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Empirical conflict rules in Dutch legal cases of cultural diversity

André J. Hoekema and Wibo M. van Rossum

1. Prelude

Take social security law. The authorities implementing social security laws and the suitably specialized judges tend to perceive this legal field as a tightly knit and relatively precise complex of rules. They want to be seen as being loyal to it. In questions of legal entitlement to a social benefit, a rather strict legality is cherished, and therefore multiculturality does not fare well in social security law. Most of the (Dutch) legal fields are closed in this way to distinct cultural institutions and concepts unless the legislator rules otherwise. To look for the responses of judges and public administrators to the phenomenon of cultural diversity, we should examine legal fields structured by general standards and open concepts like the reasonable man and the interests of the child. Or so it seems. At the end of our contribution, however, we conclude that this view is a piece of professional folk knowledge.

As a prelude let us have a quick look at this field of social security law. The Child Benefit Act entitles parents to a benefit for every child which they effectively raise and pay for. Adopted children and, under circumstances, foster children also qualify for this allowance. Therefore, Moroccan couples living in the Netherlands sometimes ask for the legal recognition of a distinct cultural institution. Moroccan Islam-based national law does not allow for adoption but has its own legal institution, the kafala contract. The contract obliges a family to take care of children from other parents, pay for all the expenses, etc. without the parents losing the right to custody over the child. It is a strict prescription that no official family relations must develop between a kafala child and the kafala parents.

Sometimes a family living in the Netherlands acts as kafala parents and takes care of a child whose biological parents are living in Morocco. Such children do not qualify as adopted and therefore proper ‘children’ in terms of the Child Benefit Act. But perhaps these children could qualify as ‘foster’ children? In case of fostering out children, in the general policy of the administrator of the Act, the Social Insurance Bank, various requirements must be met to make the foster parents eligible for child benefit. Most importantly, if the biological parents still have official custody – regardless of the question of whether or not they really do interfere in the child’s upbringing, choice of school, etc. – then the foster parents are not entitled to that benefit.

Up until recently, this formal element held a decisive position in the chain of legal reasoning. Obviously, kafala could not pass this test as the biological parents do not lose the right to custody over their children. But in 2001 the Bank changed its policies and started to reason more empirically, asking: what about the real exclusivity of the caring relation between the kafala parents and the child? If the biological parents as a matter of fact do not interfere, foster parents can qualify for the right to a benefit provided they bring the children
up as their own (a tight and exclusive relation, as the legal formula runs) and do this on a **durable** basis. A critical review of the Bank’s policy by its head of legal affairs had an impact on the legislator: an official ruling by the state Secretary of Social Affairs in 2002 expanded the concept of foster children generally. The requirement that the biological parents could not retain custody was relaxed. The Bank’s new policy was codified into the regulations.

The **kafala** case reminds us of a problem of qualification. Is this process of accommodation of a distinct cultural institution to be qualified as a bringing a multicultura change to Dutch law? And if so, on what grounds? It is not only the claim by Muslim **kafala** parents which triggered a new way of applying the concept of foster child; also among the non-Muslim population new forms of family life and new ways of providing foster care challenge(d) the established concepts. The decision maker (here: a public administrator, the Bank) takes hitherto unknown factual circumstances into account and classifies these under a general concept – foster child – which is already well established and not specifically distinct. For judges this operation is what they do all the time when facing new facts or developments. Should a judge have taken the **kafala** decision he might not have perceived this case as any different from other cases of pretended foster relations brought forward by non-Muslim Dutch. Legal reasoning uses general concepts and norms, not norms tied to specific groups in society. The legislator likewise usually refrain from motivating a new rule or definition by referring to a specific group or culture. The legislative extension of the foster child definition was officially motivated by the general need to accommodate new family relations and not by the specific need to recognize **kafala**. A distinct institution gets stored within the existing concept and norms of the (Dutch) legal order and thereby loses its distinctiveness.

This indeed is true, at least from the point of view of legal dogmatics, in any legal system that merits the qualification legal **order**. But in our research we adopt an empirical view. Equipped as we are with a concept of distinct culture, and provided with the views and expectations of the parties in a case, as well the judges and experts perceptions, we are in a position to qualify the introduction of **kafala** in Dutch domestic law as accommodation of a distinct institution into Dutch domestic law. Other indicators sustain such conclusion. For instance the Bank, according to our interview with the head of legal affairs, did have the **kafala** cases in mind when finally changing from a formal concept of foster child to an empirical one. In the article by him and another member of the Banks legal department, written before this change of Banks policy, there was an explicit pleading for such a change because of the injustice done not only to the **kafala** parents but also to the biological parents who did not get a Dutch child benefit either (as they usually have the Moroccan nationality and are living over there). But it is true that after some time this distinct institution not only theoretically will be transformed into a non-distinct element in the legal order, but also empirically in the minds of the people.

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7 Some **kafala** children, however, may not pass the test of foster children under the Act. Suppose that a Moroccan child is placed under a **kafala** contract in the household of some relatives, like an uncle and aunt, living in the Netherlands. It is possible that the original parents keep playing an important role in deciding educational matters. It is sometimes difficult to prove that the relation between the “foster parents” and the child is exclusive, and durable. Cases that are accepted by the Bank are mostly cases of orphans. (We refer here to a paper written by B. Benhsain for a course taught by the Bank’s head of legal affairs.)

8 Jurists generally use the concept “material” in contrast to “formal”, we prefer however “empirical” to stress the sociological focus of the concept.

9 Menski (this volume) observes that the institution of Kafala was ‘smuggled in’ in the English law by introducing the new legal concept of ‘special guardianship’ in 2002. This legal concept should apply to
We may conclude that the Dutch legal concept of a foster child has been extended (at least partly) because the public authorities applying domestic law opened up towards the norms and practices of a distinct institution (Moroccan Islamic). This openness occurred in this case by changing the legal reasoning from a formal way to an “empirical” way. At first we thought that there is a general truth here: when domestic authorities and/or courts in their application of Dutch law hit upon foreign institutions that bear some similarity to institutions covered by domestic legal concepts and start comparing the two not formally, but empirically, the chances are greater that a distinct cultural institution will enter the Dutch legal order and contribute to its change.10 This however is not generally true. Openness to distinct ethnic institutions may as well be arrived at by reasoning in a formal way, for example when a law forbids “behaviour X” and judges tend to decide that “only behaviour X is forbidden, but not Xa and Xb”.

Normally, particularly in matters of the personal status of people (or changes in it), judges tend to be loyal to the apparent meaning of the relevant set of legal rules, invoking the principle of legal certainty. In one example the highest court in these matters held that a gypsy marriage could not justify the claim of the wife of the deceased for a widow’s allowance, which is a general right for “official” widows only, as the law says.11 Another case12 is illuminating, too, involving an unmarried Moroccan couple where both parents held both Moroccan and Dutch nationalities. The mother asked the court to officially declare the man to be the father of the child (which was granted) as well as order their child to take the father’s name. The woman alleges that the fact that her child bears her name (which in these cases is the legal rule) suggests that she is a bad woman. The child therefore runs the palpable risk of being mistreated by (Dutch) schoolmates and by the Moroccan family. A request for such a change of name is legally admissible13, provided it comes from both parents. But here, although the father refused, the lower court granted the request, entering into a balancing of the interests of the child versus the interests of the father. The higher court quashed this decision because the relevant rule had a strict character and did not leave a space open for a judicial balancing of interests and a possible overruling of the father’s objection. The legislators’ intention being clear, the request had to be turned down.

It is hard to come to empirically grounded conclusions here, but in view of the Kafala case we are not so sure that no cultural pluralization of domestic law is to be expected in strictly regulated legal fields. True, we probably should expect more ‘influx’ from the Dutch

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10 In the literature one meets the claim that sometimes in multicultural cases there is a need to adapt domestic law by expanding the content of specific concepts beyond the ordinary meaning and thereby cover distinct cultural equivalents. See e.g. a plea for an expansion of the concepts of brother and sister in some cases regarding Moluccan practices of forbidding marriages between members of specifically allied clans, made by H.U. Jesserun d’Oliveira, Ars Aequi 1978, 586; also J.G. Sauveplanne, Elementair internationaal privaatrecht, Deventer, Kluwer, 1989, 88, 89.

