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Colonialism, Context and Critical Thinking: First Steps Toward Decolonizing the Dutch Legal Curriculum

ARTICLE

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ABSTRACT

In the summer of 2020, tens of thousands of people took to streets and squares around the Netherlands under the banner of the Black Lives Matter (BLM) movement. Many speakers called for Dutch institutions to 'decolonize' by reckoning with their own colonial history and racialized legacies. Addressing institutional racism at universities should be a multi-layered process. Recruitment and admission of students, curriculum design, hiring of academic staff, retention, promotion and teaching practices should all be considered. Those of us teaching at Dutch law schools, however, do not have to wait; by incorporating critical theoretical approaches and existing historical research on race and colonialism, Dutch law school teachers can begin to address structural racism and colonial legacies as soon as the next teaching term. This article gives concrete examples of where and how to begin.

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1. INTRODUCTION

In the summer of 2020, tens of thousands of people took to streets and squares around the Netherlands under the banner of the Black Lives Matter (BLM) movement. Though initially characterized as demonstrations of solidarity with BLM protesters in the United States, participants quickly made clear that their grievances were rooted firmly in Dutch soil. Signs bore the names of unarmed men of colour who died in police custody, chants urged municipalities to 'Kick Out Black Piet' by ending public displays of blackface during annual holiday celebrations, and many speakers called for Dutch institutions to 'decolonize' by reckoning with their own colonial history and racialized legacies. In the weeks following the demonstrations, many such institutions – universities,[1] museums, corporations, major political parties and parliament – all made statements against racism that at least included references to structural or institutional change.

Defining institutional or structural racism, or other kinds of structural injustice, and by extension identifying the parties responsible for addressing it, can be difficult.[2] Philosopher Iris Marion Young dedicates an entire book, *Responsibility for Justice*, to the subject. She defines structural injustice as existing 'when social processes put large groups of persons under systematic threat of domination or deprivation'.[3] Institutional racism, then, is the combination of social processes which link domination, and its material advantages, to the group of people deemed white, and oppression, and its material deprivation, to those deemed non-white.[4] Whiteness, like all other racial categories, is of course a social construction, not a biological characteristic. To call something socially constructed, however, is not the same as saying it does not make significant, material differences in people's lives, or that these differences are not 'produced and sustained by law'.[5]

Law schools are particularly interesting places to address both demands to address institutional racism and to decolonize institutions in any given nation, because legal education is both 'profoundly national' and 'unabashedly normative'; it is national because the bulk of legal doctrine taught comes from domestic law, normative because cases are studied not only as the 'official record' of historical events, but also held up as examples of how similar conflicts should be solved in the future.[6] Legal teaching also impacts society because only law students may become lawyers or judges. They apply what they have learned, make new case law, and the cycle repeats.

Because of their important societal role, addressing institutional racism (along with sexism, heteronormativity, ableism etc.) at law faculties should be a multi-layered process. Recruitment and retention of underrepresented groups of students and staff, teaching practices and research priorities must all be considered, in addition to curricular choices.[7] Law faculties face the additional complexity of having to harmonize their curriculum with the bodies that

1 University of Amsterdam, 'Institutioneel racisme en wetenschap' (16 June 2020) <www.uva.nl/shared-content/faculteiten/nl/faculteit-der-maatschappij-en-gedragswetenschappen/nieuws/2020/06/institutioneel-racisme-en-wetenschap.html> accessed 25 June 2020; 'UU in gesprek over racisme en discriminatie – Nieuws – Universiteit Utrecht' <www.uu.nl/nieuws/uu-in-gesprek-over-racisme-en-discriminatie> accessed 25 June 2020; 'Hester Bijl over racisme, inclusiviteit en diversiteit op de Universiteit Leiden' (*Universiteit Leiden*) <www.universiteitleiden.nl/nieuws/2020/06/interview-hester-bijl-over-racisme> accessed 25 June 2020.

2 *Rutte legt uit waarom hij niet spreekt van institutioneel racisme* <www.nu.nl/281177/video/rutte-legt-uit-waarom-hij-niet-spreekt-van-institutioneel-racisme.html> accessed 25 June 2020. Iris Marion Young, *Responsibility for Justice* (First issued as an OUP paperback, OUP 2013).

3 Young (n 2) at 52.

4 Throughout this paper, I use the terms 'white' and 'non-white' to subvert the common practice of using whiteness as an unstated background assumption or 'neutral' position, an especially problematic practice in the context of legal construction and interpretation. See e.g. Sara Ahmed, 'Declarations of Whiteness: The Non-Performativity of Anti-Racism' (2004) 3 Borderlands ejournal <www.borderlands.net.au/vol3no2_2004/ahmed_declarations.htm#top> accessed 5 October 2020; see also Steve Garner, 'The Uses of Whiteness: What Sociologists Working on Europe Can Draw from US Research on Whiteness' (2006) 40 Sociology 257.

5 Kimberlé Crenshaw and others (eds), *Critical Race Theory: The Key Writings That Formed the Movement* (New Press 1995) xxvi; see also Philomena Essed and Isabel Hoving (eds), *Dutch Racism* (Rodopi BV 2014); Philomena Essed, *Understanding Everyday Racism: An Interdisciplinary Theory* (Sage Publications 1991).

6 Carel Stolker, *Rethinking the Law School: Education, Research, Outreach and Governance* (CU Ps 2015); see also Jaap Hage, 'Hoe moet recht worden onderwezen?' (2012) 2 Law and Method 25.

7 See e.g. Suhraiya Jivraj, 'Towards an Anti-Racist Legal Pedagogy: A Resource' (University of Kent 2020); Louise Autar, 'Decolonising the Classroom' (2017) 20 Tijdschrift voor genderstudies 305; Amita Dhanda and Archana Parashar, *Decolonisation of Legal Knowledge*. (Taylor & Francis 2012).

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regulate the legal profession. Institutional change may be slow. Those of us teaching at Dutch law schools, however, do not have to wait for commissions to be formed, reports to be revised, or research grants to be distributed. By incorporating two theoretical approaches and existing historical research on race and colonialism in the Netherlands, Dutch law school teachers can begin addressing structural racism and colonial legacies as soon as the next teaching term.

Section 2 describes three theoretical approaches – decoloniality, Third World Approaches to International Law (TWAIL) and Critical Race Theory (CRT) – which can help challenge colonial and racialized assumptions in *how* we teach. Section 3 provides several cases and examples of these assumptions and practices from Dutch legal history that could serve as jumping off points for *what* we teach in several core, doctrinal law school courses.

2. DECOLONIAL AND CRITICAL APPROACHES TO LEGAL TEACHING

One challenge inherent to legal teaching is that it sits at the crossroads of academic education and practical training.[8] In Dutch these different concepts are embodied by the terms *onderwijs* as opposed to *opleiding*. We want our students to analyse and evaluate sources critically and to think creatively (*onderwijs)*, but we also want them to learn relevant laws and apply them correctly (*opleiding)*. Most Dutch law schools, like their counterparts in other parts of the world, include a first-year course that teaches students that learning to 'think like a lawyer' is the first step of their education.[9] Many schools teach some version of the IRAC method, instructing students that legal problems should be solved by identifying the legal issue (I) and corresponding rule (R), statute or precedent, applying or analysing (A) the rule to the facts of the situation and reaching a correct conclusion (C).

