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The principal function of borders in immigration law is to distinguish between persons and goods which are permitted to enter a territory and those which are not. I call this the filtering function of the border. In this short contribution, I enquire into how this filtering function of the border operates in the context of border controls in the Netherlands. More specifically, I argue that the way border controls are performed in the Netherlands structurally produces racialized subjects. To understand how border controls produce racialized subjects, it is helpful to consider what the principal object of border controls is. The principal object of border controls is not the ID-document or the legal person, but the very body of the document holder in a twofold way. Firstly, it is only by reading the biometric information of the body, stored in a chip in the official identity document, that the suspicion about the gap between a person's "real" identity and her ascribed legal identity is bridged. Secondly, bodily features are read as signposts that someone "is not from here" and thus differences in (legal and political) belonging are inscribed onto the body. This means that suspicion operating selectively is not merely the act of individual border control officers, but is, as the following section discusses, a structural feature of the law regulating EU internal borders.

Diffusion of the border

Borders do not to prevent movement. Rather, they facilitate movement of some while restricting the movement of others. The gradual abolition of controls at the cartographic borders between the Netherlands and its neighbouring states (see here, here or here) which sought to enhance free movement of Dutch and EU citizens, went hand in glove, as Kees Groenendijk pointed out, with different legislative measures that enhanced other forms of border control. For example, the number of personnel and competences of immigration police in larger cities of the Netherlands were increased and, at the same time, a general obligation to carry an identity card was introduced (something that had long been deemed a political taboo due to the Dutch experiences with *Ausweispflicht* during the German occupation). In 1994, the Dutch government introduced mobile controls of aliens in 20km zones behind the border and international train connections. The objective of these mobile controls was to reduce the numbers of asylum seekers entering the Netherlands. Moreover, the Dutch police service has assumed over the past two decades a "pioneering role" in employing cutting-edge biometric technology, such as mobile fingerprint scanning devices, in its immigration controls in the Netherlands (see here and here).

The introduction of these fluid forms of border controls illustrates two points. First, the gradual abolition of controls at the internal borders of the Netherlands did not result in the absence of border controls, but in a diffusion of the border. The border in

immigration law is not (only) the cartographic border of a state's territory, but rather an assemblage of legislative instruments that establish different points and moments where a person encounters the operation of migration law, both inside and outside a state's cartographic territory.

Second, the crucial point about these different forms of control is that they can and must be applied selectively. For instance, article 23 of the Schengen Border Code (SBC) states that identity controls for immigration purposes must not have an equivalent effect to that of border controls and requires that identity checks must be applied selectively. The CJEU further clarified the content of this requirement and made clear that Member States must, when applying identity checks in border zones, adopt domestic legal frameworks that specify the intensity, frequency, and selectivity of such identity controls (see here and here).

Article 19 of the Dutch Aliens Act requires a concrete suspicion of irregular presence to justify the performance of immigration identity checks in the territory of the Netherlands. The situation is different in border areas. Article 4.17a of the Dutch Aliens Act permits mobile immigration controls that do not require concrete suspicion of irregular presence in a 20km zone behind the cartographic border, in train stations, international train connections, and airports irrespective of a concrete suspicion of being irregularly present. As mobile controls must be applied as spot checks in order not to amount to border controls which are prohibited by the SBC, suspicion must operate selectively. Who, then, is the concrete subject of suspicion?

Race and the border

Numerous reports suggest that the selectivity of suspicion operates in the enforcement of Dutch immigration law by reading the body (see here, here, and here). Stuart Hall argued that physical features are markers at the level of appearances that function as a "set of signifiers that direct us to read the bodily inscriptions of racial difference". By 'race' I mean, like Stuart Hall and others, the historical and social construction of ancestry and external morphology into hierarchical categories of human beings. There is nothing biological about race; yet its social construction does not make it less real.

In the context of immigration controls, bodily features – the difference of skin, bone, and hair, as W.E.B. Du Bois famously put it – are read as signposts of different legal classificatory schemes that order the population into citizen/non-citizen and regular/irregular. When immigration controls rely on bodily features to identify alleged irregular presence, they socially produce race in the moment these controls are enacted by linking bodily appearance to political and legal belonging. To be clear: the construction of racialized difference are not simply singular acts of 'bad' individual border officers with a discriminatory mindset. Rather, these bodily inscriptions acquire meaning in webs of historical, social, and cultural practices, solidified into common-sense and tacit knowledge of how someone who is "not from here" looks or "how a typical Dutch person looks like".

Judicial responses to racialized immigration controls

Dutch courts adopt a twofold approach to racialized immigration controls conducted by law enforcement authorities. In the first approach, Dutch courts consider that immigration controls that rely on racialized criteria, such as skin colour, do not amount to unlawful discrimination. A recently decided case by the District Court in The Hague illustrates this approach. The facts of the case concern a mobile control of aliens carried out by the Royal Dutch Military Police on the basis of article 4.17a of the Dutch Aliens Act. Mobile immigration controls are carried out on the basis of a so-called general risk profile. On the basis of these profiles, the Royal Dutch Military Police decides when and where to carry out mobile controls. Individual officers then determine which specific persons are subject to controls on the basis of their individual characteristics. In the case before the District Court, two Dutch citizens of colour argued that they were selected for control because of their skin colour.

