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A Introduction

During the past decade, the law faculty of Maastricht University (the Netherlands) was involved in several research projects into marriages that are considered to possibly represent harmful traditional cultural or religious practices and that occur among the population of Dutch society. The research specifically concerned child marriages, forced marriages, polygamous marriages, unregistered marriages, and religious marriages. Both practice as responses from law were investigated. In order to obtain an insight in practice, the studies always included empirical research. Empirical research was conducted through case studies, interviews with professionals, stakeholders and individuals, focus group sessions with various communities, online questionnaires among professionals and stakeholders, analysing registrations, and assessment by experts. Responses by law were found by studying case law, legislation, law proposals, and policy-documents.

The issues at stake have become an important focus for Dutch policy-makers and legislators, and many cases were brought before Dutch courts.

The following studies are the source of the analyses described in the present article:

– *Forced Marriages, Left behind Family Members, and 'Marital Captivity' (Captured in a Religious Marriage) in the Netherlands,* study, commissioned by the Dutch Ministry of Social Affairs and Employment, cited hereinafter as *2014-Study*;[1]

– *Child Marriages and Religious Marriages in the Netherlands,* study, commissioned by the Dutch Ministry of Social Affairs and Employment, cited hereinafter as *2015-Study*;[2]

[1] *2014-Study*. Resulted in the Report E. Smits-van Waesberghe et al.: *Zo zijn we niet getrouwd; Een Onderzoek naar omvang en aard van huwelijksdwang, achterlating en huwelijkse gevangenschap*. Research conducted by the Verwey-Jonker Institute, Maastricht University, and the NGO Femmes for Freedom; *2014-Study:* www.rijksoverheid.nl/documenten/rapporten/2014/09/29/zo-zijn-we-niet-getrouwd-een-onderzoek-naar-omvang-en-aard-van-huwelijksdwang-achterlating-en-huwelijkse-gevangenschap (last access 27. 10. 2020).

[2] *2015-Study*. Resulted in the Report S. Rutten et al.: *Gewoon Getrouwd; Een Onderzoek naar kindhuwelijken en religieuze huwelijken in Nederland*. Research conducted by Maastricht University and the Verwey-Jonker Institute; *2015-Study:* www.verwey-jonker.nl/publicatie/gewoon-getrouwd-een-onderzoek-naar-kindhuwelijken-en-religieuze-huwelijken-in-nederland (last access 27. 10. 2020).

– *Marital Captivity in the Netherlands,* study, funded by the Dutch scientific organization NWO, cited hereinafter as *2013–2018-Study*;[3]
– *Evaluation Study into the Functioning in Practice of the Dutch Act Combatting Forced Marriages*, study, commissioned by the Dutch Ministry of Justice and Security, cited hereinafter as *2019-Study*.[4]

In the following paragraphs, some of the findings of these research projects will be described and analysed. Paragraphs will be divided by marriage types. Prior to that, in order to better understand the issues, first the Dutch legal and political context will be briefly explained.

B Dutch Context

The Netherlands historically hosts people from several denominations, mainly Christians. Nowadays, more than half of the population (51 %) does not consider themselves as believers or belonging to a faith.[5] Among the believers, most are Christians,[6] followed by a relatively small number of Muslims.[7] Jews nowadays only represent 0,2 %.[8] Due to the colonial history of the Netherlands and its previous composition, quite a large number of persons from countries like Indonesia, Suriname, and the Netherlands Antilles live in the Netherlands. Since the 1960s, the Netherlands is considered to be a migration state, hosting both refugees as migrants from Africa, the Middle East and South and Central Asia. Most of the Muslims are coming from those regions.[9] Finally, the effects of globalization resulted in a continuous coming and going of people from all over the world.

The Dutch legal system consists of a uniform set of rules of state law, applicable to all citizens within its jurisdiction. That law is based on secular principles. The only exception can be found in private international law (PIL), since the application of private international law-rules may result in the application or recognition of foreign law. All family law relationships with a transnational component are *ex lege* subjected to the rules of PIL. Although those PIL-rules are applicable to all foreign nationalities, the most pressing issues arise where foreign family law is linked to religious or cultural norms and values that differ from the ones the Netherlands traditionally is familiar with.