A problem with these courses, as identified by Professor Bal Sokhi-Buley, is that this 'thinking like a lawyer' means thinking, often exclusively, like a legal positivist.[10] The emphasis on positive law as being the only legitimate rule (R) applicable to any given question, assumes the legitimacy of that law and the state that enforces it, and deems questions of equity or fairness irrelevant to solving legal problems.[11] If positive law itself reflects historical (often colonial) power dynamics, then students risk reproducing those dynamics under the guise of neutrality, objectivity and legitimacy.

To be sure, many law teachers in the Netherlands incorporate social context into their courses, and attempt to stimulate critical thinking among their students. They often portray themselves and their practices, however, as being outside the mainstream.[12] This self-identification as different is not limited to the Netherlands, but is echoed in publications about legal pedagogy from various parts of the world.[13] Once the idea that *positivist* thinking is *legal* thinking takes hold, often early in the first year, it is very hard to dislodge.[14] Students learn that non-positivist

8 Stolker (n 6).

9 All ten accredited Dutch law faculties publish short descriptions of their first-year courses online. Generalizations are based on the author's survey of those descriptions.

10 Bal Sokhi-Bulley, 'Learning Law Differently: The Importance of Theory and Methodology', in van Klink and de Fries (eds) *Academic Learning in Law* (n12); Bal Sokhi-Bulley, 'Alternative Methodologies: Learning Critique as a Skill' (2013) 3 Recht en Methode in onderzoek en onderwijs 6.

11 Mohsen al Attar and Vernon Ivan Tava, 'TWAIL Pedagogy – Legal Education for Emancipation' (2009) XV The Palestine Yearbook of International Law 7, 172.

12 Bart van Klink and Ubaldus de Vries (eds), *Academic Learning in Law: Theoretical Positions, Teaching Experiments and Learning Experiences* (Edward Elgar Publishing 2016) The book contains chapters from 15 different legal teachers, seven of whom teach at Dutch law schools; they present their cases and calls for more creative, 'sceptical' and critical legal education and in doing so, inevitably identify their practices as departures from the norm.

13 See e.g. Joel Malesela Modiri, 'The Time and Space of Critical Legal Pedagogy' (2016) 27 Stellenbosch Law Review 507 (writing about South Africa); al Attar and Tava (n 11) (New Zealand); Dhanda, 'The Power of One: The Law Teacher in the Academy', *Decolonisation of Legal Knowledge* (n 7) (India); Sophie Rigney, 'Creating the Law School as a Meeting Place for Epistemologies: Decolonising the Teaching of Jurisprudence and Human Rights' (2020) 54 The Law Teacher 503 (UK).

14 See e.g. Barbara M Oomen, 'Orchestrating Encounters: Teaching Law at a Liberal Arts and Sciences College in the Netherlands', in *Academic Learning in Law* (n 12); Christine Schwöbel-Patel, '"I'd Like to Learn What Hegemony Means" – Teaching International Law from a Critical Angle', in *Academic Learning in Law* (n 12); Philipp Kastner, 'Teaching International Criminal Law from a Contextual Perspective' (2019) 19 International Criminal Law Review 532.

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arguments, sometimes called policy considerations, do not matter for 'real lawyering'; when teachers try to insert critical or contextual discussions into doctrinal courses, they are asked if the material will be required on the exam. Courses such as those on migration law or human rights, which may address questions of policy or equity, are often offered only as electives or in later years, when students may avoid them altogether.

Treating legal positivism as one of several theories about law and lawyering, and exposing students to a variety of those other theories, is one way to begin decolonizing legal education.[15] 'Decolonizing' a university discipline remains a contradictory idea, since core ideas of decoloniality include breaking down disciplinary boundaries and hierarchical knowledge production.[16] What law teachers can do, however, is provide students with tools to identify colonial power dynamics operating within the discipline, and enable them to be both more critical and creative in doing law to create a more just world.[17] In the Dutch context, where learning about colonial and racialized history in elementary and secondary education remains marginal,[18] higher education must fill in factual as well as methodological gaps.

Two theories that can help students learn critical thinking skills, as well as address issues of race and coloniality in law, are Third World Approaches to International Law (TWAIL) and Critical Race Theory (CRT). Either would be an appropriate topic for a legal theory course, but could also be interesting as frameworks through which to approach questions of Dutch law.

2.1 THIRD WORLD APPROACHES TO INTERNATIONAL LAW

TWAIL's central premise is that international law has its origins in global colonialism, when concepts like territorial sovereignty and mutual respect for borders were inherently racialized and reserved 'for *white* First World states'.[19] Beginning in the seventeenth century, European countries engaged in 'reciprocal recognition' of each other's rights to territorial control and self-determination, while simultaneously denying such recognition to people in Africa, Asia or the Americas.[20] These initial treaties made possible the subsequent racialized enterprises of chattel slavery and colonialism, which were in turn created, regulated, financed and enforced by combinations of domestic and international property, commercial, contract and criminal laws.[21] As international law continued to develop, following formal independence of former colonies in the mid-twentieth century, '[i]nternational legal equity, heavy on formality but grossly lacking in substance, proved to be rather meaningless, for the acquisition of political freedom was negated by the continued economic fealty of former colonies'.[22] Rather than combating colonial power dynamics, TWAIL argues, the stated neutrality of international law only masks the problem. While TWAIL fits most naturally into questions of international law, its approach would be useful in any class that assumes the legitimacy of the nation state or its laws.[23]

15 Sokhi-Bulley, 'Learning Law Differently: The Importance of Theory and Methodology' (n 10); Rigney (n 13).

16 Walter Mignolo and Catherine E Walsh, *On Decoloniality: Concepts, Analytics, Praxis* (Duke UP 2018); Melissa F Weiner and Antonio Carmona Báez (eds), *Smash the Pillars: Decoloniality and the Imaginary of Color in the Dutch Kingdom* (Lexington Books 2018).

17 Rigney (n 13) 513.

18 Gloria Wekker, *White Innocence: Paradoxes of Colonialism and Race* (Duke UP 2016); Melissa F Weiner, 'The Ideologically Colonized Metropole: Dutch Racism and Racist Denial: Dutch Racism' (2014) 8 Sociology Compass 731; Melissa F Weiner, 'Colonized Curriculum: Racializing Discourses of Africa and Africans in Dutch Primary School History Textbooks' [2016] Sociology of Race and Ethnicity.

19 al Attar and Tava (n 11) (emphasis in the original).

20 David Theo Goldberg, *The Racial State* (Blackwell 2002); Kwame Nimako and Glenn Frank Walter Willemsen, *The Dutch Atlantic: Slavery, Abolition and Emancipation* (Pluto Press 2011); Esther Captain, 'The Selective Forgetting and Remodelling of the Past: Postcolonial Legacies in the Netherlands', *Austere Histories in European Societies Social Exclusion and the Contest of Colonial Memories* (London; New York: Routledge, Taylor & Francis Group 2017).

21 See e.g. Nimako and Willemsen (n 20); see also Martine Julia Van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595–1615* (Brill 2006) (regarding Hugo Grotius's legal advice to the Dutch East India Company).

22 al Attar and Tava (n 11) 16–17; Ntina Tzouvala, *Capitalism As Civilisation: A History of International Law* (1st edn, CUP 2020).