11 See RSV (Rechtspraak sociale verzekering) 2001, # 54 (This is a periodical on cases in social security law). Menski (this volume) found a case in English law in which the outcome was the opposite. A marriage between Sikh, concluded in accordance with religious rules in London in the 1950s but not officially registered, gave the woman pension rights after her husband died, as the Court of Appeal ruled. This court claims to have applied principles of equity as a result of which the case sets no precedent. Menski interprets this as an indication of the reluctance of English judges to pluralize the legal system.

12 Court of The Hague, 16 02 2005, # 925-R-04, LJN AS6769.

multicultural society when it comes to ‘open legal concepts’ and ‘general standards’. At least that is what jurists predict and expect, and not on unreasonable grounds. We will come back to that. Before entering the field of family law where we can find some general standards and open concepts (section 3), we will introduce our main focus and research question, define some concepts, and describe our research methods.

2. Focus and research question, concepts, and methods of research

Focus and research question

The kafala case brings us to the heart of our research question: Which empirical conflict rules can be derived from actual legal cases of cultural diversity? Before explaining this concept, here is an example of such a conflict rule deduced from the kafala case:

In social security cases administrators and judges stick to the value of legal certainty and don’t deviate from the complex of rules as it stands. But in case of concepts possibly designating an empirical complex, like “foster child” etc., administrators may reason empirically in exceptional cases and take distinct cultural institutions into account.

This “rule” opens some space for the influx of cultural diversity in state law and purports to lay bare the matter-of-fact tendencies in legal practice to take legal diversity into account or not. These tendencies can be reconstructed in the day-to-day, factual decision-making behaviour of judges and public administrators. Call these rules: social rules. They are not codified, have no formal normative validity and are not binding on judges. They are not part of the law, but are the product of our anthropological and sociological invention. We generalized from cases we studied and interviews we held. This empirical nature must be stressed. Although judges might recognize or affirm some of these “rules” as plausible empirically speaking, at least for them, they will immediately comment that such a social rule has no normative standing; and that is correct.14

We are instead looking for de facto ways and circumstances in which judges tend to consider a distinct cultural institution, notion or practice as relevant for the case at hand and accept it as a challenge that might be legally accommodated, or resist this challenge and decide monoculturally. We feel that, regardless of the dogmatic, philosophical and political debates as to the merits of multicultural legal development, the judiciary holds one of the most important keys and acts as one of the most important gatekeepers. One might wonder if not the legislator is the most important gatekeeper. It is true that judges in our type of cases regularly refuse to take a culturally distinct institution into account and rather refer to the legislator. But legal change usually starts with judges taking an unconventional, open-minded stand towards some new constellation of facts, or towards “deviant customary norms”.

14 Quite apart from confusion with normative legal rules (legal norms), it is arguable that such social regularities as we found are better not formulated as “rules”, a concept that somehow suggests that judges and others use them as a kind of rule under circumstances which really motivate them to follow such a rule (see more on the concepts 'custom' and ‘rules’ E.A. Huppes-Cluysenaer, “Gewoontes bestaan niet”, in N.F. van Manen (ed.) De multiculturele samenleving en het recht, Nijmegen, Ars Aequi Libri, 2002, 77-87). We will certainly hit upon “rules” which judges would not recognize as a rule at all, let alone one to be followed, particularly when we come across mere tendencies, e.g. not to invest time in assembling a sound knowledge about the nature of distinct cultures and therefore almost automatically to go for standard Dutch definitions of the situation and approaches. Unfortunately, we did not find ‘trouvailles’ of the kind Max Gluckman found with the Lozi king who ruled that a thief was a brave man who should be accorded a high position at the court; see Agnes Schreiner, “Mulambwa’s wet”, in Joris Kocken and Agnes Schreiner (ed.), Onverzoenlijkheid, Den Haag, Elsevier, 1999, 67-76.
thereby provoking debates inside and outside the profession. Perhaps after many years the legislator follows suit.\textsuperscript{15} Therefore we concentrate our attention on the judiciary to find out what distinct cases they accept and accommodate, for what reasons, and which ones they refuse. As we explained, this gate keeping behaviour of judges (and public administrators) will be reconstructed in terms of empirical conflict rules. The road between an unbound (official) pluralism and assimilative (“one size fits all”) legal practice passes through the narrow confines of these empirical conflict rules.

Clearly then, our concept of conflict rules is quite different from that in private international law, where it denotes a complex of legally valid rules that judges have to follow in international cases when deciding what national law to apply.\textsuperscript{16} This is the place to clarify that we do not include private international law cases in our research. Through this law – and the official (legal) conflict rules applied there, as well as international treaties – foreign legal institutions and sometimes distinct cultural institutions enter the Dutch territory, like the Islamic figure codified in some national legal systems of the repudiation of a wife by the husband. Given the fact that now so many immigrant families are permanently living in the Netherlands while having kept the nationality of their country of origin, we observe at the private international law gate a busy and lively crossing of the legal border and a lot of incoming distinct cultural institutions. The more so because the Dutch doctrine and judiciary are inclined generally speaking to accept foreign legal institutions (because of the general feeling that harmonious international legal relations should be furthered and “limping” legal relations prevented). Dutch official legal conflict rules are rather generous, and the test for compatibility with Dutch legal culture (the public order), although certainly not absent, is not that severe. The introduction of foreign legal institutions through the door of private international law definitely does confront the judiciary with this other law and sometimes, many times perhaps, with distinct cultural concepts and institutions. It is likely that the quantity of such cases is rising considerably. This confrontation cannot but change the general frame of mind and the know-how of judges. This will also impact on judges ways of dealing with distinct cultural cases within domestic law. The rising tide of private international law through these indirect means has a bearing on domestic cases. Moreover, there is cross traffic between private international law and domains of domestic law. Sometimes private international law is perceived as applicable or non applicable according to the evaluation of the expected respective outcomes, e.g. when the judge dealing with a multicultural and multinational divorce case wants to award custody over the children to the woman only, which is a possibility in Dutch domestic law only.

However, notwithstanding the foregoing, we submit that private international law rulings have to be kept apart, at least in our research. Dutch domestic law is not directly going to be changed through private international law. The institution of “repudiation” legally speaking has not become part of Dutch law, but is legally accepted as part of a different legal system.\textsuperscript{17} On the other hand, purely domestic concepts like “foster child” or standards like “the interest

\textsuperscript{15} Vermeulen in this volume concentrates on the accommodation of the Dutch legal system to cultural and religious diversity.

\textsuperscript{16} Why then use the same terminology? Because both notions of “conflict rules” define the boundaries of a legal system which is supposed to be a coherent whole, a unity, viz-à-viz another system of rules. In official private international law conflict rules, the boundaries with foreign law are defined normatively. In empirical conflict rules, the boundaries with minority cultural practices are defined (determined) empirically.

\textsuperscript{17} S.W.E. Rutten, \textit{Cultuur en familierecht in eigen kring}, Deventer, Kluwer, 2005, 82-83. Important as this is, we nevertheless left it out of this study, to focus on what sometimes is called ‘krypto-private international law’.
of the child” or “reasonable behaviour” when adapted (slightly) to patterns and perceptions of a distinct culture do mean a change in the Dutch legal order.18

**Individual cases**

As the examples of the *kafala* and other cases show, the Dutch public administration and judiciary occasionally resort to officially recognizing minority legal perceptions by broadening the usual interpretation of a legal rule or principle in an individual case. Sometimes the legislator turns occasional exceptions like these into official law, like when Islamic burial ceremonies are exempt from the relevant Dutch requirements or when specific forms of slaughtering animals (Jewish, Islamic) are regulated by law.19 These two situations are examples of what in legal anthropology is called *state (or: official) legal pluralism*. In both situations the state and its legal institutions ultimately retain the power to set the boundaries of what is permissible by non-dominant cultural groups.