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[3] *2013–2018-Study*. Resulted in two Research Reports: 1. Esther van Eijk: *Wel gescheiden, niet gescheiden? Een Onderzoek naar huwelijkse gevangenschap in Nederland* (2017). 2. Pauline Kruiniger: *Niet langer geketend aan het huwelijk; Juridische instrumenten die huwelijkse gevangenschap kunnen voorkomen of oplossen* (2018); one dissertation: Benedicta Deogratias: *Trapped in a Religious Marriage; A Human Rights Perspective on the Phenomenon of Marital Captivity* (Intersentia 2019); a documentary: *Trapped in a Marriage* www.maastrichtuniversity.nl/sites/default/files/rapportage_wel_gescheiden_niet_gescheiden_nov2017_0.pdf (last access 27. 10. 2020); and a book: Susan Rutten / Benedicta Deogratias / Pauline Kruiniger (eds.): *Marital Captivity; Divorce, Religion and Human Rights*, The Hague 2019.

[4] *2019-Study*. Resulted in the Report: S. Rutten et al.: *Verboden huwelijken. Onderzoek naar de werking van de Wet tegengaan huwelijksdwang in de praktijk* (with a summary in English: *Research into the Functioning of the Act Combatting Forced Marriages in Practice*). Research conducted by Maastricht University and the Verwey-Jonker Institute; *2019-Study*. www.wodc.nl/onderzoeksdatabase/3024-evaluatie-wet-tegengaan-huwelijksdwang.aspx (last access 27. 10. 2020).

[5] Statistics CBS (2018).

[6] 36 %.

[7] 5 %.

[8] Ca. 35 000, compared to 140 000 before the Second World War.

[9] Other religions are Hinduism (ca. 0.6 %) and Buddhism (ca. 0.4 %); H. Schmeets: *De religieuze kaart van Nederland* 2010–015, CBS 2016, p. 5.

The last decades have shown that people with a non-Dutch cultural or religious background often still adhere to their traditional family norms and values and do recourse to foreign family law. As a consequence, Dutch society is faced with various legal claims that have to be answered. Looking back to the past half century, one may note that two discussions always have influenced and controlled Dutch policies on diversity.[10] Firstly, the discussion on the question whether cultural and religious diversity could or should be accommodated and accepted; and secondly, the discussion on the protection of human rights towards harmful and discriminating cultural or religious norms, traditions, and practices. The research projects that will be described in the present paper stem from the second discussion. Emancipation movements that fought for more equality between men and women, led to the development of state policies in which women were protected against oppressive normative regimes and systems. The *Women's Convention*[11] and *Istanbul Convention*[12] have definitely strengthened the urge to take legislative measures to combat practices that are harmful for women, since those practices are considered and classified as harmful and discriminatory. The concept of honour-based violence has been stretched as well. Those conventions prioritize the protection of women against harmful traditional practices above respect for those practices. As we will see in the following sections, both the Dutch legislator as Dutch case law follow this preference. This new policy required more knowledge of and insight in various cultural and religious marital traditions and practices of minorities and has resulted in new legislation and law-proposals, mainly to combat those practices.

As has been explained above, this paper will restrict to issues concerning marriage. Claims in this respect may come from two sides. On the one hand, citizens claim to be allowed to stick to their own cultural or religious traditional practices in marital affairs; on the other hand, people may claim to be protected against those traditional practices. Among citizens in the Netherlands, those practices may be used either in the Netherlands or abroad, often the country of origin. Therefore, people can become a victim either in the Netherlands or abroad. In managing these issues in law, the legislator or judge turns out to be aware of this extraterritorial aspect that may be at stake on many occasions.

C Child Marriages

The existence of child marriages within the Netherlands for a long time never had been identified as a serious problem. Little was known about an existing need for taking care of child marriages, except in cases of minor girls who were pregnant. It was mainly first signals about marriages of minor Muslim girls, that instigated the Dutch government to investigate child marriages in the Netherlands.[13] It appears from the *2015-Study* and previous research projects, that child mar-

[10] During the last decade, a third phenomenon has entered the debate, and that is public safety, an existing concern in society, often linked to Islam, about the incompatibility of Western and Islamic ways of life, symptoms of radicalization, and violence as well as other anti-democratic acts.

[11] *UN Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), 1979.

[12] *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, Istanbul 2011.

