

This article is published in a peer-reviewed section of the Utrecht Law Review

## The Dutch Confession: Compliance, Leadership and National Identity in the Human Rights Order

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### 1. Introduction

In May 2011, the former UN Human Rights Commissioner Mary Robinson visited the Dutch Prime Minister Mark Rutte. Speaking on national television, she expressed ‘concern’ in a scolding interview. ‘I have always regarded (...) this country as being a really good leader on humanitarian aid and human rights issues,’ but ‘more recently, I don’t see that voice strongly and I would just like to encourage it very much and encourage the people of this country who I know have a very strong sense of leadership on human rights.’<sup>1</sup>

While the Dutch may point to the country’s legacy of liberal social policy and as a haven for those escaping intolerance and repression, Robinson’s criticism poignantly spoke in terms of perceptions.

The criticism made public a dynamic that had been emerging in elite legal circles, in which human rights discourse had forced a changed reference point: Whereas nation states and citizens could once compare themselves to others by using self-generated domestic standards, the growth of international governance institutions has subjected self-representations to external scrutiny. Consequently, the Netherlands can no longer claim leadership based on its long-standing tradition as a country of liberalism, tolerance and social inclusion. Now, as just another country regularly rebuked by the European Court of Human Rights (ECtHR), its capacity to join international dialogue depends on its willingness to adopt a posture both confessional in nature (about its failings) and aligned with the international human rights confession.

We use an extended account of Dutch engagement with ECtHR decisions concerning immigration law to understand how these developments affect how human rights, law and the state relate. Drawing on multiple sources of information, we examine how external legal developments relate to the place of law and legal practitioners in the Netherlands. An analysis of specific decisions of the European Court of Human Rights concerning the Netherlands shows the trajectory of the Court’s jurisprudence, while public reports and material from interviews we conducted illuminate how Dutch political and legal actors and institutions have responded to these decisions.

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1 RNW (Radio Netherlands Worldwide), ‘Robinson Misses Dutch Voice in Human Rights Debate’, 2011, media release, <<http://www.rnw.nl/english/article/robinson-misses-dutch-voice-human-rights-debate>> (last visited 23 September 2013).

Traditionally, democratic states abide by a rule of law that has been fairly tightly coupled with the apparatus of the state, which itself is regulated by domestic law.<sup>2</sup> The development of international human rights law removed some elements of the rule of law that regulate states to outside of the state. International human rights law formalized the meaning and application of norms, resulting in law becoming more autonomous from the state. While states must still implement decisions for human rights law to have any real impact, the development of law has become more loosely coupled with the state.

This shift has several implications for understanding how human rights law and the state interface. First, it changes how legal professionals interact with other state leaders. Lawyers gain increased ability to act vis-à-vis the state by empowering challenges to state action and by elevating the work of legal bureaucrats who translate between domestic political and international legal contexts. Additionally, the Court can increase its authority over states in a ratchet-like fashion. As long as states engage in actions that purportedly violate rights, advocates can bring claims to the Court. This input to the Court enables judges to develop doctrine by amplifying, modifying and extending precedents.<sup>3</sup> As a result, legal professionals have become crucial brokers to understand and apply an international law that develops outside of the domestic political environment.

The shift also has implications for the culture of the domestic political order. In the face of international judgments criticizing their behaviour, states' self-images as uniquely enlightened become untenable. Extant national metaphors and myths become less salient, as assertions of human rights leadership lose potency. This shifting self-conception matters because it forms the counter-pressure to the autonomy of law, creating potential for greater contention about the place of law in the political order. The state has also been forced to enter a more level playing field and to reshape its position if it is to assert international influence.

Our analysis of ECtHR cases on the Netherlands that concern asylum from inhuman treatment and the unification of immigrant families across national borders show these dynamics in stark detail. At best, Dutch political and legal elites have slowly and unevenly absorbed a new, humbler identity as a country subject to the regulation of an international human rights regime. Our aim is not to measure and criticize the Dutch response to new challenges. Rather, we analyze the dynamic relations between the Court and Dutch political and legal cultures in order to better understand the shifting of hierarchies and layers mediated in part by legal professionals. Although similar struggles have occurred in other European countries that would consider themselves to be human rights leaders, the Netherlands' politics of immigration and its experience of Court decisions concerning immigration make it a particularly enlightening case.<sup>4</sup> The adaptations in the Court and the Netherlands illustrate the emerging shift to human rights as confession: both as a faith (expressed in international human rights law, exerting force on national norms) and as an act of professing and doing penance to maintain one's standing in the eyes of judgment.