In this study we discuss the accommodation of cultural diversity by broadening the interpretation or by formulating a general legal rule with an eye to such specific, individual cases. We do not deal with ways of recognising minority cultures by granting them some kind of *collective* right to apply and enforce their proper rules perhaps even when these rules contradict dominant national law20, as such a collective right does not legally exist in the Netherlands and is hardly ever claimed.21 Finally we want to recall our choice to study the behaviour of judges and occasionally public administrators, and far less legislators behaviour.22 In sticking to official authorities, we only deal with the tip of a very large iceberg of (multicultural) conflicts and ways in which such conflicts are dealt with in society at large.

**Distinct culture**

We have been lavishly using terms like cultural diversity, distinct culture and the like. Almost every society is host to many socio-culturally different23 encompassing societies like “first

18 See for a comparable approach Spellenberg, who would call our study one of “pluralité interne”, while Menski and Mehdi use the term “internal pluralisation”. (Spellenberg, Menski, Mehdi: this volume)


20 One of us used to call this a case of “strong” official (or state) legal pluralism to distinguish it from the individual way of legally accommodating cultural diversity. This leads to a confused terminology, however, perhaps suggesting that the state is strong (because it yields some of it power?) or the other way round, the minority community is strong (because it wrenched power out of the hands of the state?). Whatever this confusion, it seems better to develop a neutral term. We propose: extended form of state legal pluralism.

21 M. Berger stresses the fact that e.g. in marriage law it is not possible to conduct a *sharia* marriage and have sharia family law applied (apart from international private law cases). Moreover, arbitrated or mediated conditions of marriage or divorce always have to be passed by a judge. There is no legal space for an officialization of a distinct community’s “group right” here. Obviously, people may voluntarily adhere to their proper family law. M.S. Berger, *Sharia and public policy in Egyptian family law*, Ph.D. Amsterdam, 2005.

22 Are school teachers public administrators? In school, many conflicts originating in cultural diversity never make it into the official courts or court-like institutions and are solved by the good services of teachers, school directors, etc. This applies e.g. for matters of Muslim girls whose parents do not want them to have their swimming lessons together with boys (and similar problems) and then run into trouble with the compulsory education act (*Leerplichtwet*). (This information is from a discussion in 2006 with Damir Urem on his research in progress.)

nations” (indigenous peoples), national minorities, immigrant communities, etc. European societies like the Netherlands are no exception to this. Clearly, these communities cannot be simply grouped under one heading, but in this contribution we use just one term for them all: distinct communities. Admittedly, there are differences between immigrant communities on the one hand and “first nations” on the other, the latter term referring to the original peoples of some conquered territory, bought off and shoved off to some marginal part of that territory by a dominant group of different socio-cultural and often ethnic make-up. But in terms of the challenge for vested national law and legal scholarship, we can group these cases together.

This challenge consists in a mounting pressure by members of minorities to have their distinct culture and legal sensibilities recognized not just as a kind of private property (“behind the front door of their home”) but as part of the official set-up of state and national law. While not all members of such communities share this view – some are pleading for rapid assimilation – generally speaking, there is a mounting pressure for some form of recognition of this right to be (legally) different.

This challenge of diversity is a sensitive issue. For instance, the French notion of laïcité suggests resisting the challenge. This notion refers to a strict constitutional separation of the state and any religious or, for that matter, distinct cultural matter or organization. French collective identity “has depended on the idea that citizenship should transcend community ties and define beyond all particularisms, a national ‘we’ with which each person can identify”. In the Netherlands although a separation of state and religion is one of the leading constitutional principles, in practice this is not perceived as a ban on the state financially supporting religious entities nor a ban on the wearing of religious insignia during official duty (save e.g. in the judiciary). Generally, a ban on teachers wearing a head scarf is not legally upheld in the relevant decision-making body (save for specific private schools and institutions), while pupils are free to wear a headscarf at school. Citizenship is not constructed along the lines of one, monocultural, typical Dutch citizen. So, there is legal

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24 Not all immigrant communities are “institutionally distinct” over the whole range of human endeavours.
25 Practically, we are dealing mostly with immigrant communities.
26 In this article we want to distinguish sharply between two constellations which are frequently taken together by the experts in legal pluralism. Often the reference is also to the coexistence of state law and the normative (semi-)ordering capacity of functional groups like the medical professions, New York sweat shop business, street-level bureaucratic groups and other “semi-autonomous fields”. The case of non-functional encompassing communities is different in that matters of identity, ethnicity, socio-cultural diversity pose problems of their own. We follow the suggestion of Moore, who calls these two situations “entirely different” (Sally Falk Moore, “Certainties undone: Fifty turbulent Years of Legal Anthropology”, *Journal of the Royal Anthropological Institute* 2001, 95-116).
28 The Commission on Equal Treatment (*Commissie Gelijke Behandeling*, CGB), which is an advisory committee only and cannot legally sanction behaviour which it deems unacceptable under the equal treatment law.
and political space for cultural pluralization of state law. Considering the official data on non-Western citizens in the Netherlands (connected with Moluccan identity: 35,000, with Moroccan: 320,000, with Turkish: 360,000, with Surinamese: 330,000, with Asian: 200,000, with African: 100,000, and with Antillean and Aruban: 125,000), this cultural pluralization will certainly be encountered at the level of judicial decision-making.

Methods

This study is both anthropological and sociological. Our main source is provided by the empirical research by one of us on some specific cases which were selected after a tedious search of lawyers’ offices. The cases concern conflicts with a potential for bringing distinct cultural institutions, concepts or practices to bear on the legal decision-making process. The complete course of the case was reconstructed by in-depth interviewing of the party or parties, the lawyers, judge and other officials, occasionally agencies like the Children Care and Protection Board. Apart from these sources, both of us were present at several discussion sessions with judges and prosecutors about ways to handle cases specially prepared and presented for discussion. Many official judgements of Dutch courts were available as well, as are many state-of-the-art reviews from the last 5 or 6 years regarding the direction in which multiculturalism and Dutch law is going. This points to a lively discussion, but more importantly offers clues to a possible future development, a kind of expert prediction as to “the significance of Islam and Islamic law for Dutch family and juvenile law”, to quote just one of the many titles.

We have not been able to cover all or even the best part of the legal domains, partly because the terrain is too vast, partly because we feel that in some legal domains, like criminal law, not many pluralizing developments are to be noted apart from hot public debates. Judges, commentators and practitioners feel that matters of criminal law mostly reflect fundamental elements of Dutch legal culture and do not offer much space for distinct views (save for serious problems in understanding the behaviour of an accused from a distinct culture and deciding on the appropriate punishment).

All in all we feel we are on empirically solid ground, not solid enough however for generalization. Our results are more a mosaic of scattered indications and examples. We don’t know (yet) how the front line is winding through this landscape of multicultural legal problems.

3. Some cases in the field of family law and the conflict rules derived from them

In this section we will present a fairly detailed description of two family law cases. These cases were collected during research conducted by one of us, and extensively described in an as yet unpublished report. In the last part of this section, a contrasting case in the field of labour law (Case of Mohammed) will be presented in order to broaden our field of inquiry and relativize our findings so far.

32 For reasons of style we will sometimes indulge in such general statements, however.
33 This is current research funded by the Raad voor de rechtspraak, the Council for the Judiciary. The report will be published by Van Rossum in the winter of 2006-2007.
Case of Hamid – ‘the interest of the child’

Hamid’s case involves the divorce of a couple of Turkish origin, in which the contested points were the determination of custody over and place of residence of their two children. The wife had been living in the Netherlands for quite some time, the husband Hamid had come over from Turkey for the wedding (an arranged marriage). They had lived in The Netherlands for several years and the marriage went okay, but after six years when her second baby was born, the wife got depressed, the couple started to argue, and finally she left their mutual home without the kids for an unknown destination. The report of the Child Care and Protection Board stated that the wife wanted to ‘integrate in Dutch culture’ while the husband wanted her to ‘stay true to Turkish culture’. The wife was absent for one and a half years, during which time the children were living with a sister of Hamid and – for over a year – with his parents in Turkey. Hamid started a divorce procedure, Dutch law was applicable, and he obtained the divorce in due course. Meanwhile the wife had claimed custody over the children and wanted to have the children live permanently with her and not with the father any longer. Both ex-spouses had found a new life partner, Hamid a young woman from Turkey, the ex-wife a Dutch man of Turkish origin.