[13] TK 2013–2014, 32824, nr. 37; Rutten et al.: *2015-Study*, pp. 20 f.

riages occur in the Netherlands for various reasons[14] and among several communities. Only a few regular civil law child marriages, consisting mostly of pregnant girls of 16 or 17 years old, were identified. Most child marriages were irregular marriages, either unregistered or concluded abroad. The total estimated number of child marriages in 2013 and 2014 is 250 a year.[15] One third of those marriages occur among asylum seekers.[16] Child marriages seem to occur among various religious communities: Christian, Muslim, Hindu and Buddhist, and be not uncommon within the Roma community, among Syrian refugees,[17] and among young 16 or 17 year old Muslims, where a marriage enables them to have intimate relationships with the other gender.[18]

In 2011 and 2012, two law proposals were submitted to parliament, aimed at a stricter and more severe policy against forced marriages, child marriages, polygamy and female genital mutilation: a criminal law proposal and a civil law proposal. Both law proposals aimed at restricting harmful traditional practices not only in the Netherlands itself, but also when citizens residing in the Netherlands continued to follow those practices in their home countries or elsewhere abroad. The criminal law came into force on the 1st of July 2013.[19] It was in fact the quite serious number of child marriages among the flows of refugees from Syria, that encouraged the Dutch government to immediately accept the civil law proposal. It was seriously taken into consideration that marriage could be abused to either enable young girls to legitimately flee to Europe, to accompany male refugees, or for economic reasons. The state realized that children could thus be deprived of their families and familiar environment against their will, and subsequently, during the journey to Europe, could not be guaranteed any protection. The civil law came into force on the 5th of December 2015.[20]

The law sets the marriage age unconditionally at eighteen years. Since pregnancy may come at an earlier age, and cultural or religious traditions may require pregnant couples to marry, some resistance against the introduction of this measure was expressed by religious groups. Furthermore, the law does not provide measures against the conclusion of informal child marriages, and therefore as such does not form a barrier for the continuation of those marriages. Under the new law, foreign child marriages can no longer be recognized in the Netherlands. However, as soon as spouses have reached the age of eighteen, the marriage can be recognized. It follows from the *2019-Study* into the functioning of the Act, four years later, that civil servants in the Netherlands have hardly had anymore requests to conclude

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[14] Rutten et al.: *2015-Study*, pp. 106–120. Reasons that were identified: legitimization of relationship, tradition, civil marriage would not be possible, pragmatic reasons (e. g. the marriage enables spouses to travel abroad, or financial reasons), protection of women, pregnancy, forced by the parents. Also see A. Moors, *Motieven om islamitische huwelijken aan te gaan*, FORUM Utrecht 2014.

[15] Rutten et al.: *2015-Study*, p. 99.

[16] Ibid., p. 80.

[17] And, to a lesser extent, Afghanistani, Eritreans, Iraqis, Iranians, and Somalis.

[18] Rutten et al.: *2015-Study*, pp. 61–63. Also see FORUM, *Migrantengemeenschappen over huwelijksdwang*, Utrecht 2014; E. K. Szepietowska / A. Dekker / F. Özgümüs: *De doos van pandora. Huwelijksmigratie onder vluchtelingengroepen in Nederland,* Amsterdam 2011.

[19] Wet van 7 maart 2013 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en het Wetboek van Strafrecht BES met het oog op de verruiming van de mogelijkheden tot strafrechtelijke aanpak van huwelijksdwang, polygamie en vrouwelijke genitale verminking, in: *Staatsblad* (Official Gazette) 2013, p. 95.

[20] Wet van 7 oktober 2015 tot wijziging van Boek 1 en Boek 10 van het Burgerlijk Wetboek betreffende de huwelijksleeftijd, de huwelijksbeletselen, de nietigverklaring van een huwelijk en de erkenning van in het buitenland gesloten huwelijken, in: *Staatsblad* (Official Gazette) 2015, p. 354. Entry into force decision: *Staatsblad* 2015, p. 373.

