994/1995, 24 233, nrs. 1-3.
[78] *Stb.* 1998,400.

Forcing Interdependency

It is important to note that all of these measures not only affected immigrants applying for admission for the first time, but also those wishing to have their right to reside extended.

As explained in Chapter Three, family migrants in the Netherlands had to wait a certain period before they could be entitled to a residence permit on their own merits. As already explained in the previous chapter, by 1990, foreign children who were older than fifteen years but still minors and foreign spouses who had been married for at least three years could qualify for independent status if they had spent at least one year legally in the Netherlands, as a family member, directly before applying. All other family migrants had to have had at least three years of legal residence in the Netherlands, as a family member, before they could qualify for independent status. Moreover, because income requirements could apply, and not all family migrants were in a position to meet such requirements, it could take up to five or even ten years before a family migrant was ensured of a continued right to residence regardless of his or her family situation.[79]

The dependent status of family migrants had implications for their autonomy and the power relations within their families.[80] When conflicts escalated into violence, women with dependent status had to choose between staying with an abusive partner or risking loss of status. The immigration circular did offer the possibility of applying for continued residence on humanitarian grounds.[81] The rules that applied were however complex and left much scope for administrative discretion. The results of applications were unpredictable. Research conducted in the early 1990's indicated that women with dependent status who had left a violent partner could not be sure of getting a permit for continued residence in first instance. In at least half of the cases reviewed, the woman's application was rejected and she had to apply for administrative review. Some applications were even rejected in review, so that the women concerned subsequently had to go to court. As a result, it could take up to four years

[79] Minors who left their parents' home after they had been legally resident in the Netherlands for at least one year could generally qualify for continued residence status regardless of their income. This would only be denied in the event of a serious breach of public order or of a threat to national Security, Kuijer & Steenbergen 1992, p. 125 .
[80] Van Walsum 2000; De Hart 2003; De Hart 2001.
[81] Chapter B1/4.3. Vc 1994.

before a woman was finally certain of her continued right to stay.[82] Interviews revealed that women were inclined to stay with an abusive partner, rather than run the risk of losing status.[83]

The problems of women with dependent status were compounded by the various measures that were introduced, in the course of the 1990's, to streamline asylum procedures and/or discourage clandestine residence in the Netherlands. After claims to welfare benefits had become more strictly linked to residence rights in 1993, women whose requests for extended stay had been rejected were likely to lose their claims to benefits while applying for administrative review on the grounds that their immigration case was not considered a strong one.

Moreover, those who had waited too long before applying for extension of their residence rights could be confronted with a decision to treat their request as an application for first entry. This problem became particularly urgent after the period in which immigrants could apply to have their residence permits extended was shortened in 1997. Previously, they could wait with extending their residence permit until six months after their original permit had expired. Now they had to apply at least four weeks before their permit lost its validity.[84] In the event they missed this deadline, they not only risked losing their claims to social rights, but their right to continued residence as well. Their application was to be treated as an application for first entry, meaning it would not be processed unless it was accompanied by an extended entry visa issued in the country of origin.

The implications became quite dramatic when, as of December 1998, the extended entry visa requirement became statutory. From then on, women who were too late in submitting their requests for extended residence– some of whom could have already been legally resident in the Netherlands for years–were placed in the paradoxical situation of having to leave the country in order to be able to apply for permission to stay.

In 1998 the law coupling social rights to residence status came into effect. Although women engaged in applying for continued residence status could still qualify for certain benefits and provisions, they were excluded from public housing. The government's reasoning was that since housing formed one of the conditions for admission, anyone already legally resident in the country would not need a new home while applying

[82] Van Blokland & De Vries 1992, p. 67.
[83] Ibid. p. 68.
[84] Letter from the Ministry of Justice, *Kamerstukken II* 1997/98, 24 544, nr. 16. See also: Olivier 2000.

for an extended right to reside. This reasoning revealed a complete lack of awareness of (or appreciation for) the position of family migrants with dependent status. One of the consequences of this rule was that women with dependent status couldn't qualify for inexpensive public housing after having left an abusive spouse or partner. They either had to appeal to their personal network (which in many cases would consist largely of their abusive partner's friends and family) or seek refuge in a Women's Shelter. Often these women were forced to spend long periods of time in such Shelters, blocking access for other women who were equally in need of refuge. As a result, the Women's Shelters became wary of accepting migrant women with dependent status.[85]

The cumulative effect of the various measures introduced to further restrict immigration was to exclude migrant women and their children from the principle form of protection available in the Netherlands against domestic violence. The irony was that, by then, gendered violence–and particularly violence against women in Third World countries–was finally making its way back onto the political agenda.[86]

Controlling Family Documents

In 1993, the then acting Deputy Minister of Justice, the Dutch Labour Party member Kosto, sent out a circular to the Dutch immigration authorities requiring that foreign documents regarding personal identity and status be legalised in a consistent fashion.[87] Three years later, under the Kok coalition, the Dutch Ministry of Foreign Affairs identified five countries known to form the point of origin for a significant number of (family) migrants as being untrustworthy with regards to the legalisation

[85] Komitee Zelfstandig Verblijfsrecht Migrantenvrouwen 1994, p. 20-21; E-Quality 2003, p. 30-31.
[86] Met het oog op 1995, beleidsprogramma Emancipatie, *Kamerstukken II* 1992/93, 22913, nr. 1-2. The three policy targets enumerated by the Ministry of Justice included gendered violence (p. 71; 73-75). The only proposal made regarding the dependent status of migrant women, however, was to publish information folders explaining the existing rules, (p. 76). While the Ministry of Internal Affairs (responsible for ethnic minorities policy) named no specific policy goals regarding women's emancipation (p. 45), the Ministry of Foreign Affairs did highlight the position of women refugees fleeing gendered violence abroad and that of women who had been victims of human trafficking (p. 49). Where migrant women were concerned, acts of violence that had occurred outside of the Netherlands still drew more official attention than the vulnerable position of migrant women residing in the Netherlands with dependant status.
[87] Van Arnhem 1994, p. 127.

of official documents: Ghana, Nigeria, India, Pakistan and the Dominican Republic.[88]

From then on, birth certificates, marriage certificates and other documents originating from these countries could only be accepted as valid after the information conveyed had been officially verified. In the event that any confusion should arise concerning the validity of the documents in question, or concerning the authenticity of the information contained, legalisation was to be denied and, as a result, no permission would be granted for residence in the Netherlands. This resulted in very lengthy procedures, since those concerned first had to request revision from the Ministry of Foreign Affairs of the refused verification and, if need be, appeal a negative decision, before they could take legal steps against the refusal to issue an extended entry visa or (in cases initiated before 11 December 1998) against the Ministry of Justice's refusal to issue a residence permit.

Initially, attempts were made to resolve the ensuing problems by arguing that the required documents only served as proof of a person's identity or personal status, so that alternative forms of evidence should be accepted.[89] However by way of an interim announcement, the Ministry of Justice made it known that legalised (and, in the case of the "problem countries", verified) documents proving a person's identity and personal status (i.e. married or not), formed an admission requirement in their own right.[90] Even when the persons involved could provide alternative forms of evidence, their application could be refused on the grounds that the necessary documents were missing. The REK accepted this position, although it did indicate that the Ministry should still be prepared to take exceptional circumstances into consideration.[91] This highly formalistic approach to personal documents–which was actually contrary to dominant practice in Dutch civil law of conflicts[92]–would prove to be one of the major obstacles to family migration for people originating from the five "problem countries".[93]

[88] Boeles 2003, p. 107.
[89] Ibid. p. 159.
[90] TBV 1998/27.
[91] REK 10 November 1999, *RV* 1999/37.
[92] Boeles 2003, p. 217.
[93] De Hart 2003, p. 111. This problem has been critically and extensively discussed by Pieter Boeles in his book *Mensen en papieren* (Boeles 2003). A judgement of the Afdeling Rechtspraak van de Raad van State brought the verification policy in the five problem countries formally to an end, ABRvS 8 September 2004, *JV* 2004,

Policing Transnational Intimacy

Under the coalition led by Lubbers, the worry that immigrants were acquiring residence rights through fraudulent marriages was rekindled. Reports circulated suggesting that anywhere between 30% and 80% of all marriages involving foreigners were being entered into for immigration purposes.[94] As De Hart has argued, such figures were largely backed by immigrant authorities' personal impressions and rumours spread by the media. To the extent that hard figures were available, they indicated that these estimates were grossly exaggerated.[95] None the less, various members of parliament repeated the same fears that had been expressed previously when the Dutch nationality law was being reformed, namely that foreign women were being lured, with false promises of marriage, into an existence of forced (sex) labour, and that Dutch and second generation immigrant women were being seduced into marrying foreign men who were only interested in acquiring a residence permit.[96]

In 1994 a law became effective defining as fraudulent any marriage that was not entered into for the purpose of meeting the mutual obligations legally imposed upon married couples, but solely in order to obtain admission to the Netherlands.[97] Such fraudulent marriages were declared a threat to the Dutch legal order.[98] From then on, civil authorities could only agree to marry someone of foreign nationality after he or she had produced a declaration drawn up by the Dutch immigration authorities.[99] This declaration provided information concerning the residence status of the person involved and an assessment of his or her marriage motives, based on a list of observations regarding his or her personal characteristics and those of the partner, as well as their mutual relationship. Points included on this list were: the partners' respective ages, their romantic histories, their language of communication, etc.[100]

The civil authorities could refuse to conduct a marriage ceremony on the basis of the immigration authorities' assessment, or on the merits of their own judgement. Similarly they could refuse to acknowledge a

384, comment by Pieter Boeles. However it remains to be seen what the effect will be of this judgement in practice.

[94] *Kamerstukken II* 1992-1993, 22 488, nr. 4, p. 1-2; nr. 5 p. 1-2.

[95] De Hart 2003, p. 94-95.

[96] Ibid. p. 93-94.

[97] Art. 1:71 a BW:I

[98] De Hart 2003, p. 93; Van Blokland 1998, p. 85-87.