Regarding the matter of custody and other decisions to be taken, the judge postponed that decision and ordered the Child Care and Protection Board to produce a report on the situation to evaluate how to serve the interests of the children best, the major criterion which is decisive in these cases. The children however first had to return to The Netherlands, which necessitated a court order to Hamid because he did not ‘just’ want to give in to his wife who had left him. The return was effected without problems. Thereupon the Board officer wrote the report after having spoken to Hamid, and after having observed interactions between the two children and their mother and her new friend.

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

Eventually, custody over the children was awarded to the wife, as was the regular place of residence. We have to note here that “normally” custody after divorce gets shared by both parents. Moreover, one would think that the mother’s long years of absence and the father’s

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34 The law in article 251 of Book 1 of the Dutch civil code provides legal custody to both parents after a divorce. The judge may deviate from this rule ‘in the interest of the child’.
care would at least cast doubt on the decision to let the children now switch from the father’s home to the mother’s.

We will now ‘zoom in’ on the question of the meaning of the open legal concept ‘in the interest of the child’ when it comes to the decision of custody. While his ‘taking care of the children’ was not denied, the judge reproached Hamid for his lack of affectionate behaviour. Further, there was no discussion of the possibility that in other cultures other patterns of child raising could be common, like when an aunt or a grandmother cares for children and men go about earning the necessary money. Hamid’s lawyer said in the interview that such a pattern of an ‘extended family’ is ‘quite common’ in Turkish culture. The ‘interest of the children’ was also not served, according to the judge, by moving them back and forth between Turkey and Holland and from one family to another. This amounted to “a culture shock”, said the judge, which would once again be the case if the children were placed in Hamid’s household, also because the new wife was a young Turkish woman, who was not a biological parent. She did not (yet) speak Dutch, but the judge said this had no influence on her decision.

Affective harmony, radiating from a biological parent who is permanently available in a steady household, is apparently used as the criterion for the decision of custody and of which household to place the children in. These elements were thought to be better guaranteed by the wife’s new household (with her new friend), rather than by Hamid who at least in the past had not shown he could provide them. This criterion basically consists of preconceptions that have excluded the possibility of Hamid giving meaning to the open legal concept of ‘the interest of the child’. A ‘culture shock’ for example is only experienced when the preconception is that ‘steadiness’ is a normal and desirable state of living. Further ‘biological’ parents gain importance when a restricted version of ‘family’ is taken into account. And ‘affectionate behaviour’ is a gendered term, but gender roles differ between cultures. More strongly, we can say that the unquestioned and internalized commonsense meaning among the officers of the Board and subsequently judges effectively prevents the multiculturalization of the open legal concept ‘the interest of the child’.

From this case and cases from section 1, we can infer the following empirical conflict rule:

*In family law judges do not deviate from the meaning of strict rules as given by the legislator and in earlier legal decisions. In case of open legal concepts in the field of family law, like for instance ‘the interest of the child’, judges follow the meaning given by professional organisations. Judges and professional organisations in cases of open legal concepts tend to follow commonsense interpretations within the dominant culture, excluding possible interpretations from different (minority) cultures.*

Note that we are not saying that all judges act (let alone should act) according to this rule. Even though we have talked to judges who expressed that “children growing up like in a warm bath” (i.e. in an extended sort of family) was okay to them, we think that our empirical conflict rule indeed is the most common one.

**The notion of socio-cultural embeddedness of a child**

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

36 Note that we are not saying that the decision was ‘wrong’ in the sense of ‘legally wrong’ (it was taken in accordance with the law), or in the sense of ‘socially wrong’ (we would have to be able to look into the future to see whether the decision was indeed in the interest of the children). The minimum of what we say is that judges should be aware of their commonsense notions playing a role in their decisions.
In the case of Hamid we came across the notion of a ‘culture shock’ designating the differences and difficulties children and perhaps others face when moving from one country to another. This notion is connected to the idea of ‘embeddedness of a child’, which frequently pops up in interviews with judges about multicultural cases. We will expand a little on this idea.

In family law practice, judges are confronted relatively often with mixed (ex)couples quarrelling about the proper way to raise their child. One of the (ex)spouses asks official permission e.g. to circumcise the male child or to give it a proper Islamic upbringing. Usually, a notion of the embeddedness of the child in either Dutch or another distinct culture plays an important role in the court’s reasoning. We have come to the conclusion that it is quite possible that this notion rather strongly favours monoculturalism, meaning the standard approach of Dutch culture. Let us review one example.\(^{37}\) A couple married in Morocco. The woman originates from that country and has Moroccan nationality. She is a Muslim. The man is Dutch and has converted to Islam. The couple lived in the Netherlands. This ‘mixed couple’ has since divorced, after which the woman remained in The Netherlands. The ex-partners have a young child, a boy, aged five at the time the judge has to decide over a conflict between the two parents (both parents have custody as is legally standard). The boy lives officially with his mother and now she wants him to be circumcised, ‘like the Qur’an requires,’ she claims. The father has refused permission and wants the boy to be free to take this decision later. The court legally has complete freedom to decide according to the open legal concept ‘the interest of the child’ (book 1 civil code article 253a). The court argued that such a male circumcision, although usual, is not obligatory according to Islam.\(^{38}\) Moreover, the circumcision is an irreversible operation, and without medical necessity. In such cases of non-medical physical operations, the court says a judge has to be more reticent than in other decisions. Further the court found the child to be of Dutch nationality, and to be “embedded in the Dutch culture”: he visits a public school, and although he meets a lot of fellow Muslim pupils, it is not likely that he will be marginalized because of his not being circumcised. The court refused the permission asked for.\(^{39}\)

Next to the Qur’an interpretation and the irreversible nature argument, the embeddedness of the child in Dutch culture (albeit with many Muslim friends, etc.) seems a decisive argument. Rutten who commented on this case criticizes the ease with which such embeddedness is assumed.\(^{40}\) Is it not possible that such a boy does feel at home in the Dutch autochthonous surroundings while at the same time feeling and being at home in a Muslim world? How then to determine what is in the interest of the child? She concludes that Islamic children living in the Netherlands will be presumed to be embedded in the dominant Dutch culture, like the court did in the case at hand. This presumption is corroborated when we look

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37 High Court Den Bosch 26 11 2002, LJN AF2955
38 The Court settles (implicitly) the religious background of the woman’s claim – and possibly the matter and weight of her right of freedom of religion – by interpreting the Qur’an argument away, a digression into another professional field that normally does not find much favour in the eyes of our supreme court. Even, however, when the religious requirements had been found to be compelling, this interest would have to be balanced against the right of the father to save the child from a decision which he perhaps later on would not have wanted to take himself.
39 The court found that the opinion of the family living in Morocco could absolutely not be decisive. Obviously, this opinion was brought forward by the mother. The court did not interpret this as a possible indication of a kind of double identity and embeddedness. The Court may have been right all along, but the point is that in multicultural cases because of a lack of conceptual and empirical clarity and in-depth knowledge, standardized or “routine” considerations indirectly have a monocultural effect. Finally, we note that the right of a child to opt in or out of a religion was not invoked in this case (article 14.1 UN Convention on the Rights of the Child 1989).
at Hamid’s case. We presume that in that case the ‘culture shock’ as interpreted by the judge is an argument used to favour a steady and thus a Dutch cultural embeddedness. We derive another empirical conflict rule from this case, which has to be added to the one we formulated earlier:

In case of open legal concepts in the field of family law, like for instance ‘the best interest of the child’, judges tend to value embeddedness in Dutch culture over embeddedness in different (minority) cultures.

Judges in their decisions exclude the social possibility of citizens being embedded in both the dominant and a different (minority) culture.