marriages beneath the age of eighteen nor requests to register foreign child marriages.[21] On the other hand, it regularly occurs that spouses who had entered into a child marriage abroad, requested registration of their marriage in the Netherlands after having both reached the age of eighteen. The number of unregistered marriages was not investigated in the *2019-Study*. Both, communities themselves as state officers who had to apply the Act, suspect that the number of those marriages has increased rather than decreased, and that the Act that intends to prevent child marriages in practice can be – and is – circumvented.[22] Minor daughters may enter the Netherlands as part of and with the assistance of their family, although they are in fact minors and are already married. Incidentally, the judge had to assess the recognition of a foreign child marriage.[23] In the area of child marriages, the functioning of the Act has most clearly exerted its influence on migration policy, especially in asylum cases. As from the entry into force of the new Act, foreign marriages are no longer recognized if both spouses have not yet attained the age of eighteen years. In those cases, a (dependent or derivative) residence status as a spouse is no longer granted. From data obtained from immigration officers, it can be deduced that the number of child marriages they had to assess since the entry into force of the Act is approximately 150. However, the number of situations in which there in fact had been a child marriage, which was not or no longer relevant in the assessment of the request for asylum, is higher at 450. The refusal to no longer recognize marriages if one of the spouses is beneath the age of eighteen years, has not only had positive consequences. It also led to situations in which child brides were left abroad to their own devices and unprotected. This affected girls in a refugee context in particular. Furthermore, non-recognition as a spouse can in migration law result in a separation of the married couple. As the research analysis shows, it can be deduced that this can occur in at least two instances: Married couples can become estranged from each other because one of both spouses cannot be permitted to stay with the other spouse in the context of family reunification. Moreover, it happens that spouses become separated from each other as an outcome of the Dublin procedure. This is often what the spouses involved do not want and it becomes especially problematic if children (of the young bride) are involved. The right to family life can be at stake. As soon as both spouses in a child marriage have reached the age of eighteen, the marriage no longer violates Dutch public policy, and immigration officers could then recognize their marriages. In February 2020, the Dutch government announced its intention to no longer recognize child marriages at all, not even if spouses have reached the age of eighteen.[24] This means that spouses who had married in a child marriage, and want to remain married, will have to remarry.

D Forced Marriages

At the end of the 20th century, forced marriages arrived at the political agenda. Various research has been conducted ever since, commissioned by the Dutch government, into both the phenome-

[21] Rutten et al.: *2019-Study*, pp. 60 f., and 66–69.

[22] Ibid., pp. 132, 145 and 160 f.

[23] Ibid., pp. 108–116.

[24] Actieagenda schadelijke praktijken TK 2019–2020, 28345, 228 Attachment, p. 7. The Dutch Minister of Legal Protection intends to propose a bill that will also end the recognition of child marriages once the spouses have reached the age of eighteen, TK 2019-2020, 33836, nr. 47.

non of forced marriages in the Netherlands as into possible legal solutions.[25] The *2014-Study* shows that the number of forced marriages presumably is around 350 to 1 000 per year.[26] Forced marriages can be explained by various reasons, like it being a traditional practice, in order to guarantee certain family-interests, or to solve a (family) issue, for example to protect or prevent a violated honour.[27] It mainly affects young people and occurs both among the less educated as the higher educated, and among different communities. As far as it concerns Muslims, the Turkish, Moroccan, Surinam,[28] Iraqi, Afghanistan, Pakistani, and Somalian population are common in statistics.[29]

The criminal law and civil law, described in the previous paragraph, that came into force in 2013 and 2015, also tried to suppress forced marriages, both in the Netherlands and abroad. The government also deemed it plausible that forced marriages abroad could be used for migration purposes, since marriage with a spouse habitually residing in the Netherlands would open the door to obtaining residence in the Netherlands. Marriages between relatives (e. g. between cousins) and marriages with a minor would be extra vulnerable to be established with external force. Remarkable novelties that were introduced by those laws were that it became clear and was reaffirmed that forced marriages could be classified as a form of coercion and thus be a crime under Dutch law (art. 284 Criminal Code). Bringing about forced marriages abroad for people with regular residence in the Netherlands, regardless whether or not a forced marriage could be legitimately entered into in the state of celebration, was criminalized as well (art. 285 c Criminal Code). In civil law, marriages between cousins were restricted by subjecting them to an additional declaration of voluntary and non-coercive consent and child marriages were no longer allowed because they both were vulnerable to be forced marriages.[30] Foreign marriages could under no circumstances be recognized if free consent of one of the spouses was missing, unless the spouse whose consent was lacking explicitly agrees with the recognition of the marriage (art. 32 par. e book 10 Civil Code).

What was already foreseen and was confirmed by the *2019 Evaluation-Study*, was that it remains difficult to provide evidence of forced marriages.[31]