[99] Art. 1:44 lid 1 sub k BW

[100] De Hart 2003, p. 93.

marriage that had been entered into abroad. Should a couple succeed in entering into a fraudulent marriage despite all of these controls, the marriage could be subsequently annulled by the Dutch police. In addition to these measures, the protected family status provided by article 10, paragraph 2 of the Dutch immigration law was also retracted. One of the reasons for doing so was to ensure that family migrants would have to report to the immigration authorities on a yearly basis, thus offering those authorities an opportunity to continue controlling the substantive nature of the relationship.[101]

The relative ease, with which these measures had been brought about by a cabinet dominated by Christian Democrats and liberals, is remarkable. Until the late 1980's, suggestions to subject marriage migration to stricter controls had been consistently rejected on the grounds that such controls would involve too great an intrusion in people's privacy, while probably not being very effective, given the problems involved in collecting convincing evidence.[102] Yet less than a decade later, in a period in which sex was being written out of Dutch social security law in the interests of protecting the privacy of those concerned, far-going investigations into the intimate lives of marriage migrants and their Dutch and settled immigrant partners were being accepted with only a murmur of protest from the more radically left-wing parties.[103]

Moreover, the newly introduced controls represented a fundamental break with a longstanding tradition in Dutch family law, namely that the legislator should limit itself to the formal regulation of family relations and not become involved with the substantive nature of those relations. This break was limited in scope, however. The Dutch government was very clear in its position that only marriages entered into for the purpose of acquiring residence status could be labelled as fraudulent. Marriages entered into by Dutch nationals for other ulterior motives, such as tax benefits, were to remain immune from official scrutiny.[104]

In the end, while the law against fraudulent marriages certainly did have a high nuisance value for those involved, it had little practical effect on the incidence of marriages involving foreigners. An evaluative report published in 1998 revealed that in a span of four years only 69 marriages had been prevented with the use of the instruments provided by the new law. Moreover, of those couples who put in an appeal, most ended up

[101] Ibid. p. 112.

[102] Ibid. p. 91.

[103] Van Walsum 2002b.

[104] De Hart 2003, p. 92.

winning their case before the civil court.[105] None the less, this law should not be dismissed as meaningless, not only because of its effects upon the lives of those directly involved,[106] but also because of the symbolic implications of an official procedure that branded all marriages involving a foreign spouse as suspect.

Enforcing Transnational Monogamy

In this same period, rules that had been introduced previously to restrict family reunification by polygamous men were further tightened. Up until 1993, foreign men who had settled in the Netherlands could apply for family reunification with a wife they had left behind in their country of origin if the woman they were living with in the Netherlands had died or divorced them. Due to policy changes introduced on 17 September 1993 and 13 April 1995,[107] this was no longer possible, even in those cases in which it was clear that there had always been a strong family bond between the man in question and the woman and children who were still living abroad. In the same period in which Dutch fathers were becoming entitled to various rights vis a vis children born in simultaneous relationships and even marriages, polygamous relationships were becoming increasingly taboo in Dutch immigration policies.[108]

On 19 March 1998, the REK ruled that these policies were arbitrary, since no justification could be given for the fact that a monogamous husband who had divorced his wife could subsequently bring over a new wife, but that a polygamous husband who had divorced one wife couldn't subsequently bring over a woman he was already married to.[109] The underlying assumption of these policies–that polygamous marriages, like fraudulent ones, formed a threat to the Dutch legal order–remained unchallenged however.[110]

The continuing rejection of polygamy as a legitimate form of family life was also evident in Dutch nationality law. While sex outside marriage no longer formed a valid reason for rejecting a foreigner's application for naturalisation, multi-marital sex still did, even though a polygamous marriage that had been contracted abroad would be legally recognised in

[105] Ibid. p. 95.
[106] Cf. De Hart 2003, chapter 7.
[107] B1/1.2.1 Vc 1994.
[108] Van Blokland 1998, p. 85-87.
[109] REK 19 March 1998, *RV* 1998/20.
[110] Van Blokland 1998, p. 86.

the Netherlands. Hence Islamic immigrant men with more than one wife could not apply for Dutch citizenship.[111]

Policing Fatherly Love

Parallel to the measures to prevent fraudulent marriages, measures were also being taken to prevent Dutch men from fraudulently acknowledging the child of a foreign mother. On 25 February 1993, the Lubbers cabinet sent a proposal to the Dutch parliament to prevent Dutch men from passing on their nationality to children born by a foreign mother unless they had already acknowledged those children before they were born. Children who were not acknowledged until after they were born would no longer acquire their Dutch father's nationality automatically, but would have to opt for it later. They could only to do so once their Dutch father had looked after them–i.e. had lived with them in the same house–for a period of three years or more. As critical commentators pointed out repeatedly (and fruitlessly), the proposed legislation would create new forms of inequality between children born in and out of wedlock.[112]

Again, in the context of the normative changes occurring in mainstream Dutch society, these proposals were remarkable. This was, after all, the period in which all distinctions between legitimate and illegitimate children were being eliminated. Moreover, in a period in which feminists' suggestion that parental rights should somehow be connected to involvement in childcare was being dismissed as too intrusive, it is striking to note that Dutch politicians agreed to have the transfer of a Dutch father's nationality to his child postponed until the father had been involved in looking after the child for at least three years.[113]

This proposal was motivated by the observation that Dutch men were known to have acknowledged foreign children purely for motives of facilitating their admission to the Netherlands. A single case was referred to, which had occurred five years earlier, in which the Dutch police had nullified the acknowledgement of forty children of Philippine origin, on the grounds that they had been fraudulently acknowledged by a number of Dutch men. In referring to this case, the Dutch Minister of Justice Hirsch Ballin acknowledged that Dutch criminal law already provided the

[111] Haakmat 1996.
[112] Tratnik 1989, p.296-298; De Groot & Saarloos 2004, p. 252.
[113] *Kamerstukken* 1992/93, 92 029, nr. 5 (VV). These proposals became law on 21 December 2000, *Stb.* 2003, 613 and were implemented on 1 April 2003.

necessary measures to undo a fraudulent acknowledgement by a Dutch father, but insisted that preventive measures were needed as well.[114] Again these measures were presented as necessary for protecting the Dutch legal order.[115]

What is striking, when reviewing the parliamentary debates concerning this proposal, is that nobody objected to the fact that children born of Dutch fathers and foreign mothers were to be excluded from their rights, as (potential) Dutch citizens, for at least three years. A similar attitude was evident in decisions and court judgements of the time regarding the immigrant status of single or divorced foreign mothers with Dutch children. If the Dutch father continued to maintain close contact with his children and to support them financially, their mother was generally allowed to stay and look after them. However, in those instances in which the Dutch father was not willing or able to bear the requisite degree of responsibility for his children, their foreign mother risked deportation.[116] That the children would, as a rule, have to leave the country along with her was seen as a consequence of the fact that she bore custody, not as a consequence of the State's decision to have her deported. The argument that these children were being effectively excluded from their country of nationality, generally fell on deaf ears, not only with the Dutch immigration authorities,[117] but often with the Immigration Law Chambers of the Regional Courts as well–certainly in instances whereby the children had no further contact at all with their Dutch father.[118]

While there was a growing consensus, in the field of Dutch family and child protection law, that children had rights of their own, independent of their relationship to their parents,[119] children born of Dutch fathers and foreign mothers continued to be treated as appendages of their parents. Their claim to their Dutch birthright was directly dependent of their father's involvement in their upbringing. Where this was found lacking,

[114] *Kamerstukken II* 1992/93, 23 029 (R 1461), nr. 3, p. 5; *Kamerstukken II* 1992/93, 23 029 (R 1461), nr. 6, p. 12-13.
[115] Tratnik 1993 p. 1183.
[116] CWI 1999 p. 117.
[117] See: Rb Den Haag, zp Amsterdam 20 November 2000, *JV* 2001/37.
[118] See: Rb Den Haag, z; Amsterdam 20 November 2000, AWB 99/620 (unpublished). The courts were particularly emphatic in this reasoning in those cases in which the mother had never had legal status. See REK 25 September 1997, *JV* 1997/4 and 24, with comment by Boeles. For a contrary ruling see: Rb Den Haag, zp Amsterdam 6 December 1999, *RV* 1999/26 with comment by Steenbergen.
[119] Willems 1999.

their legal status in the Netherlands–for all practical purposes–merged with that of their mother.[120]

Remarkably, many of the measures introduced in the 1990's to sharpen control of family migration were not so new after all. Already in the 1970's, policies were developed to control marriages involving a foreign partner. The extended entry visa requirement also dated from well before 1990. However, these measures had in the course of time been disqualified by the Administrative Jurisdiction Division of the Dutch Council of State, and had subsequently lost much of their effect. Similarly, far-reaching proposals had been made in the late 1980's to link social rights to residence status, but these had been retracted after having met with strong public resistance (see further Chapter Three).

By the mid 1990's however, both the Dutch executive and the Dutch legislature had become much more assertive and self-assured in their insistence that family migration policies should become more restrictive. Established case law disqualifying the control of marital motives and the REK's ruling that a strict extended entry visa requirement was not in accordance with the law were not taken lying down, but parried with legislative action. New legislative proposals linking social claims to residence status were presented with fresh confidence. Bureaucratic controls were applied rigidly and unflinchingly.

On the whole then, forms of immigration control that would previously have been disqualified as discriminatory or arbitrary, now enjoyed firm political support. One of the most remarkable consequences was that, while state intrusion in family relations was being found increasingly objectionable in the context of Dutch family law, widely applied preventive incursions in family relations were being accepted when immigration control was at stake–even though this meant policing the intimate lives of all Dutch citizens and settled immigrants with foreign family members and significantly reducing the autonomy of their partners, spouses and children.

In the Dutch political imagination, families rooted in the Netherlands but including at least one foreign member, particularly one originating from outside of the EU and other select parts of the world, had become essentially different from families consisting of only Dutch nationals, or Dutch nationals and privileged foreigners. The former category had become suspect, a potential threat to the Dutch legal order. Those involved no longer deserved the protection that Dutch law was expected to provide

[120] Van Den Eeckhout et al. 2005, p. 210-213.

non-suspect families and their individual–Dutch or, at least, Western–members.[121]

The increasingly suspicious attitude towards specific categories of immigrants applying for admission on the grounds of family ties fitted well with the new perspective on immigration and integration in which the continuing arrival of specific categories of newcomers was perceived of as a threat to the social cohesion of the nation, and in which links were being made between "non-western" origin, illegal residence, racial tensions and delinquent behaviour.