We develop this analysis by first explicating a conceptual framework. The next section sketches the development of human rights dialogue and institutions for Europe, illustrating how the nation-state framework has been stretched by the rise of supranational law. In the third section, we analyze the trajectory of specific cases to demonstrate how the ECtHR has grown as a regulator of state policy and the changing nature of Dutch reactions to the Court as well as the place of legal professionals in relation to human rights. We conclude by placing the meaning of this shift in the context of the legal and political leadership about human rights.

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2 E. Boyle & J.W. Meyer, 'Modern Law as a Secularized and Global Model: Implications for the Sociology of Law', in Y. Dezalay & B. Garth (eds.), *Global Prescriptions: The Production, Exportation and Importation of a New Legal Orthodoxy*, 2002, pp. 65-95; J.K.M. Ohnesorge, 'The Rule of Law', 2007 *Annual Review of Law and Social Science* 3, pp. 99-114.

3 T.C. Halliday & B.G. Carruthers, 'The Recursivity of Law: Global Norm Making and National Law-Making in the Globalization of Corporate Insolvency Regimes', 2007 *American Journal of Sociology* 112, no. 4, pp. 1135-1202.

4 G. Martinico & O. Pollicino (eds.), *The National Judicial Treatment of the ECHR and EU Laws: A comparative Constitutional Perspective*, 2010; N. Krisch, 'The Open Architecture of European Human Rights Law', 2008 *The Modern Law Review* 71, no. 2, pp. 183-216; K. Gelinsky, 'Interview with professor Dr. Christoph Möllers, Humboldt University, Berlin, Faculty of Law: On the Occasion of the 60th Anniversary of the German Federal Constitutional Court ('Bundesverfassungsgericht')', 2012 *German Law Journal* 13, no. 1, pp. 165-170.

## 2. Harmonization around human rights in the European context

The codification of human rights in formal international institutions powerfully affects political imagination. Despite sharing some concerns with traditional platforms of political and social reform, human rights stands apart as an objective that transcends national boundaries. Notwithstanding classic epistemological problems about the derivation of human rights and concomitant debates between universalists and relativists, 'there is an international consensus on the system of human rights rooted in the Universal Declaration [that] is *relatively* uncontroversial'.<sup>5</sup> This acceptance of a core of human rights reflects the now taken-for-granted idea that individual people are the elemental basis of social and political order.<sup>6</sup>

The growth of a human rights infrastructure has led to convergence in the rights of citizenship – the definition of the relation between individuals and authority embodied in nation states. Rights claims have also become de-nationalized: Individuals no longer legitimately claim rights as members of ethno-national groups, but make claims against particular governments to whose authority they are subject.<sup>7</sup> Finally, claims have become de-territorialized, since governments have obligations towards people who are outside their borders and who are not expatriates. These developments support the assumption that notions of sovereignty are neither descriptively accurate nor conceptually helpful in explaining the actions of nation states; rather, nation states are highly structured organizations in a complex environment, leading them to be subject to normative and coercive pressures.<sup>8</sup> From this perspective, then, human rights are a source of regulation of nation states and the use of their authority.<sup>9</sup>

This perspective implies that human rights coincide with a global and international vision, but reside in local actions. Asserting rights claims invites responses through legal institutions that have primary enforcement authority at the 'street level'.<sup>10</sup> Accordingly, individuals will frequently make claims to human rights through state institutions, often privileging legal and formal modes of interaction. Since the state is both the object of regulation and the site through which individuals make claims, political contention will influence the actual practice of rights. This influence includes both agenda-setting and the refraction of international-global norms and ideas. Agenda-setting asks who is involved in bringing in the global ideas and how.<sup>11</sup> Refraction examines how states' bureaucratic and democratic structures influence the reception of global imperatives.<sup>12</sup>

Political and legal processes at international levels similarly influence the development and application of human rights principles and practices. International human rights institutions make decisions about how international norms should be interpreted by applying them to particular disputes. Instead of finding global human rights, these institutions build shared commitments among a community of states, enabling the recursive development and deployment of law.<sup>13</sup> In Europe, this project has accelerated, so that regional institutions make widening claims to authority over national sovereignty, even though the implementation of European mandates still relies on national authorities' compliance with directives and judgments. National sovereignty thus has a diminished role. Notwithstanding the fact that the construction of the human rights order emerges from the political aggregation of state interests, stronger European institutions increasingly assert themselves as the final authority over the legitimate scope and freedom of action by national governments, which has stood at the core of traditional notions of sovereignty.<sup>14</sup>

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5 J. Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 40 (emphasis in original).