23 For extensive examples of using TWAIL in the classroom, see the online symposium hosted by the Opino Juris blog in 2020, e.g. Antony Anghie, 'Critical Pedagogy Symposium: Critical Thinking and Teaching as Common Sense—Random Reflections' (*Opinio Juris*, 31 August 2020) <opiniojuris.org/2020/08/31/critical-pedagogy-symposium-critical-thinking-and-teaching-as-common-sense-random-reflections/> accessed 1 September 2020.

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2.2 CRITICAL RACE THEORY

CRT has its roots in legal realism and Critical Legal Studies (CLS), both of which reject as myth the idea 'that legal institutions employ a rational, apolitical, and neutral discourse with which to mediate the exercise of social power'.[24] This myth is especially strong in European legal scholarship, which maintains that it was precisely law's 'neutrality' and 'truth' that allowed it to prevail despite a history of changing kings, governments and borders.[25] CRT like CLS argues, however, that law can be and has always been deployed by those in power to maintain or expand that power. Likewise, CRT and CLS both see knowledge and power as 'inevitably intertwined' and thus agree that legal discourse is, as such, an area where power asserts itself.[26] Under this rationale, legal scholarship and, by extension, legal education are inherently political.

CRT departs from CLS when it comes to the relevance of both race and law to each other. While CLS has the tendency to deconstruct law to the point of irrelevance and thus discount its use for social change, CRT recognizes the material significance of legal victories in the US, like expanded access to education and voting, as well as the power of visibility gained through such efforts by and for non-white people.[27] Likewise, while some CLS scholars call for discontinuing the terminology of race in general, CRT scholars, like their TWAIL counterparts, reject this development as counter-productive, leading instead to continued racism without the terminology to address it.[28] What CRT scholars emphasize above all is 'the absolute centrality of history and context in any attempt to theorize the relationship between race and legal discourse'.[29]

The inquiry at the heart of CRT, which could be adapted as a methodology for evaluating Dutch legal history and practice, is how law constructs race.[30] To provide answers, CRT scholars often use the 'critical historical method', examining the facts and impacts of specific cases, or chains of cases, in which 'neutral' principles of law were deployed to obtain the opposite effect.[31] Studying seminal cases in tandem with other historical evidence shows that current legal meanings of equality and fairness are neither natural nor inevitable 'but, instead, a collection of strategies and discourses born of and deployed in particular political, cultural and institutional conflicts and negotiations'.[32] While the critical historical method may come more naturally to common law scholars, who trace legal principles and precedents forwards and backwards in time through case law as part of their regular practice, it is no less relevant in the context of Dutch legal teaching, where seminal cases are routinely used to illustrate core concepts.

An early CRT article which exemplifies the critical historical method, as well as the material impact of legal constructions of race, and that could serve as a good model for evaluating and teaching Dutch legal constructions of race, is Cheryl Harris's 1993 article 'Whiteness as Property'.[33] Harris traces an unbroken line through United States legislation and jurisprudence, in which whiteness evolves from an aspect of identity into a vested interest, constructed and protected by law just like any other form of property.[34] Like all forms of property, whiteness derives much of its value from the right to exclude non-holders from its benefits.[35] Harris identifies two US legal institutions which form the basis of whiteness as property: private ownership of land premised on abrogating the property rights of indigenous people, and chattel slavery imposed

24 Crenshaw and others (n 5) xviii.

25 Mathias Möschel, *Law, Lawyers and Race: Critical Race Theory from the United States to Europe* (Routledge 2014).

26 Crenshaw and others (n 5) xxii.

27 ibid xxiv.

28 Mathias Möschel, Costanza Hermanin and Michele Grigolo, *Fighting Discrimination in Europe: The Case for a Race-Conscious Approach* (Routledge 2016).

29 Crenshaw and others (n 5) xxiv.

30 ibid xxv.

31 ibid xvi, 466–67.

32 ibid xvi.

33 Cheryl Harris, 'Whiteness as Property' (1993) 106 Harvard Law Review 1709.

34 ibid 1725.

35 Harris (n 33).

on enslaved Africans.[36] Since its publication nearly 30 years ago, Harris's concept has been applied to other settler-colony states like Canada, Australia and Israel.[37] There is no reason to think it would not also serve as an interesting template against which to evaluate Dutch law concepts of property and personhood, since the acquisition of property through colonial expansion and chattel slavery were also significant projects of Dutch legal institutions.

This paper in no way suggests that applying CRT or TWAIL in the Netherlands is new. Betty de Hart, for example, has written extensively on the legal regulation of 'racialized mixture' both in Dutch colonies and the metropole, and currently leads the Euromix Project at the Free University of Amsterdam (VU) conducting similar research throughout Europe.[38] Guno Jones, cited extensively below, has researched the intersection of law, race and citizenship for people from former Dutch colonies.[39] Thomas Spijkerboer studies race and migration, and recently has published with Karin de Vries an article about race and EU migration law.[40] Barbara Oomen has written about teaching TWAIL concepts in the liberal arts context of a University College.[41] It is telling, however, that only one of the above scholars (De Vries) is regularly engaged in teaching required, doctrinal courses like constitutional or administrative law.

3. CASES AND CONTEXT FROM DUTCH LEGAL HISTORY

Fortunately for law teachers, Dutch historians have rushed in where lawyers fear to tread. Law teachers can use cases highlighted by these historians to teach both CRT and TWAIL methodologies to their students, imparting valuable legal skills and perspective to the Dutch law curriculum. What follows is not a comprehensive literature review of all current historical scholarship on issues related to colonialism, race and law; such a review is nearly impossible given the explosion of research on these topics at the moment.[42] Rather, it is a suggestion of several seminal cases or themes that could be adapted for discussion in a variety of legal courses and subjects, broadly following Harris's emphasis on the institutions of colonial property and slavery.

3.1 SLAVERY

3.1.1 Slavery and sovereignty

Historians of race argue that, while the practice of enslavement itself had a long tradition in Europe, *racialized* slavery based on notions of white supremacy took hold in western Europe around the mid-fifteenth century to justify Portuguese enslavement and commodification of people captured from Africa.[43] For centuries before, Vikings raided the British Isles and forced captives to work; Greeks and Romans did the same to prisoners of war. People from Italy and Spain captured and traded so many 'Slavic' people that the term became synonymous with the status.[44] However, while many European enslavers also raided and enslaved African people, the Portuguese were the first Europeans to do so exclusively. It was not a choice; they had

36 ibid.

37 Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Duke UP 2018).

38 Betty de Hart, '"Ras" en "gemengdheid" in Nederlandse jurisprudentie' (2021) April Ars Aequi 359; Betty de Hart, 'Some cursory remarks on race, mixture and law by three Dutch jurists' (2019); 'EUROMIX Research Project – Regulation of Mixed Relationships, Intimacy and Marriage in Europe' <*euromixproject.nl/*> accessed 7 July 2020.

39 Guno Jones, 'Biology, Culture, "Postcolonial Citizenship" and the Dutch Nation, 1945–2007', in Philomema Essed and Isabel Hoving (eds) *Dutch Racism* (Rodopi B.V 2014); Guno Jones, 'What Is New about Dutch Populism? Dutch Colonialism, Hierarchical Citizenship and Contemporary Populist Debates and Policies in the Netherlands' (2016) 37 Journal of Intercultural Studies 605.

40 Karin de Vries and Thomas Spijkerboer, 'Race and the Regulation of International Migration. The Ongoing Impact of Colonialism in the Case Law of The European Court of Human Rights' (2021) Netherlands Quarterly Journal of Human Rights.