B: Family Migration as an Integration Issue

Initially, there had been no indication that the new perspective on immigration and integration would negatively affect the intimate relations between Dutch citizens and already settled immigrants and their foreign (marriage) partners and/or children with whom they maintained long established family bonds: on the contrary. In a policy paper on legal status and social integration, published in May 1991, the Dutch cabinet, still under the leadership of the Christian Democrat Lubbers, emphasised the importance of a strong legal position for the successful integration of settled immigrants in a policy document on legal status and social integration.[122] The cabinet referred among other things to the recently introduced right to vote in local elections that had been granted to immigrants with permanent status, and the increasingly accessible naturalisation procedures. The right to family reunification was also referred to as an important prerequisite for a strong position within Dutch society, and the implicit suggestion was that this right was not to be curtailed.[123]

But at the same time, this same policy paper also intimated that the changed approach towards integration could have negative implications, as well as positive ones, for family migrants who had been admitted to the country. More than before, integration was to become a matter of personal responsibility.[124] Legal instruments could be used to encourage immigrants to deploy their capacities in order to "establish their position in

[121] Ibid, p. 224-225.
[122] Rechtspositie en Sociale integratie, *Kamerstukken II* 1990/91, 22 138 nr. 2 p. 4.
[123] Ibid. p. 13. In 1992, the Dutch cabinet confirmed its commitment to immigrants' rights to respect for family life, as protected by article 8 of the European Convention of Human Rights, *Handelingen II*1992/93, 9-483, 14 October 1992.
[124] Rechtspositie en Sociale integratie, *Kamerstukken II* 1990/91, 22 138 nr. 2 p. 4.

society independently and on equal terms". While acknowledging the importance of a strong legal position for successful integration, the Lubbers cabinet also expected those concerned to make an individual effort:

> "Dutch society has its own ground rules that apply to all of its members. To the extent that foreigners isolate themselves from society or gravitate towards its margins, they run the risk of becoming stigmatised and discriminated against by that same society. In the most extreme cases, isolation and marginalisation can lead to such deviant behaviour that those involved end up before the criminal courts. This can have implications for their legal status." (my translation, SvW)[125]

Consistent with this line of thought, the government pointed out that its decision to retract the protected family migrant status would make it possible to expel migrant (marriage) partners and children on grounds of public order.[126]

These possibilities were in fact applied in practice. From 1990 onwards, it became standard practice to have immigrants deported on the grounds of a criminal conviction and expelled from the country. This meant that they could not return to the country even for short visits during a period that could extend to up to ten years.[127] In the context of the new integration policies, protecting social cohesion had acquired a higher priority than maintaining family unity.[128]

For Dutch women, and women with permanent immigrant status, this meant they were back to the situation that had existed prior to 1977, when their foreign spouses and children had been subject to deportation following a criminal conviction. Dutch men were to be confronted with this risk for the first time. It soon became evident that the new perspective on integration was to have other ramifications for family migrants as well. On 12 January 1993, the Deputy Minister of Justice Kosto and the Minister of Internal Affairs Dales sent a letter to the Dutch parliament, explaining how family reunification policies were to be adapted to fit the new perspective on integration policies. In particular, this letter expressed the intention to appeal to the individual responsibility of those wishing to bring their foreign family members to the Netherlands–both regarding the

[125] Ibid. p. 5.
[126] Ibid. p. 16.
[127] A5/6.2 Vc 1994. See also De Hart 2003, p.113.
[128] Kuijer & Steenbergen 1996, p. 210. Dutch immigration law was in fact changed to this effect as of 1 January 1994, *Stb.* 1994, 8.

financial support of those family members, and regarding their cultural integration.[129]

The letter listed a number of proposals for policy change. The most important were: to set the minimum age for marriage migration at 18 years (this to prevent forced marriages); to require that newly admitted immigrants wait three years before they bring over new family members (this to ensure that adolescents who had come as the child of a settled migrant would be well integrated themselves before they brought over a foreign spouse); to sharpen income requirements; and to further limit the possibilities for bringing over children who had been left behind in the parents' country of origin.[130]

The last two proposals in particular threatened to have far-reaching consequences for the family lives of those involved and consequently led to heated and lengthy debates between the responsible cabinet members and the Dutch parliament. While the proposal to limit the admission of children was related to the growing preoccupation with immigrant children's upbringing, the proposal to sharpen income requirements was clearly related to the increased emphases on paid labour as a vector of integration. Although related, these are distinct issues, and they relate to different discussions regarding family norms and integration. I shall therefore discuss them separately.

Family Migration and Parental Responsibility

The new perspective on integration was not just motivated by financial concerns–i.e. reducing social costs–but by normative considerations as well. As we have seen, the new integration policies were characterised by a growing concern for the upbringing of immigrant and ethnic minority children. Already in 1992, Prime Minister Lubbers announced his cabinet's intention to limit the admission of foreign children who had been left behind, by their parents, in their country of origin. He indicated that these parents' right to respect for family life, as guaranteed by article 8 of the European Convention of Human Rights, was conditional. Once parents had met the requirements for family reunification, they would have to make sure their children came over to join them within three years. A longer separation was not only seen as detrimental to the children's integration, but also shed doubt on the substantive quality of the family ties involved.[131]

[129] *Kamerstukken II* 1992/93, 22 809, nr . 10, p. 1
[130] *Kamerstukken* 1995/96, 2 4401, nr. 6, p. 8.
[131] *Handelingen II* 1992/93, 9-483, 14 October 1992.

In their joint letter to the Dutch parliament of 12 January 1993, Deputy Minister of Justice Kosto and Minister of Internal Affairs Dales elaborated on this proposal, arguing that children who entered the country at an advanced age would experience problems adjusting to the Dutch school system and labour market, and would be insufficiently familiar with Dutch society. The success of integration policies depended on children arriving as soon as possible. Particularly the applications of children older than twelve years would have to be critically appraised.[132]

In September 1993 the immigration circular was modified in accordance with this proposal. However, by the time it could be applied in concrete cases–i.e. after a period of three years–the Ministry of Justice had reconsidered, and decided not to apply it after all. The principal reason given for this change of heart was that recent agreements reached within the EU concerning the harmonisation of family migration policies did not allow for such a measure.[133] Here, the process of European harmonisation was starting to make itself felt.

However, the then active Deputy Minister of Justice Schmitz, serving under Kok's Purple Coalition, was not prepared to entirely relinquish the idea of further restricting the admission of foreign children. In a following debate concerning this issue, held on 10 September 1996, she announced that the rules were to be "clarified":

> "On the one hand it should be made clear that children belong with their own parents, and that no undue consequences may be attributed to the fact that parents have temporarily entrusted their children to the care of others. On the other hand, it must be established that, if during the course of a number of years parents have failed to display any interest in family reunification while all necessary requirements have been met, one can no longer speak of a substantive bond between parent and child and that in such a situation the integration of the child concerned is bound to meet with great difficulties."(my translation SvW)[134]

Six months later, in a letter dated 26 May 1997, Schmitz published a further clarification. The longer the period of separation between parent and child had lasted, the more critical the immigration authorities were to be in their assessment of the substantive nature of the parent-child relationship. The immigration circular would be re-worded once more to make clear that, for the parents requesting reunification, the burden of

[132] *Kamerstukken II* 1992/93, 22 809, nr. 10, p. 4.
[133] *Kamerstukken II* 1995/96, 24 401, nr. 21.
[134] *Kamerstukken II* 1996/97, 25 001, nr. 3, p. 5.

proof weighed heavier the longer they waited with bringing over the child. At the same time, Schmitz acknowledged that long periods of separation could result from the hurdles the Dutch state imposed on family reunification, such as income requirements. This, however, did not detract from the general principle that claims to reunification became less certain, the longer a separation had lasted.[135]

Another six months further, this issue was raised once again in the Dutch parliament. Some members of parliament pointed out that some families–particularly those of refugees–might be torn apart through circumstances beyond their control, like war. It seemed unreasonably harsh to subsequently refuse reunification on the grounds of such separations. Schmitz, conceded this point and emphasised that the main issue was to prevent parents from bringing over children just before they reached the age of majority, while having shown no moral or financial responsibility for those children previously.[136] Implicitly, she suggested that where there was no hard written evidence of a consistently intense bond between parent and child, the application could be assumed to be fraudulent.

As seen in the previous chapter, the effective family bond criterion had already been introduced in Dutch immigration law in the 1980's. In this sense, policies had not changed. The focus of control had shifted, however. Where before the main concern had been to prevent divorced parents (particularly fathers) from bringing over children from a former relationship to join them in their newly established families in the Netherlands, now the chief issue was the quality of involvement of parents residing in the Netherlands in the upbringing of the children they had left behind. Even parents who had always remained married to each other could be refused reunification with some or all of their children, simply because they had not brought them over to join them quickly enough.[137] While recent legislation in Dutch family law explicitly denied the relevance of involvement in day-to-day care for determining rights to shared parental power or visiting rights, such direct and practical involvement in the care and upbringing of children had become the sine qua non for determining the right to family reunification.

From the perspective of the parents themselves, these policies were contradictory in the sense that, on the one hand, they had to actively deploy their parental authority in order to qualify as good parents, while on the other hand they were expected to initiate family reunification

[135] *Kamerstukken II* 1996/97, 25001, nr. 26, p. 4.
[136] *Kamerstukken II* 1996/97, 25001, nr. 30, p. 6.
[137] Van Walsum 1999; Van Walsum 2000a.

without delay. Thus parents who exerted their parental authority by deciding to leave their children in the care of relatives because they felt they themselves were not yet sufficiently settled in the Netherlands to be able to take on the responsibility of raising children there, or because they wished to let their children continue their education abroad, or because they hesitated to separate children from grandparents who had always been intensely involved in their care–and the like–actually disqualified themselves as parents in the eyes of the Dutch immigration authorities. Besides an evident concern for the cultural integration of immigrant children, Dutch immigration policies thus also reflected the implicit assumption that a true parent should not delegate caring responsibilities, but should personally look after his or her children on a day-to-day basis at all times.[138]

This implicit assumption can be illustrated by comparing two court decisions that both concerned applications for family reunification made by immigrant women who had left their children in the care of their own mother when they themselves left for the Netherlands. Both of these women had in fact already entrusted their children to their mother's care well before coming to the Netherlands. In the first case, the woman had left her children with her mother after having remarried with a man with children of his own, who refused to take her children into his home. During the day, this woman stayed at her mother's and looked after her own children, feeding them, taking them to school and, as the Immigration Law Chamber of the Regional Court of Haarlem later would put it, "generally doing all that a mother who actually lives with her children would do for them". In the evenings, she left her children and returned to her new husband's home to look after his needs and those of his children. When her case came before the Immigration Law Chamber, the court ruled that she and her children had in fact enjoyed family life, even though they did not sleep under the same roof, and she won her case.[139]

The second case involved a single mother who had left her children with her mother, and moved to a larger city so that she could earn enough money to look after herself and her family. In the city she moved in with a new partner, but during the weekends she returned to her home town to stay with her mother and the children. In her case, the Immigration Law Chamber of the Regional Court of Zwolle seriously doubted if there had ever been any effective family life. In any case, in the eyes of the court the

[138] See case law quoted in Van Walsum 2000a, p. 10-18.
[139] Rb Den Haag zp. Haarlem, 2 June 1999, AWB 99/296 (unpublished).

bonds between her and her children had not been such that she could now qualify for family reunification.[140]

While the prospect of policing the involvement of parents in the care of their children had been explicitly rejected in Dutch family law, scrutinising parent-child relations became part and parcel of Dutch family reunification policies. Boxes full of photographs, letters, drawings, report cards and records of financial transactions had to be perused before a decision could be made as to whether or not a child could be admitted.[141]

Like the marital bond between husband and wife, the effective bond between parent and child, too, was being subjected to extensive scrutiny. As we have seen in the previous section of this chapter, it was being made increasingly difficult for Dutch citizens and settled migrants to claim a right to family life in the Netherlands on the basis of already experienced intimacy within Dutch territory. To be allowed to enjoy family life with foreign children in the Netherlands, one first had to prove the bond between parent and child had been successfully maintained accross the geographical borders.