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[25] Smits-van Waesberghe et al.: *2014-Study*; A. Cornelissens / J. Kuppens / H. Ferwerda: *Huwelijksdwang. Een verbintenis voor het leven?,* Den Haag 2009; I. Esveldt / F. van Poppel: Partnerkeuze van Turken en Marokkanen in Nederland, in: *Genegenheid en gelegenheid. Twee eeuwen partnerkeuze en huwelijk*, ed. by J. Kok and M. H. D. van Leeuwen, Amsterdam 2005, pp. 103–133; FORUM 2014; Hooghiemstra: *Trouwen over de grens. Achtergronden van partnerkeuze van Turken en Marokkanen in Nederland*. Den Haag 2003; M. De Koning / E. Bartels, *Over het huwelijk gesproken: partnerkeuze en gedwongen huwelijken onder Marokkaanse, Turkse en Hindostaanse Nederlanders*, Den Haag 2005; A. Nanhoe et al.: *Eer en partnergeweld onder Hindostanen. Een verkennende studie naar de rol van eer en huwelijksdwang bij partnergeweld onder Hindostanen en de mogelijkheid van preventive,* Rotterdam / Utrecht 2013; G. E. Schmidt: *Juridische aspecten van gedwongen huwelijken,* Den Haag 2005; L. Sterckx et al.: *Huwelijksmigratie in Nederland. Achtergronden en leefsituatie van huwelijksmigranten,* Den Haag 2014; L. Sterckx / L. Bouw: *Liefde op maat. Partnerkeuze van Turkse en Marokkaanse jongeren,* Amsterdam 2005; O. Storms / E. Bartels: *De keuze van een huwelijkspartner. Een studie naar partnerkeuze onder groepen Amsterdammers,* Amsterdam 2008; Szepietowska (2009).

[26] Smits-van Waesberghe et al.: *2014-Study*, p. 71 (674 to 1914 in 2 years).

[27] Smits-van Waesberghe et al.: *2014-Study*, pp. 115 f.

[28] Next to Muslims, the Surinam population in the Netherlands consists of Hindustani and Christians.

[29] Smits-van Waesberghe et al.: *2014-Study*, p. 116.

[30] This link between child marriages and force was confirmed by a decision of the Court of Appeal Amsterdam of 19 April 2016, ECLI:NL:GHAMS:2016:1507.

[31] Rutten et al.: *2019-Study*, pp. 52 f., 55 (foreseen) and 91 f., 143, 177–179 (confirmed).

The problem of recognising and determining the existence of forced marriages was considered to be one of the major stumbling blocks in the new Act, not only by professionals and stakeholders in the field, but so do officials who have to apply the Act. The reasons why forced marriages remain unnoticed are diverse. Firstly, forced marriages are not reported by the spouses involved, e. g. because they fear the repercussions this may have, or persons involved may not experience it as a form of coercion on the basis of their own cultural perspective. Secondly because of faulty contact between officials and prospective spouses, as a result of digitalisation, a lack of knowledge, linguistic or cultural communication barriers, and a lack of confidentiality in the authorities. The referred declaration of voluntary and non-coercive consent is not always considered to be effective, since consanguinity between the prospective spouses does not always emerge, and the declaration does not always say much about the use of coercion. Thirdly, social factors opposed to the use of the Act: Social pressure, loyalty to one's family and the social environment, the fact that the honour of the family may be at stake coupled with fear of honour killings, as well as concern about the loss of dependent or derivative residence rights, may influence the use of the Act, both by the users themselves as by officials who have to apply this law.

In an Action Agenda *Harmful Practices,* the Dutch Ministry in 2020 announced several measures to combat harmful traditional practices in general, and measures to combat forced marriages in particular. To the first category belongs setting up targeted information campaigns, for example, an accessible reporting structure, and the promotion of expertise.[32]Among the second category are the inclusion of the subject of forced marriages in integration procedures, the training of civil servants, and the rule to no longer recognize foreign child marriages.[33]

E Polygamous Marriages

For a long time, the principle of monogamy and the public policy exception clause in private international law have functioned as adequate tools to protect women and society against polygamous marriages. The call for further protection against those marriages became stronger for two reasons. The first reason has to do with the changing attitude towards and fear for everything that can be linked to *šarīʿa* and the implications of *šarīʿa* in the West. Polygamy is considered to be one of those reprehensible and women suppressing phenomena of Islamic Law. According to Dutch civil law, one can be married to only one person at the same time. Moreover, polygamy is criminalized both for the spouses (art. 237 Criminal Code) as for the civil authority that cooperates on such a marriage (art. 379 Criminal Code). The second reason has to do with a fear for irregular practices, especially irregular marriages concluded by imams, in secret, and out of sight of the governance. The Dutch Civil Code states that the law recognizes only civil marriages (art. 1:30 par. 2 CC) and that religious marriage ceremonies can only take place after a civil marriage has been performed (art. 1:68 CC). A priest, imam or other religious leader is even punishable if he cooperates on the establishment of a religious marriage if there has not yet been a preceding civil marriage (art. 449 Criminal Code). However, there were indications that imams neglected this rule and concluded irregular Muslim marriages without requiring the existence of a preceding civil

[32] Actieagenda schadelijke praktijken TK 2019–2020, 28345, 228 Attachment, pp. 4 f. www.rijksoverheid.nl/documenten/beleidsnotas/2020/02/18/actieagenda-schadelijke-praktijken (last access 27. 10. 2020).