41 Oomen (n 14).

42 In 2020 alone, several new publications came out highlighting the specific involvement of Dutch cities in chattel slavery. See e.g. Pepijn Brandon and others (eds), *De Slavernij in Oost En West: Het Amsterdam-Onderzoek* (Spectrum 2020); Dienke Hondius, 'Nieuwe Aandacht Voor Oorlog En Slavernij : Uitdagingen Voor Erfgoedstudies, Geschiedschrijving En Onderwijs' (2020) 132 Tijdschrift voor geschiedenis 637; 'Research Projects Het Koloniale En Slavernijverleden van Rotterdam' (*KITLV*) <*www.kitlv.nl/research-projects-het-koloniale-en-slavernijverleden-van-rotterdam/*> accessed 30 August 2021.

43 See e.g. Ibram X Kendi, *Stamped from the Beginning: The Definitive History of Racist Ideas in America* (Nation Books 2016).

44 Nell Irvin Painter, *The History of White People* (WW Norton 2010).

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been excluded from the Eastern European trade by their more powerful neighbours, but the Portuguese turned their exclusion into a public relations opportunity. They portrayed their exclusive traffic in enslaved African people as a Christian mission to save 'those souls that before were lost', in contrast to the immoral traffic of their competitors.[45] Gomes Eanes de Zurara spread this message in his biography of Portuguese Prince Henry the Navigator, which 'became the primary source of knowledge on unknown Africa and African people for the original slave-traders and enslavers in Spain, Holland, France and England'.[46] The Spanish and English adopted and expanded this moral and religious justification for the Americas, where they also used it to justify taking land from the non-Christian, non-white people they found there.[47]

In *The Dutch Atlantic*, Kwame Nimako and Glen Willemsen argue that religious and moral justifications for racialized slavery and conquest left an absence of legal clarity in pre-colonial Europe, an 'age of banditry' and war between European kingdoms.[48] The treaties that ended those wars also established the first international laws regulating overseas expansion. Foundational amongst these treaties was the Peace of Westphalia, signed in 1648 by entities that became Germany, Spain, France, Sweden and the Netherlands. It not only ended the 80 Years War for Dutch independence from Spain, and established the Catholic and Protestant alignment that would define early Western Europe, it also 'set the parameters for competition and cooperation within European statecraft … [which] formed the basis of European sovereign states and the related interstate systems'.[49] The signatories recognized each other's rights to territorial control and self-determination within their borders, at least temporarily; doing so, however, amounted to non-recognition, not only of the territorial sovereignty of those outside the treaty, but also of their humanity. More explicit in its legal construction of race was the Treaty of Utrecht which, in 1713, included the '*asiento de negros*,' a licence awarding the exclusive right to provide enslaved Africans to the Spanish colonies in the Americas, to a British company.[50]

Historians Dienke Hondius, Karwan Fatah-Black and Matthias van Rossum all observe that many labourers in early modern Europe were 'unfree', but that even 'the lowliest white peasant, literally the serfs, could not be sold, while enslaved people could'.[51] Hondius explains, 'the terminology of legal status of Africans became entangled with the terminology of color' by borrowing vocabulary from the Portuguese; terms like *negro* had no independent meaning in Dutch and were borrowed to describe the appearance of Black Africans but 'at some point during the 16th century … took on a second meaning of slave'.[52] Hondius observes that people were referred to by their skin colour so long as that colour remained remarkable. Once race denoted by skin colour was considered normal, references to skin colour end; there would be no need to specify 'Black slaves' or 'African slaves', Hondius explains, because an expected precondition of being enslaved was to be both Black and African.[53] This disappearance of racial terminology from the archive in cases where race clearly played a role is evidence of what some scholars call racial aphasia, the deliberate obscuring of the role of race, white supremacy and colonial power relations from cases in which it clearly plays a role,[54] also a practice present throughout Dutch legal history.[55]

45 Kendi (n 43) 23.

46 ibid.

47 Harris (n 33); Goldberg (n 20).

48 Nimako and Willemsen (n 20).

49 ibid 14.

50 See e.g. Captain (n 20); Goldberg (n 20).

51 Dienke Hondius, 'Access to the Netherlands of Enslaved and Free Black Africans: Exploring Legal and Social Historical Practices in the Sixteenth–Nineteenth Centuries' (2011) 32 Slavery & Abolition 377; Karwan Fatah-Black and Matthias van Rossum, 'Slavery in a "Slave Free Enclave"? Historical Links between the Dutch Republic, Empire and Slavery, 1580s–1860s' (2015) 66–67 WerkstattGeschichte 55.

52 Hondius, 'Access to the Netherlands of Enslaved and Free Black Africans' (n 51) 378.

53 ibid.

54 Tendayi Achiume, 'Racial Borders' (UCLA School of Law, Public Law Research Paper N 21–33, 2022) (citing Debra Thompson, 'Through, against and beyond the Racial State: The Transnational Stratum of Race' (2013) 26 Cambridge Review of International Affairs 133).

55 Hart, '"Ras" en "gemengdheid" in Nederlandse jurisprudentie' (n 38) 360; Wekker (n 18).

3.1.2 Slavery and criminal law

In the 15 years during which I practised or taught criminal law, the metaphor I heard most was that of the sword and the shield: criminal law gives the state a sword, a monopoly on violence within its territory; in exchange it shields subjects from violence, from each other and the state, unless they are convicted by due process. 'What about prison?' someone would always say, 'that's not violent'. 'It is if you try to leave', I would reply. Deprivation of liberty always involves violence and, in this way, slavery is intrinsically bound to criminal law. Enslavement, however, was always the sword, rarely the shield. Pointing out the racialized inconsistency in legal lore like the sword and shield is a step, not only towards acknowledging unjust violence enacted by law historically, but also in getting students to remain vigilantly critical about how state violence may be deployed today.

Historian Nathalie Zemon Davis explains that, unlike their French or English counterparts, the Dutch *Staten-Generaal* did not issue any regulations regarding the treatment of enslaved people in the Atlantic colonies. Instead, they relied on Roman law defining 'domestic jurisdiction' over property, and allowed colonial administrators or chartered societies to formulate guidelines regulating the use of violence against the enslaved.[56] 'Domestic jurisdiction' did not mean, however, that the state was not involved in the violence of Dutch slavery. In the first place, enslavers were rarely if ever sanctioned for violating 'guidelines' regarding corporal punishment. Further, the state characterized resistance by enslaved people as criminal; attempts to escape or assist others in doing so was theft of property, as opposed to justified self-defence of one's own body. Resistance by enslaved people was nearly constant, as were the heinous punishments, often state-administered, designed to deter others from similar action.[57] When resistance by enslaved people escalated into all-out war, the Dutch military became involved, sometimes even receiving support from its European allies in the Caribbean, and broadening the issue from domestic criminal law to international policy.[58]

While many descriptions of the violence of Dutch slavery focus on the western colonies, race, violence and criminal law were similarly constructed in the Dutch East Indies. In 'Slavery in a Slave-Free Enclave', Karwan Fatah-Black and Matthias van Rossum observe that, although Dutch practices in the East Indies did not include the large-scale *trade* in enslaved people like that in the Atlantic colonies, there was nevertheless an extensive use of 'unfree [racialized] labor', both tolerated and supported by the state.[59] This status was enforced by European plantation managers exercising extreme violence toward labourers, and experiencing little or no legal sanction for doing so.[60]

One factor that does distinguish the use of violence in the Dutch East Indies from that in the western colonies was how much longer it was legally sanctioned. While slavery in Suriname and the Dutch Caribbean was phased out between 1863 and 1873 (more on this in section 3.1.3), a report by public prosecutor JTL Rhemrev detailed excessive violence used against 'native' workers in the Dutch East Indies in the early 1900s, and autobiographies published in the Netherlands in the 1950s often blamed Europeans' 'inability to stifle sadistic impulses' against 'native' people on tropical madness.[61] These incidents can, and should, be evaluated not as individual excesses, but consistent legal constructions of race and personhood enforced by racialised applications of the sword or shield of criminal punishment or protection. The Rhemrev report's own history illustrates this point: instead of resulting in prosecutions of

56 Natalie Zemon Davis, 'Judges, Masters, Diviners: Slaves' Experience of Crimninal Justice in Colonial Suriname' (2011) 29 Law and History Review 925, 940–42.