6 J.W. Meyer & R.J. Jepperson, 'The 'Actors' of Modern Society: The Cultural Construction of Social Agency', 2000 *Sociological Theory* 18, no. 1, pp. 100-120; J.W. Meyer, 'World Society, Institutional Theories and the Actor', 2010 *Annual Review of Sociology* 36, pp. 1-20.

7 Y. Soysal, 'Citizenship and Identity: Living in Diasporas in Post-War Europe?', 2000 *Ethnic and Racial Studies* 23, no. 1, pp. 1-15.

8 J.W. Meyer et al., 'World Society and the Nation-State', 1997 *American Journal of Sociology* 103, no. 1, pp. 144-181.

9 E. Larson, 'Regulatory Rights: Emergent Indigenous Peoples' Rights as a Locus of Global Regulation', in B. Morgan (ed.), *The Intersection of Rights and Regulation*, 2007, pp. 107-127.

10 S. Halliday & P. Schmidt (eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004.

11 P. Bachrach & M.S. Baratz, 'Two Faces of Power', 1962 *American Political Science Review* 56, no. 4, pp. 947-952.

12 E. Larson et al., 'Emerging Indigenous Governance: Ainu Rights at the Intersection of Global Norms and Domestic Institutions', 2008 *Alternatives: Global, Local, Political* 33, no. 1, pp. 53-82.

13 T.C. Halliday, 'Recursivity of Global Normmaking: A Sociolegal Agenda', 2009 *Annual Review of Law and Social Science* 5, pp. 263-289.

14 F.H. Hinsley, *Sovereignty 2nd ed.*, 1986.

Yet, formal membership of a community of rights leaves open how individuals within states see themselves as members of that multinational body. The European Court of Human Rights is particularly vulnerable to cultural differences since it takes in 47 Member Countries stretching as far east as Russia and south, through Azerbaijan, to Turkey. The ECtHR, interpreting the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), started operations in 1959 but became a full-time court only in 1998. Each of the 47 States Parties possess a judge at the Strasbourg-based ECtHR, which hears cases before seven-judge Chambers with the possibility of a Grand Chamber of 17 judges hearing or rehearing a case under relinquishment or appeal (referral) in exceptional circumstances.

The ECtHR has developed its own culture.<sup>15</sup> Complaints are brought to the ECtHR as suits by aggrieved individuals and the review is *de novo*, meaning the Court examines the whole record, rather than just the errors challenged on appeal. That examination works in one direction only: it either helps the individual or does nothing in that case. ECtHR judges hear nothing but complaints about alleged abuses of human rights by national actors. By repute the ‘Strasbourg culture’ leans strongly towards the protection of individual rights, sustaining itself as the many judges come and go. And indeed, the number of complaints filed before the ECtHR has increased markedly since the 1998 reform, putting pressure on Court procedures that must handle thousands of new cases – along with a mounting backlog – each year.<sup>16</sup> The Court’s increasing role has generated academic and political debate concerning how to increase its effectiveness and to address backlash-related claims that the Court interferes too much with national legal preferences.<sup>17</sup> Despite concern about its legitimacy, the European Convention and Court have ‘evolved into a sophisticated legal system [that] can be expected to exercise substantial influence on the national legal systems of its members. In the 21<sup>st</sup> Century, Europe is a Europe of rights’.<sup>18</sup>

Given the wide participation in the European human rights project, scepticism about the potential for common agreement on the content of those rights remains, raising concern that the content of rights must be hollowed out or that decrees will be met by substantial non-compliance. The questions of what constitutes a community and which norms may appropriately vary from place to place have renewed salience across Europe in large measure because of the movement of peoples within and across putative regional boundaries. As the Netherlands has welcomed ‘New Dutch’ from the geographic fringes of ‘Europe’ and from the Global South, the ECtHR has had clear grounds for giving close scrutiny to the work of the Dutch government. Having The Hague as the claimed ‘legal capital of the world’ and possessing a cultural heritage that predicts success in treating judiciously those who seek respect for human rights conventions, the Netherlands serves in many respects as a paradigmatic case for assessing how far human rights work as a tool toward convergence – both legally and qua attitude – within Europe.