[33] Actieagenda schadelijke praktijken TK 2019–2020, 28345, 228 Attachment, p. 7.

marriage. If this practice occurred, it could well be that in this way also polygamous marriages were established.

The criminal law and civil law, described in the previous paragraph, that came into force in 2013 and 2015, only affect regular polygamous marriages. Irregular marriages were disregarded. The Act tried to discourage polygamous marriages abroad, by regulating more specific and strict requirements for recognition of those marriages and by also criminalizing polygamy entered into abroad, while having regular residence in the Netherlands (art. 7 par. 3 in conjunction with par. 2 sub a Dutch Criminal Code). This means that not only people with Dutch citizenship but also people with foreign nationality will be punishable under Dutch law if they validly enter into a second marriage in the state of their nationality. Even more, if the first marriage had been divorced in the state of origin, in a way that it will not be recognized in the Netherlands, a subsequent marriage will presumably considered to be a criminal act as well. This not only results in a far-reaching involvement with one's family life and involvement with foreign sovereignty, one may wonder whether the Dutch government could provide convincing arguments to justify this law and possible prosecutions that might follow from this law. Another remarkable outcome of this law is that a polygamous marriage entered into abroad under civil law might be recognizable in the Netherlands but at the same time result in a criminal act for the involved spouse(s).

It follows from the *2019 Evaluation-Study* that the question whether a foreign polygamous marriage could be recognised was not dealt with on the basis of its own merits but rather as part of another legal question, like in immigration law whether a derivative residence permit can be granted. The non-recognition of a foreign marriage due to it being contrary to Dutch public policy has furthermore meant that the (legal) paternity of the husband is not accepted, children do not derive Dutch nationality from their father, divorce cannot be petitioned in the Netherlands, nor can maintenance be determined or matrimonial property be divided. The Act, which only regulates the marriage itself, therefore permeates and affects many other areas of law.

Also, with regard to polygamous marriages, authorities suspect, and people themselves do confirm this suspicion, that the law is circumvented.[34] Spouses who want to get residence in the Netherlands, can remain silent with regard to the existence of a previous marriage. If a second marriage in the Netherlands is prohibited by law, people may resort to alternative solutions and choose to marry informally or to marry abroad. Both stakeholders and authorities express their concern about those unprotected situations that remain out of the public eye.[35]

F Unregistered and Religious Marriages

While family law in the distant past in the Netherlands for a long time has been the domain of the Church, in the meantime it has completely become secular law, governed by secular authorities. Canonical and rabbinical courts and authorities can continue their family law practices, however without being recognized by law. The Netherlands host no *šarīʿa* courts. However, informal *šarīʿa* dispute resolution mechanisms do exist.[36] For a long time those religious and cultural norms and practices in family law issues, if brought to secular courts at all, only reached the courts via secular law, the freedom of religion, or via private international law. It is only quite recently that

[34] Rutten et al.: *2019-Study*, pp. 93 and 139.

[35] Ibid., p. 176.

[36] See for example: L. G. H. Bakker et al.: *Sharia in Nederland. studie naar islamitische advisering en geschilbeslechting bij moslims in Nederland*, Nijmegen 2010.

believers seek recourse to secular Dutch courts and authorities for the protection of or protection against religious family law and practices.

Ever since the introduction of secular family law, religious and traditional marriages have continued to exist, despite the fact that, according to the Dutch Civil Code, only civil marriages are recognized (art. 1:68 Civil Code) and religious authorities who cooperate with the conclusion of a religious marriage without preceding civil marriage are punishable (art. 449 Criminal Code). Since the beginning of the 21st century, concerned voices were heard that irregular marriages were concluded among young Muslims. As a response, the government initiated several research-projects, among which the *2015-Study* into child marriages and religious marriages, to get a better view of marriages that were brought about in an informal way, outside the view of civil authorities, and without preceding civil marriage.[37] It follows from those research projects that no exact numbers of unregistered marriages can be given. However, it is clear that they exist in several varieties and within several communities. Traditional cultural marriages are still the usual marriages among the Roma and the Sinti[38] and among a few specific sects and movements;[39] Muslim marriages among Muslims of various nationalities still occur in order to enable young people to have relationships with one another; and religious marriages among various religions, e. g. Muslim, Hindu, Christian and Jewish[40] are entered into either without realizing, and sometimes even without knowing, that Dutch state law states otherwise, or to enable marriages that were forbidden by Dutch law, to enable a marriage where a civil marriage was no option, or to safeguard certain interests, like social benefits.[41]