57 See e.g. Anton de Kom and others, *Wij slaven van Suriname* (Uitgeverij Atlas Contact 2020) 62–81; Nimako and Willemsen (n 20) 77–83.

58 See e.g. Kom and others (n 57); Marjoleine Kars, *Blood on the River: A Chronicle of Mutiny and Freedom on the Wild Coast* (The New Press 2020).

59 Fatah-Black and van Rossum (n 51). The recent Rijksmuseum exhibit, 'Slavery', illustrates this concept by featuring artefacts and stories from across the Dutch colonial sphere.

60 See also Jan Breman, 'Colonialism and Its Racial Imprint' (2020) 35 Journal of Social Issues in Southeast Asia 463; Thom Hoffman, *Een Verborgen Geschiedenis: Anders Kijken Naar Nederlands-Indië Fotografie* (WBOOKS 2019).

61 Breman (n 60) 464–65, 474. The use of the term 'native' here is for consistency with Dutch legal policy of the time, explained in section 3.2.1 of this article.

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plantation managers or increased protection for workers, it was buried in a file until sociologist Jan Breman found and published it in 1987.[62]

In Suriname, the use of state-sanctioned violence to regulate the behaviour of enslaved people did not end with the abolition of slavery, but merely evolved into a process which Nimako and Willemsen call 'progressive control'.[63] To this end, almost every discussion of the end of slavery in the Dutch colonies was paired with discussions of how to maintain control over the non-white. Even those few parliamentarians who concluded that slavery was unjust, cautioned against 'too hasty' abolition for fear that white people in Dutch colonies would experience the same violent reprisals as those in Haiti.[64] Abolition was a legally protracted process in the Netherlands, involving an increasing, not decreasing, role of state control in the lives of formerly enslaved people. While enslavement by private owners officially ended in 1863, it was followed by a ten-year period of '*staatstoezicht*' often translated into English as 'apprenticeship' but literally meaning 'state supervision'. In this case, it was the state exercising one-sided control over non-white people, controlling their movements and able to impose criminal punishment for failure to comply.[65]

3.1.3 Slavery and property

Another delay in the abolition process came from debates over how to compensate former enslavers for the value of their 'lost property'. White 'owners' were compensated handsomely, at 300 guilders for each individual freed in 1863, or 30 guilders if this person was already entitled to manumission.[66] The formerly enslaved, however, were given nothing for their years of labour before 1863. The injustice of this arrangement (or at least the risk that the non-white population would consider it so) was not lost on the white government of the time, which publicized information about compensation in Dutch, but not in languages which enslaved people spoke widely.[67]

The compensation issue also provides an illustration of how Harris's concept of whiteness as property applies in the Dutch context. Harris uses the appropriation of indigenous land to reveal the white supremacy inherent in John Locke's idea of private property and its relevance to American jurisprudence; in Dutch legal history the issue of unequal compensation may serve a similar role.[68] In this case, the whiteness of the former enslavers was a prerequisite to compensation for 'lost property'. The formerly enslaved did not have this prerequisite and were denied property rights in both their own bodies and their labour.

3.1.4 Slavery, 'free soil' and border control

Recently, a court in The Hague decided that 'ethnicity may be an objective indication of nationality'; specifically ruling that it was not discriminatory to stop Mpanzu Bamenga, a Dutch citizen travelling through the Eindhoven airport, solely because he was not white.[69] Again, the use of 'white' as the descriptor here is deliberate, because implicit in the court's decision is that whiteness would be the 'objective indication' of Dutch nationality, whereas non-whiteness indicates not being Dutch.[70] The practice of using law to keep the European territory of the Netherlands (the metropole) white, has deep historic roots. While racialized slavery and violence was prevalent throughout the Dutch colonies, the practice was banned

62 Breman (n 60).

63 Nimako and Willemsen (n 20).

64 Arend R Huussen Jr., 'The Dutch Constitution of 1798 and the Problem of Slavery' 67 Tijdschrift voor Rechtsgeschiedenis / Revue d'Histoire du Droit / The Legal History Review (1999).

65 Nimako and Willemsen (n 20).

66 Kwame Nimako, Glenn Frank Walter Willemsen and Abdou Amy, 'Chattel Slavery and Racism: A Reflection on the Dutch Experience', in Philomena Essed and Isabel Hoving (eds) *Dutch Racism* (Rodopi B.V. 2014).

67 ibid.

68 See also Wouter Veraart, 'Het slavernijverleden van John Locke: Naar een minder wit cirriculum', *Homo Duplex: De dualiteit van de mens in recht, filosofie en sociologie* (Boom Juridisch 2017).

69 *C-09-589067-HA ZA 20-235* [2021] Rb Den Haag ECLI:NL:RBDHA:2021:10283. At the time of this writing, the case is on appeal.

70 Sinan Çankaya, 'A Court Just Confirmed: To Be Dutch Is to Be White' (*Al Jazeera*, 29 September 2021) <*www.aljazeera.com/opinions/2021/9/29/a-court-just-confirmed-to-be-dutch-is-to-be-white*> accessed 6 December 2021.

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from 'Dutch soil' in Europe. Rather than representing a principled stand against enslavement, however, details of 'free soil' cases indicate that the purpose of the doctrine was more likely the systematic exclusion of non-white people from European soil.[71]

Many historians highlight the case of a ship which arrived in the Zeeland port of Middelburg in 1596 with a cargo of 130 enslaved Africans.[72] The ship's captain hoped to sell the men, women and children in Zeeland. However, because the captured people were 'all baptized (christened) Christians', the local authorities ordered them to be freed.[73] Unhappy with this deprivation of his 'property', the captain appealed the decision to the *Staten-Generaal* in The Hague. While denying his request at first, upon a 'second request of [Captain] Van der Hagen it was decided on 28 November that he could do with the Moors "as he sees fit"'.[74] In this case, Hondius argues, since there are no records whatsoever of any presence of a such a large number of Africans in the Zeeland area following this decision, despite her searching birth, death, church and military archives, what the captain most likely saw fit was to depart with the prisoners and sell them in a more profitable port.[75]

Dutch courses on legal history often highlight the ongoing importance of Roman law to fundamental concepts like codification and private law.[76] It also seems important to discuss, then, how Roman law enabled successive Dutch governments to maintain a formal legal distance from slavery as a state practice. As mentioned above, Roman law provided the state with a means of delegating corporal punishment to private owners.[77] However, Roman law also regulated manumission, the legal process by which the 'owner' of an enslaved person could set that person free. Unlike total freedom, however, manumission carried many obligations for formerly enslaved people.[78] For example, manumitted individuals were required to 'show respect' to their former 'owners' and those owners' descendants, and to 'support' them if they fell on hard times.[79] Specifically, formerly enslaved people could be required to give money to their former owners if the owners needed it, and even at death were required to leave a portion of their estate to their former owners.[80] In practice, this meant that manumission remained a less-than-free status under which the formerly enslaved were still obligated and bound to their former owners. While mostly relevant in the colonies, where the vast majority of manumitted people lived, manumission and its legal consequences triggered the most significant free-soil case of the eighteenth century.

