Being A Criminal: On the Penalisation of Irregular Residence in the Netherlands

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Abstract

In December 2011, amendments were made to the Dutch Aliens Act to penalise irregular residence in the Netherlands. This penalisation rigidly excludes irregular migrants by reclassifying them as criminals, a remarkable step toward the penalisation of all on the basis of their mere being. This article reviews the penalisation as the apotheosis of increasingly exclusive migration policies in the Netherlands by (an inversion of) Hannah Arendt's theory of the stateless refugee. A closer investigation of the repatriation of irregular migrants as the keystone to these exclusive and criminalising policies reveals the contradiction of the nation-state's sovereign right to citizenship and legal equality. Although the penalisation is justified as an effect and a necessary consequence of the legal-illegal binary divide, the repatriation practices show its shortcomings in effecting the expulsion policies along these binary lines, illustrating the artificial nature of the divide.

Introduction

On 15 December 2011, amendments were made to the Dutch Aliens Act penalising irregular residence in the Netherlands. The new penalisation rigidly excludes irregular migrants[1] by reclassifying them as criminals. Following a European trend of criminalisation of irregular migration from the 1990s onwards (D'Ambrossio; Düvell 2011), this policy is a remarkable step toward the penalisation of all irregular migrants, on the basis of their *mere being*. This article explores the penalisation of irregular residence as the apotheosis of increasingly exclusive migration policies in the Netherlands, a trend that has developed since 1849 when the first migration laws laid the basis for a 'binary model of illegality and legality' (Benseddik 2005: 62; Fuglerud 2005: 310). The all-encompassing scope of the penalisation of irregular migration as the 'crown piece' of these exclusive policies rigidly enforces 160 years of this binary divide, increasingly attaching 'illegality, [as] a label...to a state of *being* instead of a state of *acting* – becom[ing] the basis of incarceration and forced repatriation' (Schinkel 2009: 780). These repatriation practices expose the inherent contradiction of the nation-state's exclusive right to citizenship. Like the stateless refugee described by Hannah Arendt sixty years ago, today's irregular migrant serves 'as an emblematic philosophical figure, whose status exposes the contradiction of state-centred citizenship' (Krausse 2008: 331).

This article analyses the current penalisation of irregular residence in the Netherlands for this emblematic figure, exposing the contradiction of the nation state. First, it briefly elaborates on the comparison between Hannah Arendt's stateless refugee and today's irregular migrant. Second, the article describes how the penalisation came into being and what it (legally) entails. Third, a closer investigation of repatriation practices reveals contradictions inherent in Dutch migration policies and the sovereign nation-state as such. Ultimately, this essay shows that the

[1] I use the term 'irregular migrant' to refer to all migrants residing without residential rights, in this case in the Netherlands. Given the inherent difficulty of separating categories of 'forced' and 'voluntary' migration, and considering this article's focus on the legal status of the migrants in their host country, the term irregular migrant refers to migrants of both categories. This varied group consists of rejected asylum seekers, migrants who have otherwise exhausted all legal procedures, migrants or irregular workers overstaying a visa and undocumented migrants who entered illegally and have never applied for a status. I choose to use the term 'irregular migrant' to stress the legal (constructive) aspect of their residential status.

penalisation of irregular residence enforces this contradiction even further, leading to a double paradox of citizenship that moves the irregular migrant in and out of citizenship.

Irregular Migrants Today

Like the stateless refugees during the Second World War, modern irregular migrants are positioned outside the scope of law. While (legal) developments have taken place and certain basic (e.g. medical) rights can be claimed, the irregular migrant still effectively falls outside the nation-state's exclusive right to citizenship and thereby remains factually rightless (Krausse 2008; Borren 2010). Based on her observations of stateless refugees during the second World War, Arendt concluded that an exclusion from citizenship leaves individuals entirely outside the legal protection of the sovereign state: '…[a] loss of national rights was identical with loss of human rights, … the former inevitably entail[ing] the latter'(Arendt 1951: 292). In this way, Arendt argues that these migrants are deprived of their human rights – 'deprived, not of the right to freedom, but of the right to action; not of the right to think whatever they please, but of the right to opinion' (Arendt 1951: 296).

While irregular migrants are placed outside of citizenship (at least for the period of their irregular residence), a lack of papers is not necessarily linked to the absence of a nationality altogether. Although some irregular migrants may be classified as stateless, others might hold a nationality of a country to which they cannot or do not want to return. The migrants' place in the world can be jeopardised by a lack of cooperation from their country of origin, the Dutch government, or the migrants themselves. Addressing the divergence between migrants' legal status and practical reality, Arendt distinguishes between *de jure* (concerning law) and *de facto* (concerning fact) statelessness[2]. A *de facto* stateless migrant might hold a nationality, but for a variety of reasons is unable to return to his or her 'homeland'. Although officially belonging to a state, the *de facto* stateless cannot effectively return and thereby 'the core of statelessness…is identical with the refugee question' (Arendt 1951: 279). It is exactly this question of the possibility or willingness to return that is at stake in the contradiction of the nation-state: without a place to return to, or a citizenship to claim, the *de facto* stateless irregular migrant is caught between universalistic claims for equality and exclusive sovereign citizenship rights.