At the same time that it became clear that irregular marriages occurred outside the official legal order, the realization dawned that these marriages were not without risks. If there was no state control, minors could be given in marriage, and forced and polygamous marriages could take place without any hindrance. Moreover, as a result of an irregular marriage, the married couple would end up in an unprotected position. From 2013 to 2018 Maastricht University conducted a thorough research into, what has come to be called '*marital captivity*' over time. Both the existence of marital captivity in the Netherlands, its possible legal remedies as well as its human rights violations were studied. Marital captivity refers to a situation wherein someone (usually a woman) is unable to terminate her religious marriage, keeping a spouse trapped in a marriage against her will. This situation may, for example, arise because the religious doctrine does not acknowledge divorce or because the co-operation of the other spouse with a divorce is lacking. It follows from this *2013–2018 Study* that marital captivity in the Netherlands occurs within Christian, Hindu, Jewish, and Muslim communities, especially within the more orthodox and conservative circles.[42] Although it has proven difficult to find precise figures, it follows from the *2014-Study* that the number of situations of marital captivity presumably is around 225 to 845 per year.[43] If one is left with only an invalid irregular marriage, spouses can get caught up in deplorable situations where they cannot profit from spousal benefits, cannot

[37] Rutten et al: *2015-Study*, pp. 21 f. Also see: J. van der Leun / A. Leupen: *Informele huwelijken in Nederland; een exploratieve studie,* Leiden 2009.

[38] Rutten et al.: *2015-Study*, pp. 80 f.

[39] Van der Leun / Leupen (2009), pp. 14–16.

[40] Rutten et al.: *2015-Study*, pp. 74–83.

[41] Ibid., pp. 105–120; Moors (2014); van der Leun / Leupen (2009).

[42] Van Eijk (2017), pp. 24–49.

[43] Smits-van Waesberghe et al.: *2014-Study*, pp. 72 f. (447 to 1687 in 2 years, 2011–2012).

claim maintenance from the other spouse, positions between parents and children can be insecure, and there are no ways to bring about a judicial divorce if a spouse wants to separate.[44] Furthermore, the *2013–2018 Study* reveals that several human rights may be at stake in situations of marital captivity, like the right to remarry, the right to private life, the freedom of movement, and the right to the highest attainable standard of health.[45] Thus, where on the one hand informal marriages seem to fulfil an existing need, and many of those marriages seem to run smoothly, on the other hand voices were expressed to take hard judicial and legislative actions against irregular religious marriages.

The responses in law to those voices were twofold: a more severe policy in criminal law and more protection offered by civil law. With regard to the first category, two tensions are worth mentioning. Firstly, imams became maddened by a stricter investigation and prosecution policy. Media disclosed that there could be indications that imams in the Netherlands would conclude polygamous marriages in their mosques. Taken together with relatively little but loud societal and political concerns about existing informal Muslim marriages in general, the public prosecutor started to actively track down and prosecute imams who possibly entered those informal marriages. The first conviction of an imam who had concluded irregular Muslim marriages in a mosque dates from 2013 and 2014,[46] and culminated in a decision of the Supreme Court in 2016, that partly confirmed the conviction.[47] Secondly, a few members of a political party (the Liberals, VVD) requested the Minister to come up with a law-proposal to expand the punishability of irregular marriages to the spouses themselves and to other witnesses. The minister rejected this request, referring to the freedom of religion and considering that such a provision would be inconsistent with the way in which the principle of church and state has been interpreted in the field of marriage.[48] Furthermore, criminalizing religious marriages would weaken the position of women in marital captivity situations since she would have to reveal her punishable marriage when seeking for help to get out of her marriage.[49] Apart from that, a penal provision would affect large communities in their autonomy to organize their family and private life according to their own rituals and wishes, like the Roma communities, even if one deliberately opts to not yet enter into a valid marriage, like Muslim young people may prefer. Irregular marriages would thereby be completely banned to the criminal circuit.

With regard to the civil law, apart from the existing provision that religious marriages are not allowed without preceding civil marriage (art 1:68 Civil Code), the legislator did not take measures nor initiatives to further tackle irregular marriages as such in civil law. The protection of spouses in marital captivity who are left with an informal religious marriage is the only exception. In 1982 the Dutch Supreme Court already allowed a spouse who was trapped in her religious marriage, to ask for a court order that would condemn and compel the ex-husband to cooperate in a religious divorce.[50] During the last decades, those judicial proceedings have become regular practice

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[44] *2013–2018 Study*: Van Eijk (2017), pp. 68–76; Kruiniger (2018), pp. 35 f.; Deogratias (2019), pp. 12–17.