Andries was an enslaved man who travelled twice to the 'free soil' of the Dutch Republic, first in 1768 with his putative owner, Danielle Buttner and in 1771 with Buttner's widow, Maria Anna.[81] In 1774 Andries was working in Paramaribo and was expected to deliver three *schellingen* per day to Maria Anna Buttner. He failed to do so for 12 weeks and ended up in government custody until the case could be settled.[82] Andries's time on 'free soil' was relevant to several

71 Dienke Hondius, 'Blacks in Early Modern Europe: New Research from the Netherlands', in Darlene Clark Hine, Trica Danielle Keaton and Stephen Small (eds) *Black Europe and the African Disapora* (U of Illinois P 2009).

72 ibid; Hondius, 'Access to the Netherlands of Enslaved and Free Black Africans' (n 51); Fatah-Black and van Rossum (n 51).

73 Hondius, 'Blacks in Early Modern Europe: New Research from the Netherlands' (n 71) 33. Hondius observes that the people held in Middleburg were likely captured from a Portuguese slaving ship, on which mass, onboard baptisms were common.

74 ibid 38 (citing minutes of the *Staten-Generaal*: '"Op een tweede request van Van der Hagen werd…beschikt dat hij met de Mooren kon doen, 'soe hy' verstaet."').

75 ibid.

76 Conclusion based on author's own survey of the online descriptions of courses offered at the ten accredited Dutch law faculties in the Netherlands. None of the online study guides of legal history courses mention colonialism or critical approaches. See e.g. 'Vak | UvA Studiegids 2020–2021' <*https://studiegids.uva.nl/xmlpages/page/2020-2021/zoek-vak/vak/80570*> accessed 6 December 2021; 'Geschiedenis van Het Europese Goederenrecht, 2021–2022 – Studiegids – Universiteit Leiden' <*https://studiegids.universiteitleiden.nl/courses/104886/geschiedenis-van-het-europese-goederenrecht*> accessed 6 December 2021; 'Ocasys: Toon Vak Rechtsgeschiedenis' <*www.rug.nl/ocasys/rug/vak/show?code=RGPRG00105*> accessed 6 December 2021.

77 Zemon Davis (n 56).

78 Karwan Fatah-Black, *Eigendomsstrijd: De Geschiedenis van Slavernij En Emancipatie in Suriname* (Ambo/Anthos uitgevers 2018) 21.

79 Fatah-Black (n 78).

80 ibid.

81 Fatah-Black and van Rossum (n 51); Fatah-Black (n 78).

82 Fatah-Black (n 78).

aspects of the case. First, did Andries's time on free soil render him free in Suriname? If not, he was still Buttner's property and required to turn over his wages to her. Second, if travelling to the Republic had rendered Andries 'free', was it then a freedom akin to manumission which would still require him to assist Maria Anna financially? Or was Andries's status total freedom?[83] The case travelled from the *Raad van Politie* in Suriname, back to the *Sociëteit van Suriname* in Amsterdam and ultimately to the *Staten-Generaal* which took the opportunity both to clarify and to limit the legal significance of Dutch free soil. On 23 May 1776, the *Staten-Generaal* issued the following order on: 'The freedom of Negro and other slaves, brought here from the State's colonies to these lands':

> [I]t is an undeniable truth that the distinction between FREE and UNFREE people has been discontinued for centuries, and slavery has ended [in the Republic].' [However] 'this truth can not (sic) be deemed applicable to the Negro- and other slaves brought here from the colonies [because]... the Owners of Slaves brought to the Netherlands would be deprived from Goods that are lawfully theirs. This would be a far graver affront against the birthright and immediate freedom of the inhabitants of this Republic, than that the application of such righteous ideas of Homeland Freedom would bring.[84]

3.1.5 Slavery and constitutional law

The significance of slavery to Dutch legal history is also conspicuous in its absence from significant legal documents at the time, an example of the previously mentioned 'racial aphasia' in law.[85] Arend Huussen describes the first written constitution of the Batavian Republic, begun in 1796 and finalized in 1798. Despite contemporaneous legal debate on the subject, as evidenced by the case of Andries, the document itself makes no mention of slavery.[86] This was far from an oversight, for Huussen details a lengthy process involving several studies by groups of experts, extensive drafting, and debates closed to the public, before drafters decided that the constitution would make 'no mention of the institution of slavery at all'.[87] Much like the rationale given by the *Staten-Generaal* in the case of Andries, Huussen cites the constitutional framers' beliefs that banning slavery would have been 'more against the traditional freedom inherent to the Dutch if the legal property rights of the masters over their goods were violated against their will than if the just ideas of national liberties were to be applied to uphold the principle of property rights on slaves'.[88]

3.2 COLONIALISM AND LEGAL CONSTRUCTIONS OF RACE

As mentioned above, most CRT scholarship focuses on settler-colonial nations, where foundational ideas of the rights of white, European settlers to 'own' colonized territories were based on denying the humanity and rights of indigenous people already living there.[89] Dutch colonialism, by contrast, was primarily geared towards extracting resources (using local and/or enslaved people to do so) as opposed to resettling large numbers of its European population. While the ends may have been different, the means were fundamentally similar – racialized categorization and control of local populations, created and enforced by law, as a means to obtain property (real or movable) for the benefit of the colonizing entity.

3.2.1 Formal racial segregation in the Dutch East Indies

In the Dutch Atlantic, legal categories like free, enslaved, manumitted, and contract-labourer were implicitly racialized. By contrast, explicit racial-legal categories regulated nearly every

83 ibid.

84 Fatah-Black and van Rossum (n 72) (translation theirs).

85 Achiume (n 54); Thompson (n 54).

86 Huussen (n 64).

87 ibid.

88 ibid 106.

89 Harris (n 33); Crenshaw and others (n 5).

aspect of colonial society in the Dutch East Indies.[90] People declared legal 'natives' of the Indies (*Inlanders*), those born in the Indies to fathers also born there, were subject to a different set of laws and presided over in different courts from those declared legally European. 'Foreign Orientals' (*Vreemde Oosterlingen*), a group which included everyone not already deemed European or native, but in practice mostly included people whose families originally came from China, were subject to the same laws as 'natives'. Racialized legal status was passed generationally, such that 'European' parents had 'European' children regardless of where they themselves were born. The legal status of people with parents from different legal-racial categories was largely determined by the status of their father. European fathers could pass their European status to children regardless of the mother's legal status, by recognizing the children as their own, a privilege not granted to European mothers.[91]

Some Dutch legal scholars and historians use the term 'legal pluralism' to refer to the system in the Dutch East Indies under which Europeans were subject to one set of laws, while non-Europeans were not.[92] More telling is the terminology of the time, which called this system *Intergentiel Recht*, often translated as Interracial Law, and taught at Dutch law schools into the 1960s.[93] People with two parents born in Europe were legally European, subject to European laws, and presided over in court by European judges.[94] These different sets of laws dramatically impacted people's lives in terms of their rights to own property,[95] raise their children and, in criminal cases, be subject to the death penalty, which remained legal for 'natives' in the Dutch East Indies until independence, but was prohibited under European criminal law.