Family Migration and Financial Responsibility

Besides being motivated by concerns over the normative integration of newcomers into Dutch society, Dutch immigration policies of the 1990's also reflected the more general preoccupation, characteristic of that period, with encouraging labour market participation among the unemployed. As was already remarked in Chapter One, one of the new guiding principles of Dutch social policies of this period was that unemployment should not be seen as a broadly experienced and structural social problem, but as an individual responsibility.

Up until 1993, Dutch family reunification policies exempted those assumed to be permanently settled in the Netherlands–Dutch citizens, admitted refugees, and persons holding permanent resident status–from income requirements, in the event their lack of income was clearly not due to any fault of their own. One of the proposals presented in the letter of 12 January 1993 was to do away with this exemption. From then on, Dutch citizens, admitted refugees and foreigners with a permanent residence permit would have to earn at least 70% of the level of welfare benefits provided to (married) couples before being allowed to bring over their

[140] Rb Den Haag, zp. Zwolle, 15 January 1997, AWB 96/8085 (unpublished).

[141] This observation is based on my own experiences as a senior clerk at the Amsterdam section of the Hague immigration law chamber from September 1999 to August 2001.

spouse and children from abroad, regardless of their prospects on the labour market. Foreigners with a temporary residence permit and unmarried couples would have to earn 100% of the applicable welfare benefits.[142] Only a few limited categories of persons would still be made exempt from these requirements, namely: Individuals older than 57 and a half years; single parents with very young children;[143] the permanently disabled; people on old age benefits and admitted refugees.[144]

During the debate concerning this proposal, a number of objections was raised. The left-wing parties in particular feared that family reunification would become virtually impossible for certain groups of people now that their problematic position on the labour market could no longer be taken into account. The liberal VVD party objected to the fact that these sharpened policies were to apply to Dutch citizens wishing to bring over foreign family members, as well as immigrants. In reaction, the responsible cabinet members conceded that if people could prove they had done all that was in their power to find work, this might be taken into consideration in individual cases. However, no general policy measures were to be formulated to this effect.

As to the fact that the rules were to apply to Dutch citizens as well as to foreign immigrants, the responsible cabinet members pointed out that Dutch citizens were responsible for a sizeable percentage of the total number of family migrants entering the Netherlands,[145] and that there was no reason why they should not be held accountable for the financial implications.[146]

Moreover, equal–or in any event "comparable"–treatment of Dutch citizens and settled immigrants formed one of the key principles of the new integration policies: "To the man or woman wishing to bring over family members, whether these are of their own cultural background or not, we will explain that the person wishing to establish a family must

[142] The argument for applying stricter income requirements to unmarried couples than to married ones was that there was no statutory obligation for cohabitants to support each other and hence no legal grounds for the government to reclaim any benefits that might be paid out to the foreign partner following separation, *Kamerstukken II* 1995/96, 24 401, nr. 6, p. 9.

[143] The age of the child was initially set at six years. Later it was lowered to five years, in accordance with changes in social benefits regulations, *Kamerstukken II* 1995/96, 24 401, nr. 6, p. 4.

[144] Ibid. p. 4-5.

[145] Reference was made in particular to Dutch men bringing in wives from Poland and Tailand.

[146] *Handelingen II* 1993/94, 95-6944, 16 September 1993.

carry the primary responsibility".[147] In the end, Dutch parliament did support the new measures, and they became effective as of 17 September 1993. Remarkably, according to the rules that were published in the immigration circular, admitted refugees too were to be subjected to these new income requirements.[148]

One of the conditions under which the new rules had been accepted, was that they be evaluated after six months. In 1995 an evaluation report was published[149] and in December of that year, the Deputy Minister of Justice Schmitz reported to the Dutch parliament. In her eyes, the immigration authorities had not been sufficiently consistent (i.e. strict) in applying the new rules. She conceded that this was partly due to the problematic position of many immigrants and members of ethnic minorities upon the Dutch labour market. In particular, the growing tendency towards more temporary and casual labour contracts made it difficult for people to meet the requirement that they have a guaranteed income for at least one more year. She was prepared to accept six month contracts, but only if the person involved could prove he or she had been active on the Dutch labour market over the previous three years.[150]

Regarding the position of refugees, she pointed out that since spouses and children entering in the company of admitted refugees had become entitled to derivative refugee status, their admission was no longer subject to the rules regulating family migration.[151] Taking all this into consideration, she saw no reason why the income requirements shouldn't be strictly applied.[152]

Repeatedly Kok's Purple cabinet emphasised that anyone wishing to bring foreign family members into the Netherlands must be willing and able to bear the full financial responsibility.[153] In the course of the 1990's

[147] *Handelingen II* 1992/93, 9-484, 14 October 1992; See also: *Kamerstukken II* 1990/91, 22 138, nr. 2, p. 3.
[148] TBV 87, *Stcrt* 1993, 179.
[149] Van den Bedem et al. 1995.
[150] Normally people wishing to bring over family members had to prove that they had a steady job or, at least, guaranteed employment for at least one more year. According to the proposed reform, people who had been active on the labour market over the previous three years would only have to give proof of guaranteed employment over the next half year, *Kamerstukken II* 1995/96, 24 401, nr. 6, p. 2.
[151] *Kamerstukken II* 1995/96, 24 401, nr. 6, p. 4.
[152] Ibid. p. 7
[153] See for example: *Kamerstukken II* 1992/93, 22 809, nr. 10, p. 1; *Kamerstukken II* 1995/96, 24 401, nr. 6; *Kamerstukken II* 1996/97, 25 001, nr. 3, p. 4; *Kamerstukken II* 1996/97, 25 001, nr. 26, p. 3; *Kamerstukken II* 1996/97, 25 001, nr. 30, p. 6.

the immigration circular increasingly precluded sharing this responsibility with the Dutch state or thirds parties. Unmarried partners for example could no longer have a third party act as a guarantor, but had to supply the required labour income themselves.[154] NGO's representing immigrants and cultural minorities warned that students would have to interrupt their studies in order to be able to meet the stricter income requirements.[155] Similarly, an organisation of Dutch women with foreign partners reported that women were aborting their studies and ending their careers as free-lancers to either take on a salaried job, and thus meet the income requirements, or have a child and thus become exempt. Either way, they, too, experienced the new policies as an inhibition, rather than a stimulus, of their advancement within Dutch society.[156]

Another consequence of a strict application of the income requirements was that asylum seekers who had been admitted on subsidiary grounds, or whose family held a different nationality from their own, or whose family members had only followed them to the Netherlands years after they themselves had been admitted, now had to meet the income requirements in order to qualify for family reunification.

In May of 1996, the REK brought out a series of judgements in such cases. Its position was that in cases where the situation in the parties' country of origin was not, or no longer, such that they couldn't possibly return to live there as a family, the income requirements could be strictly applied without violating article 8 of the European Convention of Human Rights. When this was not the case, and family life could only be effected within the Netherlands, strict application of the income requirements could not be justified without further motivation.[157] The REK based these judgements to a large degree upon a judgement that had been brought out only months before by the European Court of Human Rights in the case of *Gül vs. Switzerland.*[158]

The REK's rulings met with resistance from the Deputy Minister of Justice Schmitz, who worried that the principle of personal responsibility, so central to the new perspective on integration and the driving motive behind the stricter income requirements, might be undermined by the REK's reasoning.[159] She therefore proposed to modify the rules in such a way that the principle of personal responsibility could remain intact,

[154] *Kamerstukken II* 1995/96, 24 401, nr. 6, p. 9.
[155] Nederlands Centrum Buitenlanders 1993, p. 137.
[156] LAWINE 1995.
[157] REK 15 May 1996, *RV* 1996/27..
[158] *Gül vs. Switzerland*, ECHR 19 February 1996, application nr. 23218/94.
[159] *Kamerstukken* 1995/96, 24 401, nr. 21, p. 4.

without exceeding the limits imposed by article 8 of the European Convention of Human Rights. In those cases in which circumstances in the country of origin made settlement there impossible, persons applying to have their foreign family members admitted to the Netherlands could be exempted from the income requirements, once they had proven, during a "reasonable period of time", that they had done all they could to comply with those requirements.[160] In a later communication, she defined "a reasonable period" as being equal to three years.[161] While some parties felt the Deputy Minister offered too little resistance to the court and others felt the income requirements were still too strict,[162] these suggestions were given the support of the Dutch parliament, and the immigration authorities were instructed accordingly.[163]

Further Enforced Dependency

The principle of personal responsibility was not only applied to persons seeking family reunification. On 24 June 1997 the Deputy Minister of Justice Schmitz sent a letter to the immigration authorities concerning the income requirements that applied to family migrants–particularly spouses and unmarried partners–in the event they divorced or separated before being entitled to a permanent residence permit.[164] As explained above, once a relationship had lasted at least three years and the person involved had already resided in the Netherlands for three years (or, in the event of marriage, at least one year) the foreign spouse or partner could apply for an independent residence permit. The reasoning at the time had been that after this period, such a person would have become so involved in Dutch society that further residence should, in all reasonableness, be made possible.[165] This permit was granted for one year. At the end of that year, the person involved had to meet an income requirement in order to have

[160] Ibid. p. 3.
[161] *Kamerstukken* 1996/97, 25 001, nr. 26.
[162] *Kamerstukken* 1996/97, 25 001, nr. 3 and *Kamerstukken II* 1996/97, 25 001, nr. 30.
[163] IND-werkinstructie nr. 181, 2 November 1998. These criteria are currently summed up in the immigration circular (Vc 2000) Chapter B2/10. In 2005 this policy was challenged before the ECHR. After careful scrutiny, the ECHR determined that the policies did not violate the right to respect for family life and the complaint was declared inadmissible. *Haydarie vs. The Netherlands*, ECHR 20 October 2005, application nr. 8876/04.
[164] TBV 1997/5, also published in *Migrantenrecht* 1997-7.
[165] *Kamerstukken II* 1981/92, 17 501, nrs. 1-2, p. 6.

the permit extended. Originally, any source of income could suffice, and people could also be exempted from this income requirement in the event that their unemployment was due to no fault of their own. Women with children, in particular, were generally exempted.

In the course of the 1990's, the immigration authorities became increasingly insistent that immigrants applying for continued residence following divorce should be involved in paid labour and not dependent of other forms of income.[166] In her letter of 24 June 1997, Deputy Minister of Justice Schmitz made known that nobody applying for an independent status was to be exempted any more from the income requirement:

> "The relevant policies are based on the assumption that a foreigner can only be allowed to maintain the right to residence–that was granted on the basis of a lasting ties with a (marriage) partner settled in the Netherlands–on the basis of lasting ties with an employer or company that will enable him to support himself during his stay. A relevant consideration is moreover that the foreigner, by taking part in the labour process, demonstrates (a certain degree) of integration in Dutch society (my translation-SvW)."