[45] *2013–2018 Study*: Deogratias (2019).

[46] Court of 1st Instance The Hague 4 November 2013 and Court of Appeal The Hague 14 November 2014, ECLI:NL:GHDHA:2014:3848.

[47] SC 1 November 2016, ECLI:NL:HR:2016:2455.

[48] TK 2019–2010, 35348, nr. 7.

[49] Ibid.

[50] SC 22 January 1982, Netherlands Jurisprudence (NJ) 1982, p. 489.

and established case law. In this way, many Muslim women and a few Jewish ones have successfully found their way to the secular courts to solve their religious problems. The *2013–2018-Study* comes with a number of recommendations for legal provisions to protect spouses and future spouses against marital captivity.[51] Two proposals were picked up by the legislator and in November 2019 have led to a law proposal firstly introducing, in the Civil Code,[52] an obligation for parties to a religious marriage to also cooperate on a religious divorce, on request of one of the spouses, and secondly adding an explicit provision in the Code of Civil Procedure involving a right to ask for an order to cooperate with a religious divorce as an ancillary provision in a divorce procedure.[53]

An important issue in the discussion of this and other proposals is whether the state is allowed to intervene in religious affairs, and if so, to what extent. Even if secular legislation would contain provisions that regulate religious issues, what has not yet been solved is how ex-spouses in fact can realize the required religious divorce. Secular authorities are incapable nor authorized to establish religious divorces themselves. These can only be obtained by following religious divorce procedures and involvement of religious authorities. Nowadays in this way, Dutch authorities are asked to take position in the state-and-religion relation: Are secular state authorities allowed, or should they maybe even be obliged, to interfere in religious affairs, or, on the contrary, should they abstain from such an interference? Is it acceptable to leave people subject to the discretion of the norms and practices of their religion, or should secular law always offer a last resort? Case law of the European Court on Human Rights provides indications that resort to secular courts and secular law should be open, at least if human rights would otherwise not be respected or religious law would be discriminatory.[54] Finally, if the state will feel responsible to also protect religiously inspired claims, how to offer this protection in a neutral way, and keeping secular norms separated from the religious ones? Those are actual questions both Dutch courts as the Dutch legislator are struggling with.

Conclusion

The attention for harmful traditional practices has increased enormously in recent times, not only in the Netherlands but also at an international level. Since those practices are defined in a broad sense, many marriages that are common within migrant communities have been identified as such harmful practices. Recent studies conducted at Maastricht University into traditional and religious marriages reveal existing practices of child marriages, forced marriages, polygamous marriages and unregistered marriages. Those marriages are an important point of attention for both the legislator, the judge, and policymakers. There has been a tendency to be increasingly rigorous and severe to combat those practices. However, not all measures taken have proven effective and adequate. A few points that could still be improved and need further attention are: Firstly, the classification of practices as harmful and the consequences of such a classification. By classifying traditional practices in general as harmful practices, without leaving the option to investigate whether the practice is actually harmful in specific cases, not harmful acceptable practices are

[51] *2013–2018-Study*: Kruiniger (2018), pp. 2–18: Recommendations pp. 109–112.

[52] Introducing a second paragraph in art. 68 Book 1 Civil Code.

[53] TK 2019–2020, 35348, nr. 2. The law proposal will be discussed in parliament on 9 November 2020.

[54] E. g. ECtHR 20 October 2001, appl. 30882/96, *Pellegrini v. Italy* and ECtHR 19 December 2018, appl. 20452/14, *Molla Sali v Greece*.

unnecessarily affected. The proposal of a few Dutch political party members to criminalize all traditional marriages for example, would imply a fundamental rejection of those practices that goes beyond what is necessary. By forbidding and criminalizing traditional marital practices too easily, there is a risk that people will alienate from the host society. Laws are no longer in line with people's perception, and people will look for other ways to continue to exercise their own traditions. At the same time, it has become clear that major interests may be at stake which may require that certain practices should not be tolerated and be eliminated. The challenge is to find the right balance and to develop more tailor-made solutions: To tackle those practices that are harmful, while tolerating and preserving harmless traditions where possible. Secondly, such a right balance and more tailor-made solutions, may lead to a rethinking of the church–state relationship.

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