Evidence of the relevance of race and law to practices in the Dutch East Indies can be found in the sheer number of pages devoted to the subject. Tasked with advising the colonial government on the importance of racial segregation to democratic reforms in 1940, jurist Wim Wertheim submitted so many pages that his report had to be published as a separate volume.[96] His assessment was critical and controversial, asserting that the system was not natural, but rather the result of political and economic choices.[97] Wertheim gave up law following Indonesian independence and became a sociology professor at the University of Amsterdam, but he continued his critical writings on race and colonialism throughout his career.[98] His professional transition is a metaphor for the exit of discussions of race and law within Dutch legal academia, because prior to 1949 Dutch law schools were intimately involved in the colonial project. Beginning in the nineteenth century, 'native' elites would send their sons

90 Hart, '"Ras" en "gemengdheid" in Nederlandse jurisprudentie' (n 34); David Van Reybrouck, *Revolusi: Indonesië En Het Ontstaan van de Moderne Wereld* (De Bezige Bij 2020); a tool for teachers of Dutch-speaking students may be the podcast version of *Revoulsi*, especially this episode on life in the segregated East Indies. 'Luisteren: Direct na de kolonisatie door Nederland begon het Indonesische verzet te borrelen en te gisten' <*https://decorrespondent.nl/12332/luisteren-direct-na-de-kolonisatie-door-nederland-begon-het-indonesische-verzet-te-borrelen-en-te-gisten/1232669724-c20aac50*> accessed 6 December 2021.

91 See e.g. Bart Luttikhuis, 'Beyond Race: Constructions of "Europeanness" in Late-Colonial Legal Practice in the Dutch East Indies' (2013) 20 European Review of History: Revue européenne d'histoire 539; see also Hans Ulrich Jessurun d'Olviera, 'De Gouden Koets en zijn Koloniale Kant' (*www.goudenkoets.nl*, November 2021) <*www.goudenkoets.nl/verdieping/de-gouden-koets-en-zijn-koloniale-kant*> accessed 6 December 2021.

92 Ariela Gross, 'Race, Law, and Comparative History' (2011) 29 Law and History Review 549; Luttikhuis (n 91); for greater discussion on the intersections of gender and race in the Dutch colonies, see Hart, '"Ras" en "gemengdheid" in Nederlandse jurisprudentie' (n 38).

93 William Lemaire, *Kwesties Bij de Studie van Het Intergentiel Recht : Rede Uitgesproken Bij de Aanvaarding van Het Ambt van Gewoon Hoogleraar Aan de Rijksuniversiteit Te Leiden Op 23 November 1956* ('s-Gravenhage [etc]: Van Hoeve 1956) Lemaire was a professor at the University of Leiden law school from 1954 until his death in 1976, first of Intergentiel Recht and later of International Private Law. See also Roeland Kollewijn and Sudiman Kartohadiprodjo, *Intergentiel Recht : Verzamelde Opstellen over Intergentiel Privaatrecht* (Van Hoeve 1955).

94 Due perhaps to international relations with colonial Japan, people with two parents born in Japan were also declared legally European and subject to European laws in the Dutch Indies; a distinction that carried into the metropole, where until recently, people with Japanese ancestry were categorized as having 'western migration background'. See e.g. Luttikhuis (n 91).

95 Upik Djalins, 'Becoming Indonesian Citizens: Subjects, Citizens, and Land Ownership in the Netherlands Indies, 1930–37' (2015) 46 Journal of Southeast Asian Studies 227; Anton Ploeg, 'Colonial Land Law in Dutch New Guinea' (1999) 34 The Journal of Pacific History 191.

96 Willem Frederik Wertheim and Frans Herman Visman, 'Verslag van de Commissie Tot Bestudeering van Staatsrechtelijke Hervormingen, Ingesteld Bij Gouvernementsbesluit van 14 September 1940, No. 1x/KAB, Deel II' (Note: Oorspr uitg: Batavia : Landsdrukkerij, 1941–1942 (2d edn, Minden Press) 1941).

97 Hart, *Some cursory remarks on race, mixture and law by three Dutch jurists* (n 38) 28–29.

98 ibid 31.

to study law in Leiden.[99] While the idea was that they would learn European ways and return to assist the colonial government, some of these students went on to lead the movement for independence, and were even prosecuted for their actions in the 1920s.[100] The civilizing mission of Dutch legal education also took place within the Dutch East Indies, beginning with secondary education and eventually the opening of a university of applied science (*Hogeschool*) in Batavia.[101] This civilizing mission had its limits, however, and stopped short of the idea that 'natives' would ever be fit to judge European citizens in European courts.[102]

Historian Bart Luttikhuis and others challenge the notion that 'European' in the Dutch colonial context was synonymous with whiteness.[103] He cites legal cases in the Dutch East Indies where people challenged their status, courts considered evidence such as language, religion and comfort with European culture as well as skin colour, and where people were sometimes granted European legal status without having white skin. However, legal and social constructions of race have never been limited to merely skin colour, and almost always include elements of 'culture' or behaviour.[104] While the legal category 'European' may have been more expansive than the racial category 'white' within the Dutch East Indies, the importance of whiteness, and/or proximity to it, revealed itself when non-white Europeans tried to enter the metropole following Indonesian independence.

3.2.2 Colonial constructions of race and citizenship in the metropole

Legal scholar Guno Jones describes the transition of race from an explicit practice of colonial governance to an unspoken social factor in the metropole through analysis of Dutch parliamentary debates on immigration from both the former Dutch East Indies and Suriname. Happening about 20 years apart, the debates reflect the shifting nature of racial discourse in the Netherlands, which becomes less explicitly racist, while nevertheless maintaining whiteness as 'one of the essential conditions of "real" Dutchness'.[105] Historian Esther Captain also highlights conceptions of race and citizenship evidenced in diaries and memoires of Indo-European people settling in the Netherlands following Indonesian independence.[106]

Despite the fact that the numbers of migrants from the former colonies remained relatively small compared with the total Dutch population – 315,000 Dutch nationals from Indonesia between 1946 and 1968 and only 130,000 Dutch nationals from Suriname between 1973 and 1980, compared with a Dutch population of approximately 10 million – rhetoric frequently referred to a flood of immigrants.[107] Both Jones and Captain observe Dutch politicians' consistent portrayal of non-white citizens of the former colonies as unprepared and even unfit for Dutch citizenship. Even when eventually granted citizenship, non-white Dutch citizens from former colonies and their offspring were seen as 'aliens within the borders'.[108]

Racial constructions were not merely rhetorical; they conferred material benefits and burdens on the groups of people in question. For example, the government gave 'Europeans' coming from Indonesia loans to cover their moving expenses to the Netherlands; 'Eurasians' of mixed parentage were granted Dutch citizenship, but denied financial assistance until 1956. Captain highlights the role of law professor William Lemaire in debates; as member of parliament for the

99 Harry Poeze, 'Indonesians at Leiden University', in W. Otterspeer (ed) *Leiden Oriental Connections* (E.J. Brill 1989); Harry A Poeze, *In Het Land van de Overheerser Deel I* (Foris 1986).