The District Court considered it was undisputed that "ethnicity" played a role in the decisions of the Royal Military Police when selecting individual persons for control. The Court made clear that "this leads or can lead to a difference in treatment between people based in part on ethnic appearance when performing" mobile controls. Nevertheless, the Court argued that relying on "ethnicity" in mobile controls is a proportionate means to achieve the aim of combating irregular migration:

> "8.9. Since [mobile immigration controls] are aimed at combating illegal residence in the Netherlands, obtaining concrete clarity on an individual's identity, nationality and position under residence law is central to the controls. Being able to establish a person's nationality or geographical origin is of great importance to the effectiveness of [mobile immigration controls], because these may determine a person's residence status in the Netherlands. Although external ethnic characteristics are not required, they can be an objective indication of someone's origin or nationality. The fact that this is done on the basis of an assumption of the alleged nationality does not alter this. After all, the control takes place precisely because the nationality is not already known."

Accordingly, the Court concluded that "there is a reasonable and objective justification for the (possible) use of ethnicity as a selection criterion in selection decisions in the context of [mobile immigration controls]."

The District Court's argumentation is problematic for a number of reasons. By considering physical features such as skin colour as a legitimate criterium in the operation of immigration controls, the Court essentially encroaches on the prohibition of racial discrimination in article 1 of Additional Protocol 12 of the European Convention of Human Rights – the relevant provision that the Court scrutinized – to a prohibition of arbitrariness. Using skin colour as criteria for different treatment in immigration controls is, in principle, legitimate if it can be "reasonably" justified.

The “reasonableness” of justification is based on a series of problematic assumptions. It presumes (i) the existence of a relation between nationality and a person’s physical appearance; (ii) it is based on the assumption of how a “typical Dutch person” looks like (presumably fair skinned, tall and sun-burnt in summer); (iii) conversely, being non-white, then, operates as a legitimate presumption of not-being Dutch; (iv) crucially, it is not merely a presumption of not being Dutch, but of being irregularly present. After all, the objective of the mobile immigration controls is to detect irregular presence.

The reasonableness of relying on “ethnicity” also entails the assumption that physical appearance might be an “*objective* indication” of irregular presence. Although the Court did not bother with empirical facts, this claim seems to be based on probability reasoning: non-white persons are more likely to be irregularly present on Dutch soil than white persons. Leaving aside the factual baselessness of such probability reasoning, even if it were true, it is not simply an innocent, bona fide description of reality, as it were, but also a *normative* statement on how Dutch people ought to look like – and not merely a factual statement of how Dutch persons do look like.

In the second approach, Dutch courts hold that relying on racialized criteria in immigration identity controls is unlawful. A case before the Dutch State Council illustrates this approach. The facts of the case are fairly straightforward. Labour inspectors performed workforce controls on the appellants at a construction site, which were carried out on the basis of the Dutch Aliens Employment Act. The appellants were checked because, as the labour inspection office argued, they “had dark hair and a tinted skin colour, we asked them for identification, because this led to the suspicion that they were foreigners.” The Dutch State Council recognized that the suspicion of the labour inspectors was based on the appellants “dark hair and a tinted skin colour. Therefore, in the investigation in the context of the [Aliens Labour Statute], a distinction was made on the basis of external characteristics.” The Council of State unequivocally stated “that there is no justification for this distinction” and thus held that identity controls based on physical appearances amount to a violation of the principle of non-discrimination.

The persistence of racial borders

As laudable as the unequivocal stance of the Dutch Council of State against racial profiling is, it does not and cannot address the persistence of racialized border controls. The recent decision made by the District Court of The Hague demonstrates the persistence of a common sense that sinks people into national soils defined along racialized lines (see here chapter 4 on common sense). In her recent country report on the Netherlands, the UN Special Rapporteur on Contemporary Forms of Racism points out that political and social discourse on racialized groups in the country “reinforces a distinction between Netherlanders perceived to have a non-Western migrant background and Netherlanders considered to be without a migrant background” (see also here: para 24-26). These discourses both reflect and (re-)produce common sense about how political and legal belonging ought to look like.

These discourses do not occur in a historical vacuum but are linked to the colonial past of the Netherlands. Historians pointed out that immigration to the country after World War II is partly an inheritance of its colonial past – and so are the immigration laws and policies adopted to regulate and curb immigration to the Netherlands, legal structures that in turn shaped political and social discourses on immigration.

At the same time, there is a strong tendency in judicial approaches and institutional responses to view racial discrimination simply as acts of single officials, as individual cognitive states of mind and prejudices, and not as the result of solidified historical and legal structures. Reacting to the publication of a 2013 Amnesty International Report on racial profiling in the Netherlands, the Chief of Police stated that it is "statistically unlikely that all of the 63,000 police officers work without making judgement mistakes". However, to focus simply on cognitive and psychological states of mind fails to consider how these cognitive frames relate to broader relations and structures of power. It is precisely these structural aspects that remain muted when focus is laid on individual acts. Decisions of courts might then end up reproducing racialized common-sense.