The notion that long term residence in the Netherlands led to integration in and of itself–traditionally the underlying principle of Dutch immigration law and integration policies–no longer fit with the new perspective on integration.[167]

This "clarification" of policy–Schmitz denied she was introducing any substantial changes–gave rise to questions concerning the implications for divorced and separated women with young children. Shouldn't they be exempt from income requirements, just as single parents wishing to bring over a spouse or partner for purposes of family reunification were?[168]

This was a pertinent question. Contemporary figures revealed that between 47% and 76% of immigrant women belonging to the officially listed ethnic minorities were still unemployed after having resided in the Netherlands for five years, and that between 30% and 55% of all single mothers belonging to the officially listed ethnic minorities and bearing the responsibility for a child younger than five years was unsuccessful in finding a job.[169] In a letter of 19 December 1997, Schmitz pointed out that divorced and separated women could always apply for continued residence

[166] De Lange & Reurs 1997, p. 153.
[167] C.f. De Lange & Reurs 1997, p. 155.
[168] *Kamerstukken II* 1997/98, 19 637, nr. 303.
[169] Hooghiemstra & Niphuis-Nell 1995, p. 361; 363.

on the grounds of pressing humanitarian circumstances. In the event that no such circumstances prevailed, these women could, in all reasonableness, be required to support themselves and their children.[170] Implicitly, this letter also indicated that these women and their children could reasonably be expected to leave the country in the event the mother should remain unemployed.

The problem, as we have already seen, was that acquiring a right to continued residence on humanitarian grounds was no easy matter. What this change in policy effectively meant, was that in the name of integration and personal responsibility, migrant mothers with young children would have to accommodate themselves to the same dependent position they had occupied before the reforms of 1983 had been introduced. Once again they would have to wait until they had been in the Netherlands with their husband or partner for at least five years before they could be certain of an independent right to stay on in the Netherlands, regardless of how their relationship developed.

Some Transnational Families More Equal than Others

Complaints that the sharpened income requirements inhibited the emancipation of ethnic minorities in the Netherlands, rather than stimulating it, and that they were discriminatory in their effects, met with little response. After the government had explained its plans to take part-time contracts into account, no further reference was made to the labour market situation of ethnic minorities in the Netherlands. Following the publication of a report by the Clara Wichmann Instituut (a feminist legal institute) questions were raised regarding the possible indirect discrimination of income requirements for women. In response, the Ministry of Justice replied that available figures indicated that, while men were over-represented in the highest and lowest income brackets, women were over represented in the *f* 20,000 to *f* 40,000 per year gross income bracket, while the required income amounted to *f* 22,000 gross per year.[171] Hence the Ministry saw no reason to assume that the requirements would affect women more negatively than men.[172]

Unfortunately, the Ministry didn't provide any more information concerning the figures it had quoted. Most statistics of the time did not distinguish between income from labour and income from other sources,

[170] *Kamerstukken II* 1997/98, 19637, nr. 306 p. 2.
[171] The euro equivalent of the former Dutch guilder is just under 50 euro cents.
[172] *Kamerstukken II* 1996/97, 25 001, nr. 7.

particularly welfare benefits. However, the main point of imposing strict income requirements was to prevent people on welfare from bringing a foreign partner to the country.[173] It was a well established fact at the time that the majority of people on welfare were single mothers.[174] Income figures from this period, corrected to exclude people on welfare, indicate that the majority of women in the Netherlands earned less than the income requirements demanded, while the majority of men earned more. Moreover, when the figures were disaggregated according to ethnic origin and gender, it became apparent that 60% to 90% of ethnic minority women and 25% to 40% of ethnic minority men earned less than the requisite amount. By contrast, only 16% of ethnically Dutch males earned under the mark.[175] While admittedly these figures were not aggregated as to marital status, in the sense that they failed to reveal the income position of single and divorced persons, they did provide sufficient information to suggest that indirect discrimination both regarding gender and ethnic origin might have been an issue.

Another remarkable effect of the income requirements that was noted by members of parliament, but elicited little or no response from the cabinet, was the fact that Dutch citizens now had to meet stricter requirements than other EU citizens working in the Netherlands and applying to bring over family members from outside of the EU.[176] Family members of EU citizens making use of their freedom of movement within the EU fell under the rules of EU migration law, regardless of their nationality,[177] and were hence exempt from requirements imposed by national immigration laws.

One of the aims of the Kok cabinet's integration programme had been to encourage settled immigrants to adopt the Dutch nationality, arguing that this was the best way to strengthen their legal position in the Netherlands. Thanks to the relatively liberal naturalisation requirements that applied at the time, a growing number of immigrants did in fact take on the Dutch nationality.[178] However, a situation was emerging in which many Dutch citizens could less easily settle in the Netherlands with foreign family members than certain categories of privileged foreigners. Not only were the family members of other EU citizens exempt from a

[173] *Handelingen II,* 1992/93, 9-484, 14 October 1992.
[174] Holtmaat 1992, p. 181.
[175] Van Walsum 1996.
[176] De Hart 2003, p. 114.
[177] Sewanando 1998, p. 166.
[178] In 1992 nearly 30,000 foreigners acquired Dutch nationality via naturalisation as opposed to 7,000 in 1984, Heijs 1995, p. 206.

number of requirements imposed by Dutch immigration law. Spouses and children accompanying labour migrants from outside of the EU were also privileged in the sense that they were exempt from the compulsory language and integration tests.[179] Not every case of family migration, it seems, was deemed equally threatening to the cultural integrity of the Dutch nation.

Given this growing discrepancy between Dutch citizens and privileged groups of foreigners when it came to family migration, there seems to be some reason to nuance the government's position that Dutch nationality formed the most solid basis for integration into Dutch society. Particularly poignant in this respect is the assumption, quoted above, that as long as a family could conceivably settle elsewhere, the Dutch state was not obliged, on the grounds of article 8 of the European Convention of Human Rights, to concede to family reunification between a foreigner and a Dutch national.

In effect, what we see is an emerging divide between those Dutch citizens and settled immigrants who had well paid steady jobs, or who were successful on the international labour market, and those who occupied less secure positions on the Dutch labour market. The former could count on a secure future in the Netherlands, regardless of whom they intended to share it with. The latter could only count on being able to stay in the Netherlands to the extent that they shared their intimate lives exclusively with Dutch nationals. This group included a disproportionately large group of women and members of ethnic minorities. Increasingly, members of these categories ran the risk of having to choose between a lengthy, possibly permanent, separation from foreign family members, or moving to another country where family reunification might be possible.[180]

Remarkably, almost unannounced, housing requirements–that had long figured as a major practical hurdle to family reunification, and as the main point of distinction between settled immigrants applying for family reunification and Dutch citizens–ceased to apply. Although Dutch municipalities were actually introducing stricter criteria for determining the suitability of homes for receiving new family members from abroad,[181] the Ministry of Justice–more or less in passing–noted that housing requirements were no longer deemed fitting. While refusing family reunification on grounds of insufficient income was considered to be consistent with article 8 of the European Convention of Human Rights,

[179] Article 2 Wet Inburgering Nieuwkomers, *Stb.* 1998, 261.
[180] C.f. Van Walsum 2002.
[181] Tazelaar 1993.

refusing family reunification on grounds of insufficient housing was not.[182] Public housing, the most material manifestation of the incorporation of families into the Welfare State, was no longer to figure as a practical hurdle to the admission of foreign family members to the Dutch nation.

In this, Dutch family migration policies reflected the general shift away from the post-war model of social democracy. The scenario was no longer that of the Dutch state integrating families, as social units, into a nationally orchestrated system of shared welfare, but that of the Dutch state incorporating diverse and in varying degrees internationally mobile individuals into the Dutch segment of a polarised and diversely regulated transnational market of jobs, homes, services and securities. While those at the upper end of the market were being granted an increasing margin of privacy, freedom of movement and privilege, those at the lower end were being subjected to a growing range of controlling and coercive measures that inhibited their freedom to come and stay as they pleased, and that reached deep into their intimate lives.

Calling the Bluff of Universalism

The tensions between policies that forced women into a dependent position, and the stated aims of Dutch emancipation policies did not go unnoticed. Repeatedly, coalitions of migrant women's organisations and other feminist groups, like the Clara Wichmann Institute, undertook activities to draw political attention to this issue. Ultimately, as we shall see, they did book some success. Similarly, parents who were being denied the right to enjoy family life with their children in the Netherlands were well aware of the discrepancies between immigration and family law regarding the right to respect for family life. While they too lobbied for political support for their cause, their primary strategy continued to be litigation on the basis of article 8 of the European Convention of Human Rights.

In Chapter One, we observed how single and divorced fathers in mainstream Dutch society succeeded in mobilising article 8 of the European Convention of Human Rights to compensate for their loss of parental authority in non-marital relations and/or following divorce. This led to a chain of legislative reaction that empowered single and divorced

[182] *Kamerstukken II* 1996/97, 25 001, nr. 30 p. 8. In the new immigration law that was introduced in 2001, the housing requirement was definitively retracted, *Stb.* 2000, 497, p. 102.

fathers even more than the case law based on article 8 had already done. In the end, strategies that could have been used by mothers striving to win the final word over their children were successfully parried. Thus, what might have been a feminist coup within family relations was neutralised after all. In the process however, a human right had been brought to life that, until then, had been largely dormant.[183]

The impressive body of law that was subsequently built up around the issue of family life between parents and children could hardly be ignored when parents and children involved in transnational family relations appealed to that same right. For the Netherlands, the *Berrehab* case had made clear how the radical changes taking place in Dutch family law under the auspices of article 8 could impact Dutch immigration policies.[184] Still, to the extent that family life was protected in Dutch immigration law subsequent to this judgement by the European Court of Human Rights, it was a different family life than was protected in Dutch family law. As discussed above, Dutch fathers of foreign children and foreign fathers of Dutch children had to be more intensely involved with their children in order to be able to invoke the protection of article 8 than Dutch fathers of Dutch children. Moreover, that article 8 not only protected a father's right to maintain contact with his child, but also the child's right to stay in touch with and develop its relationship to both its parents, was not a relevant consideration in Dutch immigration policies.[185] Although complaints put before the European Court of Human Rights were consistently declared not admissible, parents and children none the less persisted in this strategy and, ultimately, they too were to book a certain degree of success.