The Child Care and Protection Board

We would now like to devote some special attention to the subject of the official supervision of ‘children at risk’. This permits us to draw together some findings from Hamid’s case and from interviews we have held, regarding the role of the Child Care and Protection Board in the handling of multicultural family cases. What is the general picture in matters of the imposition of official supervision of children? Regularly, Dutch authorities\(^{41}\) get to know children ‘at serious risk’\(^{42}\). Parents are reported for mistreating their child in crucial matters of health and welfare. In serious cases, the Board steps in and after an investigation sometimes requires the imposition of supervision\(^{43}\) of the child without taking custody away from the parents nor requiring the child to live in a foster parents’ home. Normally, this means that an employee of the Guardianship Council supervises the upbringing of the child by giving advice, visiting the parents, seeing the child and monitoring specific measures (s)he suggests to the parents. The matter of imposing supervision has to be brought before a juvenile judge, while each year the Board has to report to the judge about progress made and to propose either stopping this measure or continuing it. In this annual session, the parents may put their view forward, often but not necessarily accompanied by a lawyer. If the parents do not cooperate with the supervision, the Board may require the application of more serious measures, e.g. removing the child from the parents’ home and fostering it out.

Dealing with these children sometimes poses typical problems of what to do about practices in Turkish or Moroccan families living in the Netherlands. In some instances it seems that distinct practices and frames of reference play a role in producing the problem as it is defined by intermediaries, juvenile judges and the Board. Sometimes the Board has to deal with a mentally handicapped child or a child with severe health problems that have not been dealt with adequately by the parents.\(^{44}\) Its report mentions the parents’ unwillingness to accept the fact that the child has the handicap or the illness and/or accept “normal treatment” and that this puts the child at serious risk. The parents will not consider a special regime or the usual treatment for their child, but instead want to send the child away to their country of origin where there are supposedly really effective remedies. The Board may interpret such cases as one of a general pattern having a cultural connotation. It is “a typical Turkish/Moroccan habit” to deny the situation of a child being mentally handicapped and/or to go to an unofficial doctor, like Surinamese winti-experts. Sending the child to the country of origin is certainly not in the interest of the child, the Board reports, and then it requires

\(^{41}\) Authorities like physicians, teachers, agencies for child care, specialized police branches, etc.

\(^{42}\) The relevant legal concept can be found in book 1 of the civil code article 254.1: “Indien een minderjarige zodanig opgroeit, dat zijn zedelijke of geestelijke belangen of zijn gezondheid ernstig worden bedreigd ...”

\(^{43}\) Dutch legal term: onder toezichtstelling.

\(^{44}\) There are also cases in which other specific communities in the Netherlands refuse vaccination for a child or other treatment against some serious illnesses, like the members of a dogmatic Christian denomination. In these cases the child protection agency steps in as well, and often supervision is granted by a judge.
supervision of the child. The judge has to decide about the merits of these cultural arguments. What meaning should be given to the parents' protests and wishes and potential decisions? The juvenile judge can hardly be expected to know the distinct cultural situation or to engage in research into these matters. Sometimes when parents do not protest coherently or their lawyer is not raising the specific issues while the Board does, for formal reasons alone the case is practically settled and the Board's interpretation sticks. But even in cases where a more balanced presentation of the situation is given, judges are not in a position to evaluate the "typical distinct cultural pattern" way of arguing. In other cases for instance, quite serious suggestions have been made as to the adequacy of some distinct cultural solutions of a child’s problem, but a judge is empty-handed. Whether or not specific doctors in the country of origin, or specific schools, extended family structures or specific local institutions, may deal adequately with children with some specific problem, a judge cannot easily obtain and/or evaluate the knowledge to really feel comfortable with an alternative, non-routine treatment (and accept it as a serious approach which shows the parents’ full responsibility). In one of our interviews, a judge stated this as follows:

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

So, practically speaking, judges in this kind of cases cannot but accept the Board’s interpretation, perceive the situation as serious, and order (or prolong) the supervision. As we have seen in Hamid’s case, the Board’s interpretation in official reports by and large is based on the dominant Dutch culture. It would require empirical research to be able to pinpoint more clearly the way the Board comes to define the situation of the child and its family. To the best of our knowledge, we know of only one example. While the focus of this research was on the field of youth and criminal law, some research findings and conclusions have a broader meaning. The researcher, for example, was struck by the contrast between the data from the interviews with employees of the Board on the one hand and the written reports she studied. In the interviews these employees often took a liberal and open stance toward taking different cultural practices into account. In the reports, however, ‘culture’ only came to the fore in the form of ‘labels’ and ‘typologies’ re-enforcing a static, deterministic view of cultural backgrounds. The researcher explains this result by referring to the standardised way of Board research and reporting, to preconceptions about ‘what culture is’, to jargon and to preconceived ideas of what judges expect. Because of these aspects, individual circumstances and cultural patterns specific for a family are not presented strongly. We recognise these four factors in our own empirical data. It means that ‘labels’ or ‘clichés’ of ‘typically Turkish/Moroccan cultural patterns’ circulate and are re-enforced in each case. One family law judge, apparently speaking also for her colleagues (‘we’), specifically pointed to this issue in one of our interviews:

45 Brenda Carina Oude Breuil, De Raad voor de kinderbescherming in een multiculturele samenleving, Den Haag, Boom Juridische Uitgevers, 2005, 60-61.
“When we consider the role of the Child Care and Protection Board, we don’t think they pay a lot of attention to cultural differences. They basically have a quite uniform approach, ‘the Dutch way’ so to speak. They are scared as hell of one notion, and that is revenge for honour. You see that quite often, like ‘oh, gee! Honour!’”

The combined data, that is the Board’s use of ‘the Dutch approach’ and occasionally using ‘cultural clichés’ and Dutch judges lacking actual knowledge and opportunities to gather new knowledge about different cultures, reinforce the empirical conflict rule formulated earlier that stated: In case of open legal concepts in the field of family law, judges follow the meaning given by professional organisations.

**Child abduction**

Another family law problem, the abduction of children to the country of origin (usually) by the father without the mother’s consent, has stirred a lot of deliberation and debate among Dutch juvenile judges and others. Recently in 2004, Judge Van der Reijt, then presiding over a working group of juvenile judges, attended ‘the first Arab-European conference of judges on child abduction’. In strong language he publicized his conclusion

46 which we can read as an insider’s proposal for a normative conflict rule: “It is highly irresponsible for a juvenile judge to order a mother after divorce to let the young child visit the father regularly if the father is of Arab and Islamic origin, the mother isn’t, and the child is living in her place.”

Let us consider a case in which the father has a dual nationality, Dutch and Egyptian, for example, and the mother is Dutch, as is the child. The article’s reasoning: such a father tends to feel fully responsible for the education of the child, as the national law of Egypt (of Islamic origin) tells him, and therefore feels that he has full power to determine the place where the child will grow up. This may lead him to take the child with him to his family in Egypt.47 Recourse to the Egyptian authorities to claim the child back is of no avail as these authorities in such cases strictly apply their national law only (this would even be the case with a father without Egyptian nationality but who is a Muslim48).

It is quite certain that not all Muslim fathers will behave according to our example, and from the same motives and in the same way. Judges will try to look at each case anew and will try to evaluate the evidence for and the accusations of a possible child abduction. This of course is a difficult task, which will, as in all cases, be influenced by general notions and clichés – re-enforced by media attention, etc. – about ‘typical’ instances and behaviours of Islamic fathers that come to be seen as ‘typically Egyptian, etc. pattern’. These mechanisms lead to social rules, and these rules will be influenced by statements like those of Van der Reijt.

**Case of Rachida - Moroccan child abduction**

Our second ‘full case’ that we have selected from our empirical research is useful to focus on the issue of ‘child abduction’. Rachida is a woman of Moroccan origin who married when she

47 ‘To take with him’, is of course the father’s interpretation, who is legally allowed to do this according to Egyptian law. From Dutch and from international law point of view, however, it is abduction.
was 17. She married Ahmet, then 30 years old and an illegal immigrant in the Netherlands. Rachida’s parents had selected Ahmet as a wedding candidate and strongly advised Rachida to accept. Three children were born of the marriage: first a girl, then a boy, then another girl.

After 12 years of marriage, Ahmet fell in love with a young woman during a holiday in Morocco. He regularly visits her from then on. After two years the family again visits Morocco. Ahmet however has plans to leave his family there, to marry the young girl, and to take her to Holland. He takes Rachida’s passport away, and moves his three children to secret locations. He wants Rachida to approve of him marrying a second wife.