The Penalisation of Irregular Residence

In late September 2010, the Dutch government coalition presented its plans for the penalisation of irregular residence (Coalition Agreement 2010). The plans formulated irregular residence explicitly and repeatedly as an important problem leading to disturbance of public order and eroding the foundations of the state's asylum and migration policies. In accordance with this view, Gerd Leers, the Minister of Immigration and Asylum in 2011, asserted that a clear signal must be given, explaining that 'irregular residence is not allowed; we agree on that point…No one can claim that illegal should be legal. It is undesirable, and thus we should act against it in principle' (Ministry of Immigration and Asylum 2011b: 17).

This principle is the penalisation of irregular residence (Coalition Agreement 2010), of which the first steps[3] were taken by the implementation of the European Returns Directive, comprising a

[2] While '*de facto* statelessness [has entered] common use and has acquired a meaning…this has not been reflected in the international legal framework and the term has no *legal* significance' (Waas 2008: 23).

[3] While the Minister initially planned a full penalisation of irregular residence (Kamerstukken 2010-2011), the fall of the government on 23 April 2012 prevented this. Thus, the current state of penalisation referred to in this article is the graduated penalisation of irregular residence through the implementation of the Return Directive (see below 5).

strict enforcement of the 'return decision' and 'entry ban'.[4] A 'return decision' is issued when a migrant no longer holds legitimate residence (Directive 2008/115/EG Article 3(4)), indicating the period within which the migrant must leave the country 'voluntarily'. If a migrant is found residing irregularly in the Netherlands when the period for voluntary departure has passed, an 'entry ban' will be issued. This ban prohibits entry into and residence within the territory of the EU Member States for up to five years (Directive 2008/115/EG Article 3(6)). A violation of the ban by continued residence or (irregular) re-entry is penalised by imprisonment of up to six months or a fine of the second category[5] (Art. 108 Aliens Act 2000). The amended articles have drastic consequences for those living and working in the Netherlands irregularly. By penalising a state of presence – criminalising *all* irregular migrants – the comprehensive law overrules any form of making a living by a rigid classification of 'legal' versus 'illegal', with criminalisation and a ban of entry as a consequence.

Before the introduction of a separate penalisation, the penalisation of irregular residence operated through an 'undesirable-declaration', based on the active commitment of a crime (Art. 67 Aliens Act 2000). Only after the verdict of a crime has been reached could one be declared an 'undesirable' migrant, thereby losing his or her right to residence (Art. 67(3) Aliens Act 2000). Continued residence in spite of this decision was considered a criminal act (Art. 197 Dutch Penal Code). The penalisation under the current amended articles, however, penalises *all* irregular residence on an entry ban, regardless of one's (criminal) record. The amended Article 108 of the Aliens Act reads that imprisonment or a fine will follow for residing irregularly when one 'knows or has serious reasons to suspect that an entry ban has been issued against him' (Art. 108 (1,3,6) Aliens Act 2000).

It is thus not irregular residency *per se* that is penalised, but continued residence in spite of an entry ban – phrasing residence as an active violation of the law. The Minister of Asylum and Immigration is clear on the question of removal: 'Aliens who are no longer allowed to stay in the Netherlands, must leave the country as follows from the policy' (Minister of Asylum and Immigration 2011b: 1). While the Minister acknowledges certain complications to the expulsion of irregular migrants, he ultimately lays responsibility for departure with the migrant by declaring that an individual 'who came to the Netherlands independently must take the responsibility to leave the country when residence is no longer permitted' (Ministry of Immigration and Asylum 2011b: 2). The possibility or willingness of return, however, plays a vital role in determining the reality of migrants' outcomes.