Emancipation versus Dependency

On 15 September 1991, in reaction to a broadly expressed concern in the Dutch parliament regarding the position of migrant women with dependent status, Kosto, the then acting Deputy Minister of Justice under Lubbers, promised that, in future, he would take their position more into consideration.[186]

This promise was however belied by the decisions that were actually taken by his ministry and the immigration authorities. In 1997 a coalition

[183] The important exception, of course, being the famous *Marckx* case that, incidentally, had worked to the advantage of a single mother and her child, *Marckx v. Belgium*, ECHR 13 June 1979, application nr. 6833/74.
[184] See Introduction and Chapter Three.
[185] Van Blokland et al. 1999, p. 117.
[186] Van Blokland & De Vries 1992, p. 75.

of women's organisations that had already joined forces ten years before to address the problems faced by migrant women with dependent status, started to lobby for an amendment to the immigration circular that would allow for residence on humanitarian grounds in the event of domestic violence. Initially, their efforts seemed successful. In December of that year, Schmitz–who by then had taken over the portfolio immigration affairs under Kok–added domestic violence to the list of the factors named in the Dutch immigration circular that could justify continued residence on humanitarian grounds.[187]

But again, nothing really changed. The Clara Wichmann Institute, a feminist legal institute, had ninety case files examined in 1999 to determine to what extent immigration authorities were in fact taking domestic violence into account when making their decisions. The results showed that still, more than 90% of the women who applied for continued residence had their applications rejected in first instance, while in the end nearly 80% were allowed to stay after all. In the meantime, these women had had to sit through legal procedures that lasted an average of two years and three months.[188]

Moreover, in order to convince the authorities that they should be allowed continued residence, these women still had to present evidence of a number of factors that rendered return to their country of origin impossible. The mere fact that they were caught in an abusive relationship was not sufficient. Even in review, women had to prove that the situation in their country of origin was so problematic and/or that they and their children were so bound to the Netherlands, that it would be inhumane to force them to leave the country. Notably, women from Islamic countries stood a better chance of finally being allowed to stay: 88% of the women originating from Islamic countries as opposed to 65% of the women originating from non-Islamic countries eventually won their case. The price however was that they had to depict their own family and culture of origin as backward and barbaric, further confirming the growing conviction, in the Netherlands, that Islamic cultures were inherently misogynist.[189]

But if Dutch immigration authorities showed concern for the (real or imagined) oppression of women in Islamic countries, they showed little

[187] Chapter B1/2.4 Vc 1994; Van Blokland et al. 1999, p. 18.
[188] Van Blokland et al. 1999, p. 141-143.
[189] Cf comment Sarah van Walsum following a number of decisions and court rulings regarding women with dependent status published in *Nemesis* 1998/4, nrs. 908-911.

concern for migrant women's emancipation in the Netherlands itself. Their decisions revealed no awareness of the fact that women's dependent status placed their Dutch and settled immigrant husbands in a position of power that could easily be abused. By denying women the right to continued residence once they left an abusive situation, the authorities effectively strengthened the position of abusive husbands and partners. In the end most women who did leave an abusive partner were allowed to stay. The problem remained however that no woman could be certain of her case ahead of time, and that in any event, it would take months and sometimes years of uncertainty, often compounded by problems in getting welfare and other social benefits for herself and her children, before she knew whether or not she would be able to stay. The amendment to the immigration circular had done nothing to change this situation.

As discussed in Chapter One, by the 1990's domestic violence as an issue had been demoted from its former status as an issue of national social policy, and had been relegated to the Ministry of Justice, that treated it as a problem of individual deviancy, attributed to a pathological attachment to archaic notions of patriarchy. To the extent that it was still being recognised as a social phenomenon, this only applied to Third World countries brought under the aegis of the international development programmes of the Ministry of Foreign Affairs. The perception of domestic violence as a problem centred in migrant women's countries and cultures of origin, and not in the dependent status imposed on them by Dutch immigration law, fit well in this new ideological context.

In 1999 the Clara Wichmann Institute published its findings based on the researched dossiers. In that same year the Sociaal Cultureel Planbureau, a highly respected national research institute, published a report on the position of migrant women on the Dutch labour market.[190] The latter report showed that the rate of employment among women in the Netherlands dropped significantly once they started having children–regardless of their level of education or country of origin. However this tendency was particularly strong among women originating from Turkey or Morocco, still the two major countries of origin of family migrants to the Netherlands. Even after their children started attending school, unemployment rates remained relatively high among this group of women. One explanation was their relatively low education level. Further, it appeared that their chances on the labour market were affected by their degree of familiarity with Dutch society. Hardly any of these women took

[190] Sociaal en Cultureel Planbureau 1999.

part in paid employment during the first five years of her stay in the Netherlands.

Following the publication of these two reports, Albayrak, a member of parliament for the Dutch Labour Party, asked the then active Deputy Minister of Justice, Cohen, where he stood on the issue of migrant women with dependent status.[191] In reaction, Cohen published a memo stating that the income requirement would no longer apply to family migrants requesting an independent residence permit after having legally resided in the Netherlands, as family members, for three years or longer. After three years of residence as a family migrant, a permit for continued residence could only be refused for reasons related to public order and national safety. In the event a relationship was terminated by the death of the partner or spouse, a residence permit was to be granted regardless of how long the person in question had resided in the Netherlands.

Furthermore, this memo announced that in the event that an immigrant with dependent status was forced to leave a violent partner or spouse before the requisite three years had passed, a residence permit could be granted on humanitarian grounds if, besides the fact of a violent relationship, there was at least one other pressing reason, as listed in the immigration circular, pleading against expulsion.[192] In other words, women would no longer be expected to prove that an entire complex of factors, both in the Netherlands and in their countries of origin, rendered expulsion extremely unreasonable. What this amounted to was that women with children born in the Netherlands or attending school there could in any case be assured of a residence permit on humanitarian grounds in the event they decided to leave an abusive husband or partner. These policies were made effective with the introduction of a new law on immigration in 2001.[193]

Clearly, this change in policy meant a significant improvement in the position of migrants with dependent status–both men and women. Moreover, women with young children who had decided to leave a violent partner could count on being able to arrange their affairs much more quickly than before, so that they could start working on a new life for themselves and their children within a reasonable period of time after having stepped out of the abusive relationship. It is remarkable then that

[191] *Kamerstukken II* 1998/99, 25 453, nr. 13.
[192] *Kamerstukken II* 1999/00, 27 111, nr. 1, p. 11-12.
[193] By then, too, the term during which an application for continued residence could be submitted had been brought back to the original six months, instead of four weeks, this following an advice brought out by the Advisory Commission on Immigration Affairs See *Migrantenrecht* 2000/1, p. 27.

these changes were not motivated with any reference to women's emancipation or the importance of a secure legal status for successful integration, as they might have been in the 1980's. Rather, these changes were placed in the context of the impending European harmonisation of family migration rules. The Netherlands, it appeared, was the only European country where family migrants remained in such a dependent position for so long.[194] Without further ado, the policies concerning continued residence were adjusted. A surprisingly abrupt change of course, as had been the sudden decision to scrap the three year time limit regarding the admission of children, just before it was first to apply.

Family Life versus Immigration Control

Following the negative judgement of the European Court of Human Rights in the case of *Gül vs. Switserland*,[195] and subsequently in the case of *Ahmut vs. the Netherlands*,[196] many Dutch immigration lawyers initially doubted whether article 8 of the European Convention of Human Rights offered much scope for further challenging the underlying assumptions of Dutch immigration law.[197] Both of these cases concerned the request of a young child to be allowed to join its parent(s) in Switzerland, respectively the Netherlands. In the *Gül* case, the European Court of Human Rights determined that:

> "The essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interest of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation..."(para. 38)

Previous to the *Gül* case the European Court of Human Rights had already determined in the case of *Kroon vs. the Netherlands*[198] that the distinction between negative and positive obligations under article 8 of the European Convention of Human Rights did not lend themselves to precise definition.

[194] Ibid. p. 11.
[195] ECHR 19 February 1996, application nr. 23218/94.
[196] ECHR 28 November 1996, application nr. 21702/93.
[197] See for example Boeles 1996.
[198] ECHR 27 October 1994, application nr. 18535/91.

In that particular case, which involved family law, the European Court of Human Rights had left the Dutch State a very slim margin of appreciation indeed, disqualifying Dutch paternity laws in the interests of the individual child and parents involved. In the *Gül* case however the European Court of Human rights claimed a more modest role for itself. Deciding that the Swiss State's decision to refuse the Gül child entry did not amount to interference in family life, the European Court of Human Rights allowed for a wide margin of appreciation, determining that the disputed decision was not beyond the bounds of reason.

In the *Ahmut* case, the European Court of Human Rights similarly allowed for a wide margin of appreciation. This case concerned the admission of nine year old Soufiane Ahmut to The Netherlands in order to join his father. Soufiane's father had left his children behind when he left Morocco in 1986, after having divorced his first wife. He remarried in the Netherlands and acquired status on the basis of that marriage. In 1987, Soufiane's mother died in a car accident and those children who were still living at home were brought up in the paternal grandmother's home. Three years later Mr. Ahmut, who by then had acquired Dutch nationality, requested to have his youngest son, Soufiane, admitted for family reunification, since his mother had grown too old to be able to look after her grandson any more.

As usual, the Dutch immigration authorities refused admission on the grounds that the effective family bond had been severed. The father lost his case before the Dutch courts and proceeded on to Strasbourg where the European Commission of Human Rights judged his case admissible. The European Court of Human Rights however took a more reticent position. Considering that the father had made the deliberate choice to leave his children behind, that the father could, in theory, return to Morocco to join his son there and that Soufiane could be looked after in Morocco (his father had, for the time being, placed him in a boarding school), the European Court of Human Rights ruled that "In the circumstances The Netherlands Government cannot be said to have failed to strike a fair balance between the applicants' interests on the one hand and its own interest in controlling immigration on the other".

Significantly, four of the nine judges presiding over the *Ahmut* case explicitly rejected the majority reasoning in three separate dissenting opinions, the most extensive of which was written by the Dutch judge, Martens. His dissenting opinion rested upon the following arguments. Once a state has allowed an immigrant to settle within its territory, arguably that state is bound to respect the choices made concerning family life by that immigrant. Accordingly, one should as a rule admit members

of the family he or she has left behind. In Marten's view this is particularly the case where reunification with young children is at stake.

Regarding the specific merits of the *Ahmut* case, Martens argued that the Dutch government should have taken Mr. Ahmut's settled status and his recently acquired Dutch nationality into account. Moreover, he dismissed the fact that Souffiane could be properly looked after in Morocco as insignificant: "... whether or not Souffiane might possibly be brought up by his grandmother, his uncles, his brothers or sister, is all, in principle, immaterial as long as Souffiane's father is ready, willing and able to do so."