Rachida contacts her brother and parents in the Netherlands, who immediately travel to Morocco. They plead, persuade, contact the police, and put pressure on Ahmet, and finally Rachida gets her passport back. With her two girls, she is able to return to Holland. She could not find the boy. Ahmet probably thinks he is better off in Morocco.

Back in Holland, Rachida asks for a divorce and a court order that her children stay and live with her. The Child Care and Protection Board issues a report in which this indeed is their advice. The Board, however, also advised (without being asked) that Rachida should get legal custody with Ahmet being excluded. This advice is largely based on the opinion that Ahmet ‘did not act in the best interest of his children’, largely according to information obtained from Rachida. Ahmet namely refused to react to questions from the Child Care and Protection Board and to appointments for interviews and observations. From the answers to the questions during the interview, the researchers of the Board came to the conclusion that Ahmet has ‘abducted’ his son, has ‘threatened to abduct’ his two girls once back in Holland, and had tried to dump his wife in Morocco.

Thus, in Rachida’s case ‘abduction’ and ‘the threat of abduction’ play a leading role in the Board’s advice and consequently in the court’s legal decision. This ‘abduction’ is a cliché of ‘images’ and ‘commonsense notions’ about what ‘abduction’ is, however. These commonsense notions are being fed by stories about child abduction in the popular media and scientific research because some cases drew political attention. When professionals like judges and researchers of the Board talk about child abduction in Islamic cases, typically the father is the abductor, the father acts on the basis of a secret plan, and the mother is submissive or ‘caught in a web of lies’. Although the information and facts in Rachida’s case should lead to a more nuanced opinion about what really happened in the ‘abduction’, the judge and other professionals seem to be glued, so to speak, to this cliché version of abduction. For example, Rachida told us in the interviews that she knew what Ahmet was up to because he told her about it and tried to win her over. Moreover, he packed the suitcases with clothes typically suited for wintertime, while they went on a summer holiday. Rachida: “I knew what he wanted to do.” Again at the Spanish-Moroccan border Ahmet told Rachida that ‘of course she knew that he wanted her to stay in Morocco, because he was going to marry a second time’. Rachida protested but went along anyway.

The Board’s researchers who wrote the report and advised the court said in the interview that they vaguely knew what had actually happened: “They went for a holiday, and then he

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49 As said before, the law as a rule provides legal custody to both parents after a divorce.

50 For example, the large Dutch newspaper NRC, weekend edition of 15 and 16 April 2006, contained a large story about mixed Dutch-Egyptian ex-marriages and the problem of child abduction. This newspaper is widely read by judges.


52 From the interviews we held it is not clear why she went along. Her lawyer did not know either. Maybe there was a lot of pressure from Ahmet, maybe she was naive, maybe she wanted just to see what would happen or maybe she wanted it to happen to put her marriage to the test or something. The point is nobody knows, but the official interpreted her behaviour as submissive or unknowing.
left them there, isn’t that it?” Some time later in the interview, this possibility for nuance is lost in cliché terms: “He did not consult the mother, the child did not even have an opportunity to say goodbye and was suddenly pulled out of his familiar environment.” The judge went along with the Board. In particular, the fact that the Board advised about custody without being asked caught the attention of the judge. “That is very exceptional. I have never seen that before. When the Board advises like this without being asked, then I think there must be a very good reason for it, they must have been shocked by the father.” The Board could not have been shocked, however, as we have seen, because they had never even met him. They themselves said they gave the premature advice because they knew ‘the question was going to come anyway, one day or another; besides it’s completely up to the judge to decide what he does with our report and advice’.

Does the cliché of ‘abduction’ have anything to do with Muslim culture? According to the judge it has. She regards child abduction as “having something to do with the Moroccan culture, since this is indeed what we observe in certain cultures”. According to her, “Moroccan fathers have a strong social tie with their children and bear a large responsibility for their upbringing, so I assume he wanted to keep the child under his authority”. For her this explains child abduction by Muslim fathers. These Muslim fathers play a different role for the officers of the Child Care and Protection Board. In the interview they said that the pattern they observe is that (strategic accusations of) child abduction seems to be related to Muslim cultures, in the same vein as (strategic accusations of) incest and child molestation seem to be related to Dutch culture. In other words, women ex-married to a Muslim man strategically use the cliché of the danger of child abduction.

Concluding from the case of Rachida, we can say that factual information about what really happened when the family went on that summer holiday was either disregarded or ignored, which lead to an unquestioned and unconscious use of the cliché of ‘abduction’: active father – secret plan – submissive or unknowing mother. This cliché, coupled with the observation of legal professionals that child abduction is a typical pattern in Muslim cultures, leads to certain directions of legal outcomes, that is to certain social rules on how to decide multicultural legal cases. From the material we described under the heading ‘child abduction’ taken together with Rachida’s case, we infer the following empirical conflict rule:

*In family law, judges prefer children to be raised in the Netherlands. Even when there is only a slight doubt about the possibility of abduction of children by a parent, judges give custody to the parent who prefers raising the child in the Netherlands, and they do not grant unattended parental access to the other parent.***

This seems to have been the empirical conflict rule for quite some time already. Three years ago (2003) the two of us sat in on the occasion of a debate among judges, and one judge literally said (about custody, but the same goes for parental access):

“As a rule, custody after divorce is given to both parents. But when I have an Egyptian man before me in court of whom I only suspect that he could take his children to Egypt without consent of the mother, I dissent, and only the mother gets custody.”

Of course much more can be said about child abduction. Especially much more to counter existing stereotypes, for example that it is not – as judges of course know - a ‘Muslim’ issue,

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53 We add ‘unattended’ because in The Netherlands there is a possibility of the father seeing his child in a ‘safe environment’ (safe that is for the mother and the child): The father is not allowed to leave the building with his child. He is obliged to speak Dutch only.
and that it is not a ‘male’ issue. In Dutch legal practice and media coverage, however, the combination of abduction to Muslim countries by fathers somehow seems to attract the most attention.

**Concluding the family law cases**

Based on the material in the field of family law, we can say that the idea that open legal concepts leave space for the influx of the Dutch multicultural society is right in principle, but wrong in practice. Usually, judges act as gatekeepers to a uniform, monocultural law. In their decision-making we can reconstruct social rules that prevent different cultural practices and values from entering the Dutch legal system. (This is of course an empirical statement, not a normative one.) We have formulated these social rules as empirical conflict rules because they seem to define the boundaries of what is permissible to enter the Dutch legal system. Taken together, these empirical conflict rules state:

- *In family law, judges do not deviate from the meaning of strict rules as given by the legislator and in earlier legal decisions.*
- *In case of open legal concepts in the field of family law, like for instance ‘the best interest of the child’, judges follow the meaning given by professional organisations (like the Child Care and Protection Board).*
- *Judges and professional organisations in cases of open legal concepts tend to follow commonsense interpretations within the dominant culture, excluding possible interpretations from different (minority) cultures.*
- *In case of open legal concepts in the field of family law, judges tend to value embeddedness in Dutch culture over embeddedness in different (minority) cultures.*
- *Judges in their decisions exclude the social possibility of citizens being embedded in both the dominant and a different (minority) culture.*
- *Judges prefer children to be raised in the Netherlands. Even when there is only a slight doubt about the possibility of abduction of children by a parent, judges give custody to the parent who prefers raising the child in the Netherlands, and they do not grant unattended parental access to the other parent.*

This rather realistic view on multicultural legal practice in the Netherlands, a view that might seem somewhat sombre to those who prefer multiculturalism, is one that is only ‘valid’, according to us, in the field of family law. Other legal domains might present a totally different, contrasting picture. To demonstrate this, and to focus the attention of social scientists on the legal specifics of the legal field they investigate and talk about, we will present a case in the field of labour law in the following section.

**Case of Mohammed – evidence in labour law**

In the case of Mohammed we will focus on the interpretation of evidence in order to show how multiculturality plays a role at this level. The case shows how the judge extensively tried to take cultural factors into account. The material legal rule at stake is the one of the civil code, book 7, article 685, stating that an employment contract can be annulled if “it cannot reasonably be expected from the employer to continue the employment contract”. This rule clearly contains an open legal concept, which provides the judge with discretion to decide

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54 Officially there were 77 cases (126 children) of abductions from The Netherlands and 31 to The Netherlands in 2004. Fifteen of those 77 cases probably concerned Muslim countries. In two-third of the abduction cases the mother is the abductor.