100 Poeze, *In Het Land van de Overheerser Deel I* (n 99) 211–28.

101 Upik Djalins, 'Re-Examining Subject Making in the Netherlands East Indies Legal Education: Pedagogy, Curriculum, and Colonial State Formation' (2013) 37 Itinerario 121.

102 Cees Fasseur, 'Rechtschool en raciale vooroordelen' (Farewell lecture, Leiden University, 14 December 2001).

103 Luttikhuis (n 91); Fasseur (n 102).

104 See e.g. Goldberg (n 20); Hart, '"Ras" en "gemengdheid" in Nederlandse jurisprudentie' (n 38).

105 Jones, 'Biology, Culture, "Postcolonial Citizenship" and the Dutch Nation, 1945–2007' (n 39); see also Jones, 'What Is New about Dutch Populism?' (n 39); Guno Jones, 'Just Causes, Unruly Social Relations. Universalist-Inclusive Ideals and Dutch Political Realities', in U. Vieten (ed) *Revisiting Iris Marion Young on Normalisation, Inclusion and Democracy* (Palgrave Macmillan 2015).

106 Esther Captain, *Achter het kawat was Nederland: Indische oorlogservaringen en -herinneringen 1942–1995* (Kok 2002).

107 Jones, 'Biology, Culture, "Postcolonial Citizenship" and the Dutch Nation, 1945–2007' (n 39).

108 ibid 319.

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conservative Catholic People's Party (KVP), he argued that Indo-European Dutch people should be allowed to make their own decisions about where their 'roots' lay.[109] While Captain does not use the term race, she makes the connection between 'concerns' about Indo-European's' ability to integrate into 'Dutch' society and *de facto* racism when she recognizes that no ability of cultural assimilation could overcome the fact that Indo-European Dutch people 'did not comply with the exterior characteristics required for the human body to be considered Dutch', or as one of her interviewees more concisely put it, they were 'Brown and stuff, you know'.[110]

Even more extreme were the conditions of people coming from the Moluccan Islands. They had fought on the Dutch side during the war for Indonesian independence, and were reluctant to disarm and live under the new Indonesian government. Instead of working towards a long-term solution, the Dutch military ordered the Moluccan soldiers and their families to the Netherlands in 1951, discharging them from military service on the way. Having been 'natives' under colonial rule, Moluccans were neither entitled to, nor did they necessarily want, Dutch citizenship. Instead, the Dutch government considered their presence in the Netherlands temporary, forced them to live in former concentration camps, and denied them access to work permits. After 25 years of statelessness, intense political mobilization and eventually political violence, Moluccans were finally granted a legal status equivalent to Dutch citizenship in 1976.[111]

By the time of Suriname's independence in the 1970s, parliamentarians in the Netherlands failed to pass legal restrictions on immigration from Suriname. Instead, they 'encouraged' Dutch citizens of West Indian origin to return 'home' when their work contracts ended. Parliamentarians lamented that these migrants 'association with the Netherlands' had resulted in 'cultural isolation and little contact with their own country'.[112] Others went on to observe that people from 'Suriname and the Dutch Antilles will need to find their place in that part of the world where they *happen to be placed*, on the edge of the Caribbean and the northern part of South America'.[113] This discourse indicates, at best, a lack of awareness that it was Dutch colonialism that happened to place Surinamers of African and Asian descent in the Caribbean; at worst it reveals a wilful denial of the ongoing impacts of that history, and an affirmative effort to keep its legacy outside European borders.[114]

Contingent citizenship is not just a historical legal artefact. In 2012, the Dutch parliament debated applying different rules for Dutch citizens migrating from the Antilles to the metropole.[115] The bill was ultimately defeated because of arguments that its distinction based on national origin would violate international law.[116] Jones observes that portraying all non-white Dutch citizens as coming from somewhere else results in 'conditional citizenship … whose meaning is contingent upon variable forces in a given place and time [and] always on the verge of being compromised'.[117]

4. CONCLUSION

Recent events only bolster Jones's point. Whether legitimizing racial profiling at borders,[118] systematically selecting and accusing parents with 'non-Dutch' last names or dual nationalities of fraud related to childcare subsidies,[119] Dutch law, lawyers and judges play a continual role

109 Captain (n 106) 171.

110 ibid 131. ('*Bruine en zo, weet je wel.*')

111 See e.g. Wim Manuhutu, 'Moluccans in the Netherlands: A Political Minority?' (1991) 146 Publications de l'École Française de Rome 497; Usman Santi, *Molukers & Recht* (Inspraakorgaan Welzijn Molukkers 1993).

112 Jones, 'Biology, Culture, "Postcolonial Citizenship" and the Dutch Nation, 1945–2007' (n 39) 329.

113 ibid (emphasis mine).

114 See e.g. Jones, 'Biology, Culture, "Postcolonial Citizenship" and the Dutch Nation, 1945–2007' (n 39); Guno Jones, 'Unequal Citizenship in the Netherlands: The Caribbean Dutch as Liminal Citizens' (2014) 27 Frame 65.

115 Jones, 'Unequal Citizenship in the Netherlands' (n 114).

116 ibid 72.

117 Jones, 'Biology, Culture, "Postcolonial Citizenship" and the Dutch Nation, 1945–2007' (n 39).

118 See racial profiling case 2021 (n 69); Çankaya (n 70).

119 Jesse Frederik, *Zo Hadden We Het Niet Bedoeld: De Tragedie Achter de Toeslagenaffaire* (De Correspondent BV 2021); Samir Achbab, 'De Toeslagenaffaire is ontstaan uit institutioneel racisme' (*NRC*) <*www.nrc.nl/nieuws/2021/05/30/de-toeslagenaffaire-is-ontstaan-uit-institutioneel-racisme-a4045412*> accessed 10 February 2022.

in constructing whiteness as a prerequisite for full exercise of citizenship in the Netherlands. If a significant goal of Dutch law faculties is preparing future lawyers and jurists to do justice in an increasingly and diverse national community, then history and context matter; this is the conclusion of experts in higher education pedagogy as well as advocates for race and social justice.[120] To date, efforts to improve the performance of 'non-western' students at Dutch universities have problematized the students themselves, as opposed to examining how the institutions themselves may need to change or adapt.[121] This article represents my own ongoing efforts to educate myself and enrich my teaching. I hope it encourages fellow teachers to seek out material relevant to their own courses. Including historic cases and critical inquiries in the curriculum is in no way sufficient to decolonize or eliminate institutional racism within law faculties; it is a small but necessary first step.

COMPETING INTERESTS

The author has no competing interests to declare.

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120 See e.g. Jivraj (n 7).

121 Maurice Crul and Frans Lelie, 'Access to Higher Education and Retention of Students with a Migrant Background in the Netherlands: A Comparative Analysis', in Jacqueline Bhaba, Wenona Giles and Faraaz Mahomed (eds), *A Better Future: The Role of Higher Education for Displaced and Marginalized People* (CUP 2020); Peter AJ Stevens and others, 'The Netherlands: From Diversity Celebration to a Colorblind Approach' in Peter AJ Stevens and A Gary Dworkin (eds), *The Palgrave Handbook of Race and Ethnic Inequalities in Education* (Springer International Publishing 2019); Saskia Bonjour, Marieke van den Brink and Gwendolyn Taartmans, 'Een Diversity Officer Is Niet Genoeg' (2020) 5–6 Thema Hoger Onderwijs 83.