The European Court of Human Rights none the less remained reluctant to impinge on member states' decision-making powers when it came to immigration policy. This is understandable when we take into consideration the significance of immigration law for state sovereignty in the late twentieth century context. As Hirst and Thomson have argued, as nation-states have had to adapt to the growing pressures of political and economic internationalisation, the significance of policed borders for affirming national sovereignty has not decreased, but increased:

> "... Nation-states are now simply one class of powers and political agencies in a complex system of power from world to local levels, but they have a centrality because of their relationship to territory and population. Populations remain territorial and subject to the citizenship of a national state. States remain 'sovereign', not in the sense that they are all-powerful or omnicompetent within their territories, but because they police the borders of a territory and, to the degree that they are credibly democratic, they are representative of the citizens within those borders."[199]

Following the *Ahmut* case, several more complaints concerning the Dutch "effective family bond criterion" were submitted to the European Court of Human Rights. Most of these cases were judged inadmissible on the basis of the same arguments that were put forward in the *Ahmut* decision.[200]

[199] Hirst and Thompson 1999, p. 275. See Van Walsum 2006 for a more extensive discussion of how the ECHR balances state sovereignty and individual rights in immigration law.

[200] *Kwakye-nti and Dufie vs. the Netherlands*, ECHR 7 November 2000, application nr. 31519/96; *P.R. vs. the Netherlands*, ECHR 7 November 2000, application nr. 39391/98; *Knel and Veira vs. the Netherlands,* ECHR 5 September 2000, application nr. 39003/97; *J.M. vs. the Netherlands*, ECHR 9 January 2001, application nr. 38047/97; *Mensah vs. the Netherlands*, ECHR 9 October 2001, application nr. 47042/99.

Significantly however, in two cases, namely *Lahnifi vs. The Netherlands*[201] and *Adnane vs. The Netherlands,*[202] the European Court of Human Rights followed a different line of reasoning.[203] It distinguished between family reunification and the establishment of a new family unit; it took into consideration that the parents involved had become settled in their country of residence and stipulated that it could be unreasonable to place parents before the choice of having to renounce their acquired status in their country of residence or the company of their foreign child.

Although both of these cases were judged non-admissible, the reasoning followed clearly lay closer to the line propagated by Judge Martens than to that followed by the European Court of Human Rights in *Ahmut*. On 7 November, 2000, a case concerning the admission of a child was judged admissible: the case of *Sen vs. The Netherlands*.[204] Since this decision was only motivated by the standard consideration that the case raised complex issues in the sphere of article 8 of the European Convention of Human Rights, it remained to be seen to what extent the European Court of Human Rights would indeed be prepared to play a more active role than it had done in *Gül* and subsequently *Ahmut*.[205]

In the meantime, for the first time since its judgement in the case of *Berrehab vs. the Netherlands,*[206] the European Court of Human Rights ruled in the case of *Ciliz vs. The Netherlands* that a Dutch immigration law decision concerning continued residence had been in violation of article 8 of the European Convention of Human Rights.[207] This case was interesting because in it, questions of family law interfered with immigration law issues. The case was as follows. A Turkish man, named Ciliz, came to the Netherlands in 1988 and subsequently married a settled immigrant woman of Turkish origin. Together they had a child, born in the summer of 1990. In the fall of 1991, Mr. Ciliz and his wife separated. Mr. Ciliz applied for and received an independent residence permit, but this was not extended after a year since he could not meet the requisite income requirements. By then there were problems regarding access to his son, and he had appealed

[201] *Lahnifi v. the Netherlands,* ECHR 13 February 2001, application nr. 39329/98.

[202] *Adnane vs.The Netherlands,* ECHR 6 November 2001, application nr. 50568/99.

[203] By then the European Commission's task of deciding on admissibility had been taken over by the ECHR.

[204] *Sen vs. The Netherlands*, ECHR 7 July 2000,application nr. 31465/96.

[205] This case was subsequently declared grounded by judgement of the ECHR of 21 December 2001, application nr. 31465/96s. See also Van Walsum 2002b.

[206] *Berrehab vs. the Netherlands,* ECHR 21 June 1988, application nr. 10730/84.

[207] *Ciliz vs. The Netherlands*, ECHR 11 July 2000, application nr. 29192/95.

to the civil court to examine and to grant his request for a formal access arrangement. Despite this fact, his request to revise the negative decision regarding his continued residence was rejected. By then he did have a job, but he was still in his probationary period. Due to the problems regarding access to his child, he had not been very regular in providing support payments. The Immigration Law Chamber of the Regional Court of Amsterdam supported the Deputy Minister in his conclusion that, under these circumstances, the degree of family life between this man and his child did not warrant further leave to reside in the Netherlands.

In the meantime the civil court had ruled that trial meetings between Mr. Ciliz and his child should be organised. By then however Mr. Ciliz was already in detention awaiting deportation. Although further proceedings concerning an access arrangement were pending, he was deported to Turkey in November of 1995. Since he was no longer able to reside in the Netherlands, the civil court determined that the establishment of a formal access arrangement would not be in the interests of the child.

In its judgement in this case, the European Court of Human Rights ruled that the Dutch authorities had not "acted in a manner which has enabled family ties *to be developed*" (my emphases), resulting in a breach of article 8 of the European Convention of Human Rights. Significantly, in its judgement, the European Court of Human Rights referred to its earlier decision in *Ahmut* (in para. 61) in determining the margin of appreciation to be allowed to the defending State. This is striking considering that in *Ciliz*, continued residence was at stake and not–as in *Ahmut*–a first entry, where normally one would expect the European Court of Human Rights to allow a member state a broader margin of appreciation. In fact the European Commission of Human Rights, in its decision on the admissibility of the *Ciliz* case, had examined all the interests involved quite extensively, in the same spirit as that the European Court of Human Rights had previously done in the *Berrehab* case.[208] In its final judgement on *Ciliz* however the European Court of Human Rights chose to limit itself to a more marginal examination, close to the spirit of *Gül* and *Ahmut*, and focussed only on formal points of procedure.

However, the margin of appreciation that the European Court of Human Rights was prepared to grant the defending State in *Ciliz* found its limits in a core obligation that had taken shape in the family and child protection law jurisprudence around article 8 of the European Convention of Human Rights, namely: to allow for and even facilitate the normal development of family life between parent(s) and children. What is

[208] European Commission, 22 October 1997, nr. 29192/95.

significant is that in this judgement in an immigration law case, the European Court of Human Rights referred to its case law on family law and on the forced placement of children,[209] and the principles developed in those lines of jurisprudence–principles referred to by Martens in his dissenting opinions following *Gül* and *Ahmut*. On the basis of those principles, one would have to conclude that, even in the event that there had been little or no direct contact between parent and child, the member state could still be required, on the grounds of article 8 of the European Convention of Human Rights, to take positive action to ensure that family life be (re)established and maintained at a level to be considered normal and desirable, given the age of the child.

Admittedly, the implications of judgements like that in the *Ciliz* case for national policies concerning family migration should not be exaggerated. Although the Dutch Ministry of Justice modified the immigration circular, following *Ciliz*, to better match the interpretation that the European Court of Human Rights had given to article 8, on the whole, the reception of the European Court of Human Rights' case law in immigration law in the Netherlands was decidedly more reserved than the reception of its case law in family law had been. None the less, like the shifts in policies regarding the status of marriage migrants, this successful attempt to mobilise the family law jurisprudence of the European Convention of Human Rights in the interests of transnational family life made clear that law–even immigration law–is not monolithic, but fragmented and fraught with contradictions and logical flaws. In serving conflicting interests, it can also facilitate surprising coalitions. It is, after all, nothing more and nothing less than the result of dynamic processes of human interaction.[210]

C: A Nation of Individuals

As seen in Chapter One, by 1990 a new consensus was being reached in Dutch family law, grounded in the liberal values of freedom and equality. Men and women were to be treated equally and all adults were to be left free in their sexual choices and preferences. By the same token, men and

[209] In *Ciliz* the ECHR refers to: *Keegan vs. Ireland*, ECHR 26 May 1994, application nr. 16969/90; *W. vs. the United Kingdom*, ECHR 8 July 1987, application nr. 9749/82 and to *McMichael vs. the United Kingdom*, ECHR 24 February 1995, application nr. 16424/90 .

[210] I have worked out this theme more thoroughly, referring to more recent rulings by the ECHR, in Van Walsum 2006.

women were all assumed to bear the responsibility for their own financial needs and to face the financial consequences of choices made regarding the division of labour within the family. Children, too, were seen as an individual choice and as a personal responsibility. How parents chose to raise their children, where they chose to do so, and with whom, was left to their discretion, as long as they proved capable of bearing the costs and of passing on the norms of individual responsibility and self-sufficiency to their offspring.

No longer perceived of as a seamless unit, the family became a collection of individuals. Men and women were free to determine who they shared their intimate lives with, under which conditions and in whose abode, and for what period of time. Sexual relations between adults became disassociated from the pedagogical relations between adults and children. Parents were distinguished from each other depending on whether they were biologically, legally or socially connected to their children. As foundation of the family, the married couple had more or less evaporated out of Dutch family law. What remained was a myriad of variations on the theme of the parent-child dyad. This made it possible to distinguish and separately regulate physical, legal and cultural acts of reproduction, allowing for example for the introduction of special measures delaying the transfer of a Dutch father's nationality to his child until after he had lived with the child for at least three years in those instances in which the father was not married to the mother and had not already acknowledged the child before it was born.

To a large extent, in legal terms at least, the nuclear family had become disaggregated. In practice, however, a healthy majority of people in the Netherlands continued to live according to the classic model of (male) fulltime breadwinner, (female) part-time homemaker and shared progeny. Where in the post-war period the ideal of the monogamous and heterosexual nuclear family had been too rigidly imposed, now it had become too radically erased from the legal blue-print of family life in the Netherlands

But the fact that, once again, legal theory did not provide an accurate reflection of lived human experience did not detract from the fact that, once again, it was becoming possible to determine a mode of inclusion and exclusion in terms of family norms. Under the motto of individual responsibility, single and divorced mothers who previously could have turned to the Dutch state for financial support could now be excluded from such support. Welfare services were instructed to pressure single parents into taking whatever jobs the increasingly casualised labour market had to

offer, even though national support for child care facilities had ceased to be negotiable.

The paradoxical result was that parents, rather than becoming more independent, actually became more reliant on others as they struggled to reconcile often erratically paid employment with moral obligations to provide care. Moreover, those parents who were deemed financially irresponsible, pedagogically inept or otherwise "incapable of coping with freedom" were made subject to an expanding regime of pedagogical control and intervention. While the Dutch state had retreated from its former role of controlling sexual relations between adults, it had increased its scope for intervening in the upbringing of children.