55 Connected with articles 677 and 678.
what is ‘reasonable’ in the case at hand. The rule however has to be interpreted in the context of a body of legal rules that offer a high level of protection to the employee. Judges therefore do not conclude lightly against the employee. Concerning evidence, our main topic in this case, the law stipulates – inter alia – that the evaluation of evidence in general is up to the judge (article 152 code of civil procedure\textsuperscript{56}), that allegations by parties have to be proven by the respective party (article 150), and that ‘facts or circumstances of common knowledge (feiten of omstandigheden van algemene bekendheid) as well as general rules of experience (algemene ervaringsregels)’ do not need to be proven (article 149.2) Again, there is discretion accorded to the judge.

Mohammed was born in Morocco some 35 years ago, had married a Moroccan wife (15 years ago) in the Netherlands, has a family of four children, and has worked at a Dutch company as a truck driver for over four years ‘fully satisfactorily’. One evening Mohammed is arrested by the police. He stays two days in custody and is not allowed to contact anybody. Upon his arrest, however, he manages to hand over his cell phone to his nephew, telling him ‘to call his employer’. The nephew that same night calls the employer to tell him what happened. After his release, Mohammed talks with the human resource manager of the company, to whom he says that he was ‘falsely accused’. Without going any further, they decide to let the case rest. Mohammed does not get his salary for the two days he spent at the police station.

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

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

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

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

Many issues in this case ask for interpretation, some possibly connected with Mohammed’s cultural background. Central however is the ‘commonsense notion’ of both the judge and Mohammed’s legal aid officer that getting ill on one of the last days of a holiday is
typically Moroccan. The judge, for example, said in the interview that Mohammed’s case was one of several she saw every autumn: “It begins with problems at work - then a holiday to Morocco - then reporting ill from Morocco – then the question of whether you can trust official documents from Morocco – then not showing up at work once they’re back – it’s standard, this whole thing. We see that regularly.” The legal aid officer confirmed this view in the interview we held. In court she argued very empirically, trying to make the facts seem less important. The judge followed her example. Against the commonsense notion of a ‘typically Moroccan report of illness’, the judge had to determine the merits of the facts of the case at hand, which pretty much came down to establishing Mohammed’s ‘trustworthiness’. How did she do that? Did she take into account Mohammed’s cultural background, and in what sense? The official verdict (of course) does not say anything on this issue. The verdict merely says that ‘all circumstances considered’ the employer’s request has to be dismissed.

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

In this case, the judge’s interpretation and ‘guess-work’ were largely in agreement with those of Mohammed and of his legal aid officer. From the interviews with Mohammed and his legal aid officer, we understand that the judge came close to their interpretations. The form with which Mohammed had asked for the second opinion eventually turned up.

From Mohammed’s case we infer empirical conflict rules that are quite different from those in the field of family law. Apparently, the specific field of law, namely labour law with a high level of protection of the employee as against the employer, is responsible for these differences. Our rule is:

*In legal fields in which the protection of weaker interests is at stake (labour law, anti-discrimination, renting of houses), judges interpret the evidence whenever possible in such a way that they favour the weaker party.*

*Judges take into account the meaning or value of facts in minority cultures, try to find out that meaning, and decide whenever possible in favour of the ‘culturally laden meaning’ and thus whenever possible against a commonsense stereotype.*

*Judges take into account that ‘facts or circumstances of common knowledge’ as well as ‘general rules of experience’ (not in need of proof) are ‘culture specific’. Judges are aware that ‘common knowledge’ means a shared cultural background, and ‘general rules of experience’ means that experiences are connected to a culture’s*
specific practice and understanding. Judges try to keep ‘all options open’ as long as possible, and are aware of the fact that common knowledge cannot be taken at face value.

These empirical conflict rules in the field of labour law clearly contrast with those we have found in the field of family law. Our explanation would be that in the field of family law, the judges rely strongly on professional institutions like the Child Care and Protection Board for guidance. These institutions interpret the open legal concepts in advance. In the field of labour law, judges have to rely on their own interpretations. This gives them much more leeway to decide according to the circumstances of the case at hand, and thus much more leeway to take the values and practices of different cultural communities into account. Further the goal of the field of law is important: labour law is there for the protection of the weak (including minorities), while in family law legal certainty is much more at stake.

4 Some final considerations

In terms of the theme of this colloquium, The Response of State Law to the Expression of Cultural Diversity, our focus was on the response of the Dutch judiciary to cases where multicultural issues are at stake. Of the two central questions for this colloquium, we did not address the first (‘necessary conditions for management of diversity’). Neither did we address the normative part of the second question: What should be the limitations on the right to difference? We addressed the question: What are the limitations on the right to difference? It has to be stressed again, however, that this question can be answered by setting out the legal limitations but also by researching the actual (empirical) limitations. The latter approach was the one we took: how and when do judges take cultural diversity into account as a matter of fact, or: what empirical conflict rules can be found? What has it brought us?

Concerning cases covered by strict and “closed” legal regulation

Folk knowledge of jurists keeps telling us that cultural diversity makes its way into Dutch domestic law in fields of regulation through open concepts and general standards only, while it is commonly alleged that a judge will never deviate from what is perceived as the wordings of the rule in strictly structured legal fields. The first thesis is wrong (as we found, see further below), but the second one holds. The judiciary points towards the legislator to correct monoculturality in some legal field if need be.57 It can only be the task of the legislator, not our task: how often have we overheard this conflict rule in discussion with judges. Kafala, the case we began our paper with, would never have entered Dutch law if left to the judiciary.58 Judges know very well the importance attached to legal certainty, e.g. in matters of the status of people, such as being (formally) married or not married, being entitled to

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57 F.J.A. van der Velden, “Multicultureel familierecht in Nederland: ja?, en hoe?” Themis 2004, 228-240, does not find much space for judicial acknowledgement of distinct cultural elements in matters of marriage, divorce and the like, but pleads for some legislative amendments, for example the rules for the marriage settlement of property (common property or separation of property, the latter being normal in the Muslim world). Why force Muslim couples to go to the notary to contract a special arrangement and not allow them a simple choice? Also in the name of the right to freedom of religion, he asks for some changes in the adoption law. Revocation of adoption nowadays is only possible between the age of 20 and 23 years (plus a judicial test). A 25-year-old adopted person, who recently did convert to the Islam where adoption is not permitted, should be allowed to have his earlier adoption revoked.

58 Susan Rutten, Verzoening, islamitisch recht in West Europa, Universitaire Pers, Maastricht, 2005a, says that legal institutions unknown to Dutch family law cannot enter our legal order and refers explicitly to the kafala we have referred to in our Prelude.
benefits, and if third-party interests are strongly present. This attitude is reinforced by considerations of equality, freedom of choice, human rights, and public order. The Islamic institution of ‘repudiation’ is not accepted as part of domestic Dutch law for reasons of equality of the marriage partners as well as (other) considerations of public order. The equality principle will also stand in the way of a Roma who asks the court to endorse an inheritance regime according to Romaniye (Roma law) that favours male descendants. A Dutch judge:

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

Other fundamental principles enter the legal reasoning, e.g. in a case in which the parents of a child want to bar a marriage between partners-to-be who in terms of a distinct cultural kinship system are defined as brother and sister. The overriding principle here is the right freely to engage in a marriage. Finally, it is felt strongly that in matters of family law, the fundamentals of Dutch legal and social order are at stake. Therefore, distinct institutions like polygamy or specific marriage and divorce rules should not be taken into account, not even by the legislator, let alone the judge. Persons who want to obey the far stricter Islamic requirements of marriage have a hard time enforcing these in Dutch family law. For example, the Islamic prohibition that a Muslim woman cannot marry a non-Muslim person cannot be upheld because it violates her human rights. There is hardly any opening here. Therefore, as mentioned already, proposals to recognize distinct marriage and divorce regulations never got anywhere in Dutch legal practice (and only rarely in the literature). The Dutch legislator did not opt for the recognition of some kind of community-based family (or only: marriage and divorce) law.