### 3. The ECtHR as a regulator of state policy and the reactions of Dutch legal professionals

The European Court of Human Rights has produced a growing conflict between the continental human rights regime and Dutch self-identification as a human rights leader. In its relatively young life, the ECtHR has demonstrated its staying power and has been credited with having influenced national decision-making across a wide range of policy areas. Even if grudgingly, national authorities have been willing to adapt national policy and law to the judgments of the ECtHR, even when relating to highly salient and controversial policies. Still, the Court does not act autonomously but depends on legal professionals like lawyers, domestic judges and policy makers willing to support its interpretations against contrary local views.

15 N.-L. Arold, *The Legal Culture of the European Court of Human Rights*, 2007.

16 European Court of Human Rights, ‘Analysis of Statistics, 2012,’ 2013, <[http://echr.coe.int/Documents/Stats\\_analysis\\_2012\\_ENG.pdf](http://echr.coe.int/Documents/Stats_analysis_2012_ENG.pdf)> (last visited 12 October 2013).

17 For a recent critical analysis of how to address the ‘backlog and backlash’ issues, see S. Flogaitis et al., *The European court of human rights and its discontents*, 2013. On 19 and 20 April 2012 the Committee of Ministers of the Council of Europe convened in Brighton, UK, for a ‘High Level Conference on the Future of the European Court of Human Rights’. Among other provisions, their ensuing Declaration states that countries should take ‘effective measures to prevent violations’, encourages the Court ‘to give great prominence to and apply consistently’ principles such as subsidiarity and the margin of appreciation, urges the Court to carefully but strictly apply the admission criteria etcetera. See <<http://hub.coe.int/20120419-brighton-declaration>> (last visited 20 September 2013).

18 A. Stone Sweet & H. Keller, ‘The Reception of the ECHR in National Legal Orders’, in H. Keller & A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, p. 25.

The starting point for our analysis is the political dynamic that has made immigration a highly salient question, a potential source of public backlash and a consideration the Dutch government confronts concerning the nature and limits of its obligations towards individuals. In this section, we examine this dynamic in the context of the law governing the entry of individuals to the Netherlands. We focus on immigration and asylum as a case study in which the issue bridges the expert world of policy and the public world of politics. The content of these cases directly affects both the idea of the sovereignty of a nation ('who is to be let in and on what conditions?') and is a sensitive area in increasingly populist politics in an ethnically diverse society.

This analysis considers both how the ECtHR as an international legal body has expanded its regulatory purview in relation to the Netherlands and also how this regulation has affected legal professionals and politics in the Netherlands. Although the Constitution of the Netherlands puts domestic judges in a monist system of law, our focus is not on domestic judges applying the European Convention.<sup>19</sup> Such a focus would not attend to our central concerns: how policy makers react and how the policy field develops in the wake of increasingly active international law and the implications of these changes for human rights leadership in the contemporary world. Additionally, we examine cases in which there was no domestic remedy: administrators, judges and other government officials did *not* see actions as violations of the European Convention, while in many cases the European Court did.

Our analysis draws on published ECtHR decisions concerning the Netherlands, on literature in which Dutch legal professionals express their reactions about Court decisions and on interviews we conducted with practitioners in the Netherlands. We selected all ECtHR cases concerning the Netherlands and immigration involving Articles 3 and 8 and analyzed these cases to understand the trajectory of ECtHR involvement with the Netherlands. Our interview material comes from a series of interviews conducted by the authors in 2010 and 2011 with legal practitioners and government officials in the Dutch human rights policy network, including lawyers involved in the first European Court cases against the Netherlands. We do not claim to represent the full extent of the Dutch legal field; that is, we do not seek to see how the growth of ECtHR jurisprudence diffuses to all legal actors in the Netherlands. Rather, we seek to understand the meaning of these jurisprudential developments for those most centrally connected to policy making and implementation in the Netherlands and the processes that connect or isolate Dutch policy and the ECtHR. We selected government officials to interview by contacting relevant ministries and offices and speaking to those with the most detailed knowledge of the European Court of Human Rights or immigration/asylum practices. In sum, we interviewed about a dozen legal professionals who may be considered members of the 'inner circles' of this legal field. These interviews and public statements also provide a window into how Dutch political culture responded to these developments.<sup>20</sup>