As the contours of this new normative order were being filled in via family and social security law, pedagogical services and the increased surveillance of juvenile delinquents and high-school drop-outs, a new consensus also found expression in Dutch integration policies concerning the nature of Dutch citizenship. Neither Christian altruism nor socialist solidarity now served as the normative touchstone for defining the virtues of the citizen. The new citizen had to be competitive and self-sufficient. He or she was to adhere to liberal principles like the separation of Church and State and the rule of law, and refrain from discriminating on grounds of gender or sexuality. Neither father nor husband–let alone mother, daughter or wife–the new citizen was first and foremost a flexible and enterprising individual, unfettered by family or religious bonds or commitments, ready to seize life's chances wherever and whenever they presented themselves.

From a Quantitative to a Qualitative Control of Migration

In the course of the 1990's, in accordance with the WRR's analysis, the Dutch government, first under the leadership of the Christian Democrat, Lubbers and then under that of the Labour Party member, Kok, came to accept immigration as a fact of modern life. It was no longer seen as necessarily problematic, as long as it involved persons sharing a similar cultural background to that of the ethnically Dutch. Consequently, the ongoing integration of certain categories of people formerly designated as "ethnic minorities"–for example immigrants originating from southern Europe–was no longer seen as a reason for concern. But the arrival of newcomers who were perceived of as culturally divergent came to be seen as problematic and requiring special attention. This applied, in particular, to those foreign immigrants affiliated with ethnic minorities–particularly those perceived of as Islamic–who increasingly were being portrayed in

terms reminiscent both of the Dutch before their emancipation from the tutelage of the religious columns–devout, interdependent, the genders and generations hierarchically related, their sexuality contained by the limits of heterosexual marriage–and of the natives and "Orientals" of the former colonies: tolerant of polygamy, forced marriages and other "heathen practices".

Particularly under the Purple Coalitions led by Kok, proposals for programmes for pedagogical intervention and integration policies started to overlap. Pre-school programmes merged with integration programmes, crime prevention schemes and plans for urban renewal. All of these initiatives focussed on bringing deviant youth, irresponsible adults and second generation migrants and their parents into the new moral order of the Dutch nation. They all found their justification in the declared mission of protecting Dutch society against potential threats to the hard won freedoms and individual liberties that the new normative order represented.

As had been the case in the colonial regime described by Stoler, family norms were now being used to shape a disciplinary regime that wasn't just meant to regulate the volume of the population, but to protect a specific manner of living, and the privileges of a group associated with that manner of living.[211] The emancipated individualism of the new and improved Dutch nation had to be protected against the archaic forms of interdependency that the cultures of origin of certain categories of migrants had come to represent. In the process, the privileges that accrued to citizenship were being made the preserve of those presumed to be endowed with the properties now associated with that status.

New Combinations of Techniques of Power

Compared to the preceding period in which a number of attempts to further limit family migration had been checked in the Dutch parliament or by the national courts, the final decade of the century was remarkable for the number of new restrictions to family migration that were successfully introduced. While in the context of Dutch welfare policies, Dutch citizens became more emphatically protected against administrative controls of their sexual behaviour, in the context of Dutch immigration law relationships between spouses were made subject to increased scrutiny. Dutch family and social security laws were increasingly premised on the assumption that individual men and women should be financially

[211] Stoler 1995, p. 78; 83

independent, and Dutch emancipation policies presented as ideal the couple that shared both financial and care responsibilities equally. Dutch immigration law however became increasingly premised on the assumption that anyone in the Netherlands wishing to bring over a spouse or partner from abroad should bear the full responsibility, like an old-fashioned breadwinner, for the family income. Income requirements no longer just applied to recently arrived newcomers applying for family reunification, but to Dutch citizens, refugees and settled immigrants as well, while single parents stood less chance than before of being made exempt.

On the whole, transnational family bonds came to be viewed with more suspicion and less sympathy than before. The newly declared mission of protecting the social cohesion of the nation now trumped the outmoded ideal of preserving the unity of the nuclear family. Established family ties in the Netherlands no longer offered protection against deportation, while there was growing political support for the notion that foreign family members originating from non-western countries could be required to attest to their adherence to the separation of Church and State; to their tolerance of homosexuality; to their adherence to the equal treatment of men and women, before being admitted to Dutch citizenship, or even–in the perception of some politicians–to the territory of the nation.

Thus we see how, in the course of the 1990's, rules regulating immigration came to be linked to integration policies, in ways that frustrated rather than facilitated the establishment and maintenance of transnational family bonds. Both the "clarification" of income policies as a prerequisite for continued residence and the "clarification" of the effective family bond criterion as a prerequisite for admitting children were explicitly motivated in terms of integration policies. In order to ensure successful integration, family migrants applying for an independent residence permit following separation or divorce had to have established a lasting bond with an employer, and only those children who had stayed in close contact with their parents were allowed in for purposes of family reunification since only they were expected to be able to adjust successfully to life in the Netherlands.

Yet both of these "clarifications" were also related to measures meant to control immigration, not encourage integration. Thus the strict application of income requirements to family migrants applying for independent status in effect extended the period of dependent residence–originally instigated to prevent fraudulent marriages, while the stricter application of the effective family bond criterion was also defended as a

necessary measure to prevent adolescent labour migrants from entering the country under the pretext of joining their parents.

Different techniques of exclusion were also combined in order to once more enable the Dutch state to control mobility by manipulating time and space. New bureaucratic hindrances were introduced, or already existing ones were more vigorously applied, such as the extended entry visa requirement and the lengthy and complicated procedures devised to control the legality and validity of family documents in the five so-called problem countries. Similarly, aspiring family migrants already resident in the Netherlands were encouraged or even forced to leave the country by refusing them permission to await the outcome of procedures in the Netherlands, and by further limiting their access to social rights in the Netherlands as long as they were not (yet) in possession of legal status.

At the same time, with the measures that had been introduced to prevent fraudulent marriages, relationships and parentage, along with the stricter application of the effective family bond criterion, intensive face-to-face contact had become more important for establishing the existence of family ties warranting admission. Since establishing and maintaining face-to-face contact was dependent of the freedom of movement of those concerned, the combined effect of these two developments in immigration policy was to once more equip the Dutch state with the means to control migration by manipulating time and space, even in an era of radically increased international transportation.

International Law as a Mode of Resistance

As the Dutch state developed new bureaucratic tools for manipulating time and space, family migrants experienced more difficulty in acquiring a right to inclusion via prolonged residence within Dutch territory. And as a new consensus emerged concerning the dominant normative order in the Netherlands, it became easier to justify the exclusion of family members who were assumed to divulge from that order. The pluralist and egalitarian discourse of the 1970's and 80's, in which shared territory had been the main defining feature of the nation, no longer offered the possibilities it once had for including foreign family members into the Dutch nation.

But while the Dutch government claimed the restrictions it imposed on immigration were necessary to protect personal freedoms depicted as typical of Dutch national identity, the restrictions on family migration actually threatened the very freedoms the government putatively claimed to defend. Where Dutch families were assumed to consist of autonomous and responsible individuals, bound by contracts freely negotiated on equal

terms, those families subject to Dutch immigration law were manoeuvred into a position whereby their mutual relations became increasingly asymmetrical, allowing for little or no autonomy for members with dependent status. Where in the sphere of family law Dutch citizens had acquired a growing degree of freedom in their choice of spouse–allowing even for marital unions between same sex partners–in the context of immigration law, specific categories of people were being limited, in cumulative ways, in their choice of partner or spouse. Where Dutch families were generally assumed to be diverse, engaged in a variety of living arrangements and approaches to the upbringing of children, "non-Western" families were declared suspect as soon as they deviated from traditional patterns.

Given the role universalistic tenets of liberalism played in defining the new normative order of the Dutch nation, appealing to those same tenets became the most promising strategy for challenging the construed distinctions between citizens and the aliens, and thus claiming inclusion into that new normative order. As we have seen at the end of this chapter, family migrants often had to go as far as the European Court of Human Rights in Strasbourg in order to succeed in this strategy. By doing so, they confronted the European Court of Human Rights with the growing disjunction within Dutch law between the degree of freedom being accorded to Dutch citizens via Dutch family law, and the powers being accorded to the state, via Dutch immigration law, to interfere in those same freedoms.

When only immigration law was at issue, as in the *Ahmut* case, the European Court of Human Rights generally took a cautious stance, granting the Dutch state a wide margin of appreciation in determining who should or should not be admitted to its territory. But when the disjunction between freedoms accorded via Dutch family law and freedoms denied via immigration law lay at the heart of the conflict at issue, as in the *Ciliz* case, the European Court of Human Rights made short shrift of the Dutch state's sovereign right to regulate immigration. In such cases, the obligation to enable and facilitate family life between parents and children prevailed. Even where no claims to inclusion had been built up via long-term legal residence, the Dutch state was not entirely free to allow the "protection of social cohesion" to prevail over family unity. The admissibility of Sinem Sen's complaint against the Dutch state's refusal to allow her to join her parents in the Netherlands attested to this fact.

By appealing to the universalistic principles of international human rights law, migrant family members not only challenged the essentialist distinctions being made between them and the new model Dutch citizen,

they also helped increase the scope of the European Court of Human Rights' jurisdiction over the Dutch state's sovereign right to regulate the terms of national belonging.

Conclusion

In her work, Anne Stoler has made clear that the racial divide codified during the Dutch colonial regime in the former Dutch East Indies, did not simply serve to define existing distinctions and legitimate the related differences in wealth and power. Rather, it formed the legislative component of a complex technology of exclusion that actually produced, maintained and reproduced such differences. This technology incorporated various lines of distinction that could be arranged and rearranged in varying combinations to produce a discourse of exclusion suited to the normative context of the time, and subject to enforcement via the interfering techniques of alliance and discipline as they were applied within the territory of the Dutch East Indies during the colonial period.

Race, as the focal concept of this regime, was both complex and contradictory. It brought together gender, genealogy and education as lines of distinction via multiple and diverging narratives. As Stoler argues, physical traits did not form the essence of racial distinction, but merely served to indicate the hidden but truly relevant distinctions of character: distinctions that were linked–through the gendered regulation of family relations–to genealogy and upbringing. Only those who could legally claim descent from a European male and who had been raised by a woman subject to the marital authority of a European husband were assured of European status. Even then, however, factors of class, education and lifestyle–particularly as they related to sexuality–could weaken this claim, while periods of residence and–preferably–advanced education in the Netherlands could serve to strengthen it.

The Bertha Hertogh affair provided a dramatic illustration of the ambiguities and contradictions involved, as did some of the court cases cited in Chapter Two, concerning the admission, following Indonesia's independence, of people originating from the Dutch East Indies to the Netherlands. Such cases brought to the surface the inherent tensions of a regime that, like the codified family norms on which it depended, claimed to be grounded in the objective reality of biological reproduction, while defining that same reality in the normatively charged terms of gender, legal status and upbringing. Such disjunctions made the regime unstable, requiring constant adjustments and controls, but they also rendered it flexible, making it possible to recombine the various lines of distinction