All in all, there is strong evidence for the existence of a major (empirical) conflict rule: Judges do not engage in dissenting from a strict system of legal rules because they are not in a position to decide on all of the other, further legal consequences that would follow from this dissent.

Indeed, domains of law with a tight web of rules practically turn into monocultural bastions. Rutten and others are right: often in law, multiculturality is a non-starter right from the beginning. Some dissenting goes on nevertheless. In the case of an unmarried mother requesting the court to grant her child the name of the biological father (who had recognized the child), we saw the lower court deviate from strict law and engage in an interests-balancing operation. Perhaps this court did not perceive the “name-giving law” as a fundamental and core matter for Dutch society, perhaps the court wanted dearly to side with the woman and/or the child.

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59 In Dutch private international law, repudiation (in view of important changes in the foreign procedures in some countries) is being accepted more easily than before (S.W.E. Rutten, Cultuur en familierecht in eigen kring, Deventer, Kluwer, 2005b, 43-94).

60 This case is not a real case but a possible multicultural case presented to a group of judges in a round table discussion.

61 In terms of legislation, opposition to deviant regimes is voiced strongly. It is widely felt that a regime allowing specific religious/cultural minorities to follow their specific proper personal law, like family law, and on that basis be recognized as married, divorced, etc. in the Dutch legal order on a par with the dominant family law should not be introduced in the Netherlands, partly for a host of practical reasons, but more fundamentally because then the state would have to define what groups qualify as distinct religious/cultural communities which it is not the function of the secular state to determine (F.J.A. van der Velden, “Multicultureel familierecht in Nederland: ja?, en hoe?” Themis 2004, 228-240).

62 Susan Rutten, Verzoening, islamitisch recht in West Europa, Universitaire Pers, Maastricht, 2005;
Concerning cases covered by rules with open legal concepts and by general standards

When it comes to open legal concepts containing words like ‘reasonable’ and ‘in the interest of X’, we started out with the expectation of legal professionals that here a considerable influx of rules and practices of distinct cultures is a smooth and frequent event. We always felt this to be a reasonable expectation. What Tjittes writes, for instance, seems well grounded: ‘open concepts’ leave room for considering the circumstances at hand, and when these circumstances happen to include ‘different cultures’, then ‘of course’ these are taken into account. Although there are some cases proving this rule, basically on the whole we have found otherwise.

Analysing our findings and uncovering several empirical conflict rules, our conclusion is that ‘it very much depends’. Whether or not ‘room for cultural diversity’ in cases of open concepts and general standards is provided by the judges depends on several factors and circumstances:

- when a legal field protects weaker parties, there is more openness to cultural diversity in favour of the weaker party,
- when legal certainty is at stake, the legal field is (nearly) closed to cultural diversity,
- when the interests of third parties are at stake, the legal field is (nearly) closed to cultural diversity,
- judges’ interpretation of open legal concepts is more stereotypical when they have less information about other possible meanings
- the more the ‘interference’ of para- or extra-judicial institutions in the judicial process, the greater the prevalence of stereotypical interpretations, and the less openness to cultural diversity.

Finally, a tendency towards stereotyped reasoning and producing a monocultural decision sneaks in the moment judges adhere to the (widespread) notion that establishing particular circumstances and their relevance for the decision is a matter of “just facts”. The filling in of a concept like “the welfare of the child” may be perceived as a non-contentious issue, as “just

64 A man of Moroccan origin who had already been living in the Netherlands for 17 years divorced his (Dutch-born) wife and entered a second marriage with a woman living in Morocco. Following local Moroccan practices which orient his life in the Netherlands, too, he endows his new wife with expensive jewellery and incurs a huge debt. This diminishes his capacity to pay alimony to the children from his first marriage. In the final verdict over the amount of alimony to be paid, the Dutch Supreme Court (NJ - Nederlandse Jurisprudentie, a periodical for civil and criminal cases - 1992: 338) quashed the appeals court’s refusal to take these costs into account while fixing the alimony. The Supreme Court reasons that it is not at all clear why such an outlay of money typical for a Moroccan community - although higher than the costs of a “Dutch” wedding - would not legally count as “reasonable costs” which allow for a lower alimony. The case is hereupon referred to another court of appeal. At least the door is opened towards an interpretation of the concept of reasonable costs in a distinctly cultural way. Clearly, however, the interest of the first wife and the children to have a decent alimony also plays a role here.
65 This also seems to be the case with expert testimony given in criminal cases. In cases in which a cultural defence is brought forward (this is to be determined by the defence), the judges in exceptional cases (this is up to the court) appoint an expert (anthropologist, psychiatrist). Judges are free to determine the weight of the expert’s report in relation to other information. Lawyers seem to work on a ‘case by case’ method in determining whether it is ‘wise’ to bring in a cultural defence, because of the uncertainty of the outcome (a higher or a lower sentence). (Mirjam Siesling, Multiculturaliteit en verdediging in strafzaken, Den Haag, Boom Juridische Uitgevers, 2006.) More importantly, experts do not always seem to be free from cliché’s themselves. (Hermine Wiersinga, Nuance in benadering, Culturele factoren in het strafproces, Den Haag, Boom Juridische Uitgevers, 2002.)
a fact”. This perception of the decision-making problem tends to restrict the range of considerations, including those about culture-specific elements.

It is difficult to say which of the factors on this list is at stake in a line of Supreme Court decisions apodictically shutting the door on cultural diversity. Let us quote just one of them.

Once a woman of Moroccan origin (dual nationality, living in the Netherlands for a long time already) did not want her partner – also with a dual nationality – to divorce her. She said that in the original distinct culture that still dominated their life, the fact that the man engages in a second marriage does not count as a sure sign of an irretrievable breach of the marital union. It was decided that in this case Dutch law had to be applied. “And therefore, the court has to answer the question of the presence of an irretrievable breach of the union on the basis of Dutch criteria only”.67 “A court cannot dismiss a request for divorce on grounds unknown to the law”.68

When we consider that ‘irretrievable breach’ is an open legal concept, and that no para- or extra-judicial institutions are involved advising the judge to decide in one way or another, it is puzzling why non-Dutch criteria are so drastically ruled out. Why not reason empirically and test the content of some general standard against the factual situation, Rutten asks.69

Maybe her wish is coming true. From an interview with a lawyer in family law, we understand that this is happening today. The lawyer told us of Dutch cases of Turkish and Moroccan couples, in which judges adjourn the divorce and try mediation on the grounds that they are not sure of there being an irretrievable breach. Today’s practice thus may show more “empirical reasoning” and teach other lessons than publicized legal decisions from years ago.

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66 To be found in NJ (Nederlandse Jurisprudentie) 2000, 452. (This is a periodical for legal decisions in civil and criminal law)

67 These criteria are extremely liberal. It is almost as if should one of the partners allege such a breach, the breach is a legal fact already. The woman probably wanted to block the divorce, because they had married years ago (1989) at a Moroccan consulate in the Netherlands and would therefore, even after having obtained a Dutch divorce, still be considered married in Morocco, a fact that impairs the woman’s freedom considerably, for instance when visiting that country.

68 The two quotes come from the report of the Advocaat-Generaal (the official advisor in each Supreme Court case) which is explicitly endorsed by the Supreme Court in its official justification of the decision not to quash the lower court’s decision to grant the divorce.

69 Susan Rutten, Verzoening, islamitisch recht in West Europa, Universitaire Pers, Maastricht, 2005. The same question of how to fill in open concepts comes to the fore forcefully in cases where it is a matter of determination of the interest of a child to be educated in either the “Dutch” or an Islamic way. It is not easy to understand why in a case of forced supervision and ordering a child out of the parental home, the evaluation of what the interests of the child are does not draw at all on Moroccan-Muslim views. This is not to suggest that those norms should have the final say in the matter but only to suggest that one would expect these norms to be at least taken into account in the justification of the decision. The case is an old one, however (1982, Nederlandse Jurisprudentie 1983: 201). Perhaps after nearly 25 years the (formal) reasoning in similar cases has changed, and autochthonous Dutch standards of family life and education are not the automatic yardstick any longer.