### **3.1. The clash with Dutch exceptionalism**

During the last decade, immigration and asylum have figured prominently in political debates in the Netherlands. In the 2010 elections, the Party for Freedom (PVV, in part far right and morally conservative; in part populist and left-looking on social issues) won the opportunity to play a significant role in the resulting coalition government. PVV's party head, Geert Wilders, who recently faced criminal charges over hate speech, built on the prominence of a fellow populist, Pim Fortuyn, who was assassinated in 2002. Both Wilders and Fortuyn expressed a rising strain of populist anxiety that linked Islam to the demise of 'Western' values like gender equality, freedom of speech, respect for others in the public sphere; in sum, the loss of human rights. Ironically, this rhetoric has today set the tone for a more restrictive application of human rights to immigrants and asylum seekers. For example, the Netherlands instituted new requirements for prospective immigrants to demonstrate an understanding of the Dutch language

19 The system is laid down in Articles 93 and 94 of the Dutch Constitution. Article 93: 'Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.' Article 94: 'Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.' See <<http://www.government.nl/files/documents-and-publications/regulations/2012/10/18/the-constitution-of-the-kingdom-of-the-netherlands-2008/the-constitution-of-the-kingdom-of-the-netherlands-2008.pdf>> (last visited 15 October 2013).

20 As is usual in qualitative research, we reassured our informants that we would not disclose their names or positions in publications or presentations. Interview material, however, is available upon request, if necessary.

and political culture.<sup>21</sup> The Netherlands has also established new detention centres for asylum seekers for the period in which their case is pending. Further, the government has enacted regulations and laws making it easier to expel migrants and asylum seekers.

The rise of the PVV conflicts with the dominant cultural belief, especially strongly held among social and political elites, usually called *Nederland gidsland*, literally ‘Netherlands Leading/Guiding Country.’ The Netherlands as a leading country refers to the rather self-righteous attitude of ‘moral superiority’ of the Dutch state (and many of its inhabitants) to regard the Netherlands as being the best and brightest country with the highest moral standards. This sentiment may also be found in other European countries, but the attitude was expressed particularly clearly by leading members of the public in the Netherlands, who since the 1960s saw themselves as standing apart, even from other developed countries, as ‘the most progressive country in the world.’<sup>22</sup> From the perspective of *Nederland gidsland*, the Dutch recognized a distinction between ‘we’ and the rest of Europe (let alone the United States). For example, the Netherlands was always generous in development aid. Dutch critiques of the post-colonial order left by previous empires were particularly incisive, reflecting an amnesia concerning the country’s own legacy in Indonesia. In discussing UN peace missions, the Dutch led the charge for ‘progressive’ international operations, as opposed to unilateral militarist adventures. Social pride solidified behind near-libertarian tolerance of drugs, abortion, euthanasia, along with pride in low incarceration rates and a record of humane treatment of prisoners, focused on rehabilitative reintegration.

A series of blows over the past twenty years have called Dutch superiority into question. After the Srebrenica mass murder in 1995 occurred on the watch of the Dutch military, some commentators went so far as to compare the Dutch soldiers with the ‘engine-drivers of the trains to [WWII transit camp] Westerbork.’<sup>23</sup> The rise and subsequent assassination of the politician Pim Fortuyn in 2002 and the murder of the film director Theo van Gogh in 2004 marked other episodes of ‘normalization’ of how the Dutch might view themselves. As one Belgian journalist described the denial that meets such challenges: ‘In the eyes of the Dutch I saw that typical Dutch characteristic of their identity: this will never happen to us, because we are too civilized, too tolerant, too open-minded, too liberal – actually too Dutch for those kinds of things.’<sup>24</sup>

It is against this backdrop that a significant number of migrants and asylum seekers over the last couple decades have filed grievances against the Netherlands at the European Court of Human Rights. In the 1950s, the Netherlands did not expect that the European Convention would sharply alter Dutch law. Yet, human migration is causing new pressures.<sup>25</sup> The scale of the conflict is only now becoming clear. Only a small minority of all grievances result in published decisions; however, one published decision of the Court may cover issues related to scores of cases and may have future effects. The published decisions of the Court in two sets of issues – family reunification (based on Article 8) and asylum (based on Article 3 of the Convention) – form a significant portion of the corpus of ECtHR cases concerning the Netherlands. Of over 6,000 applications filed against the Netherlands in Strasbourg between 1983 and 2006, just 123 produced decisions on their merits; Articles 3 and 8 have accounted for over 10% of these decisions.<sup>26</sup> We turn first to Article 8 cases concerning family reunification among immigrants. We examine those cases that directly concern the Netherlands because that enables us to focus on how the Dutch political reaction and how the Court’s decisions in one country and area of law develop.

21 T. Spijkerboer, *Zeker weten. Inburgering en de fundamente van het Nederlandse politieke bestel*, 2007; also K. de Vries, *Integration at the Border. The Dutch Act on Integration Abroad and International Immigration Law*, 2013.