The Contradiction of the Nation-State

An examination of the actual number of deportations by the Repatriation and Departure Service (*Dienst Terugkeer en Vertrek*) demonstrates the inefficacy of the Dutch government's expulsion expectations. Of the 20,980 deportations ordered in 2011, only 10,820 migrants were effectively

[4] The major amendments to the Aliens Act 2000 contains an addition of the 'return decision' and 'entry ban' to Article 1 of the Aliens Act 2000, the introduction of Article 66a on the implementations of the entry ban with regards to a residence status, followed up in Article 108 of the Aliens Act 2000 and amendments to Article 197 of the Dutch Penal Code. The amended Article 108 of the Aliens Act reads that imprisonment (up to six months) or a fine (second category) will follow for residing irregularly when one knows or has serious reasons to suspect that an entry ban has been issued against him (see Art. 108 (1,3,6) Aliens Act 2000), (considered an offence) (see Immigration Act Implementation Guidelines2000 A/5:2:3) . Similarly, following Art. 197 of the Dutch Penal Code, imprisonment (up to six months) or a fine (third category) will follow for residing irregularly when one knows or has serious reasons to suspect that an entry ban has been issued against him on the basis of a undesirable declaration (based on Art. 66a Aliens Act 2000), (considered a criminal act) (see Immigration Act Implementation Guidelines2000 A/5:2:3).

[5] € 3.900, Article 23(4) Dutch Penal Code.

repatriated (Dienst Terugkeer en Vertrek 2001). The remaining 10,160 migrants are categorised as 'unverified independent departure' meaning that 'the migrant is no longer available on the last known address, but that actual departure has not been proved' (Dienst Terugkeer en Vertrek 2001: 53-54). This could mean that a migrant has gone into hiding to prevent expulsion, or that a migrant has been 'told to leave the Netherlands' but no exit has been verified (Dienst Terugkeer en Vertrek 2001: 54). If the Repatriation and Departure Service fails to deport someone to their country of origin, the migrant is told to leave the Netherlands independently. Although deemed undeportable, without the necessary papers the migrant cannot stay in the Netherlands and is thus told to leave independently, to an undetermined destination. The data of unverified independent departure are not specified by reasons for or means of unsuccessful departure. It thus remains unclear how many people have actively gone into hiding and how many are left 'being' in the Netherlands. However, what is clear is that only half of the migrants that are dealt with by the Repatriation and Departure Service depart at all. The other half 'disappears' from government control: they can neither stay nor go, leaving them no place in which to reside and no community in which to belong[6], making them *de facto* stateless. Deprived of a place in the world, the non-repatriated irregular migrant, like the stateless refugee, is left 'representing nothing but his own absolutely unique individuality' (Arendt 1951: 302).

The penalisation of irregular residence operates by a double paradox of citizenship. Thrown back and forth between inclusion and exclusion the migrant is moved in and out of the law. Irregular residence (outside the scope of law) is penalised by the return decision and entry ban. To effect the penalisation, the migrant is temporarily included in citizenship under the Penal Code to be punished as a violator by either fine or prison sentence. This inclusion in citizenship is always temporary, for it is only based on the migrant's status as a violator and thus only lasts for the duration of the sentence. Upon completion of the sentence, the irregular migrant is positioned outside the scope of law once again and will be transferred to immigration detention to be deported. Re-entry or further residence is banned for up to five years.[7]

In addition to the issue of statelessness, which shows the impossibility of some to return, the ineffectiveness of the return procedure also leaves a significant portion of irregularly residing migrants with no choice but to continue their irregular residence. Though officially phrased as an active transgression of the law, the problem of *de facto* versus *de jure* statelessness leaves part of the irregular population at the mercy of inevitable penalisation. The nation-state operates in a tension between, on the one hand, 'its universalistic principle of legal equality of all its residents; and on the other hand its naturalist principleof national sovereignty' (Borren 2010: 181). This tension illustrates that the nation-state within the limits of its exclusive national sovereignty is 'factually unable and unwilling to treat non-national aliens, including those without a nationality whatsoever, i.e. stateless people, as legal persons; and as such undermines the first principle [of universal equality]' (Borren 2010: 181). Like the stateless refugee, the penalised, irregular migrant of today exposes the limits and shortcomings of the nation-state.

Under the current Dutch penalisation irregular regime, residence is phrased as an active violation of the law, ignorant of the contradiction of the nation-state's exclusive right to citizenship that Hannah Arendt's argument brings to the fore. Against the Minister of Immigration and Asylum's statement that 'no one can claim that illegal should be legal' (2011a: 17), this article has argued that it is exactly this agreement that is at the foundation of the penalisation. It is only by the

[6] The data concern 2011, before the penalisation was introduced (data for 2012 are not yet available). The return procedure itself has stayed the same, considering a rough 50:50 ratio between successful 'verified' deportations and 'independent departure without supervision' is the trend over all the published data between 2008-2011 (Dienst Terugkeer en Vertrek 2011: 38) it is to be expected this trend will continue.

[7] Art. 66a(4) Aliens Act 2000.

artificial nature of the legal-illegal binary, enshrined in Dutch migration laws since the nineteenth century, that the penalisation act can be maintained. Although penalisation is justified as an effect and a necessary consequence of this binary divide, the law's shortcomings are ironically illustrated by its inability to effectively categorise and expel people along these lines.

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