22 J. Kennedy, ‘Nederland als het meest progressieve land ter wereld’, in W. van Noort & R. Wiche (eds.), *Nederland als voorbeeldige natie*, 2006, pp. 105-118; E. Myjer, ‘Over hoe het EVRM verzeild raakte in de Nederlandse strafrechtspleging en aan wie dat valt toe te rekenen’, in A.W. Heringa et al. (eds.), *Veertig jaar Europees verdrag voor de rechten van de mens*, 1990, pp. 272-289.

23 NIOD Nederlands Instituut voor Oorlogsdocumentatie, *Srebrenica, een ‘veilig gebied’. Reconstructie, achtergronden, gevolgen en analyses van de val van een Safe Area*, 2002, p. 63. On 6 September 2013 the Dutch Supreme Court ruled that the Dutch state was to be held responsible for the death of three Muslim men from Srebrenica; see <<http://www.rechtspraak.nl/Organisatie/Hoge-Raad/Nieuws/Pages/State-responsible-for-death-of-three-Muslim-men-in-Srebrenica.asp>> (last accessed 23 September 2013).

24 J. Blokker et al., *Nederland in twaalf moorden: Niets zo veranderlijk als onze identiteit*, 2008, p. 10.

25 B. Swart, ‘The European Convention as an Invigorator of Domestic Law in the Netherlands’, 1999 *Journal of Law and Society* 26, no. 1, p. 38; E. de Wet, ‘The Reception Process in the Netherlands and Belgium’, in H. Keller & A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, p. 306.

26 See De Wet, supra note 25, pp. 254-255.

### 3.2. Family reunification

Article 8 cases about immigration typically involve claims by individuals that they should be able to remain in the country to be with family members (usually, partners or children). Article 8 of the Convention reads:

‘Right to respect for private and family life

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.’

Allowing a state to interfere with the right to private and family life when ‘necessary in a democratic society’ the Court first determines whether any interference with private and family life has occurred. If so, the Court next examines the procedural regularity and asserted national interest behind the interference and then finally weighs the relative collective interests against the individual interests in private and family life. Article 8 obligations extend to ‘everyone,’ not merely citizens; for migrants, these obligations can be positive (the state has the obligation to admit a migrant) as well as negative (the state must refrain from expelling a foreign national). In order to avoid imposing an obligation that could be seen as undue interference in a national context, the Court has developed a doctrinal device, or a turn of phrase, which is meant to respect the relationship of national and universal authority – giving a ‘margin of appreciation’ for states’ needs – with wider scope in the case of positive obligations and in cases in which a European consensus is largely absent.<sup>27</sup>

The trajectory of Court decisions in Article 8 Dutch migration cases shows a shift toward giving greater weight to family rights and a concomitant narrowing of the state’s margin of appreciation. *Berrehab* (1988),<sup>28</sup> the first Dutch ECtHR case to apply Article 8 to immigrants’ status, questioned the limits of the state to expel family members. Two cases concerning whether the Netherlands had a positive obligation to issue residence permits to children left behind by immigrant parents in the country of origin show the greater weight the Court granted to individual rights. *Ahmut* (1996)<sup>29</sup> is the single case we consider in which the Court found no violation. A mere five years later, a unanimous Court found a violation in the substantially similar *Şen* case (2001).<sup>30</sup> In two 2006 decisions, *Rodrigues da Silva and Hoogkamer and Sezen*,<sup>31</sup> the Court found rights violations even with applicants less sympathetic than *Berrehab*.

*Berrehab* presented the case of Moroccan-born Abdellah Berrehab, who had married a Dutch national and was granted permanent residence and the right to work in the Netherlands for the purpose of the marriage. Following their divorce in 1979 and the birth one week later of their daughter Rebecca, Abdellah sought to renew his residence permit. Although ordered to pay child support and granted frequent visitation rights, he was denied a residence permit independent of his wife and so was subsequently arrested and deported. The Court rejected the harsh approach, holding that Abdellah still maintained legitimate family life with his daughter and deportation was not a proportionate response to ‘a pressing social need’ (Para. 28), even after making ‘allowance for the margin of appreciation that is left to the Contracting States’ (Para. 28). Thus, the Court found the interference with family life to be too severe.

In contrast, the Court found for the Netherlands in *Ahmut* (1996), a claim on behalf of nine-year old Souffiane Ahmut, the youngest child from Salah Ahmut’s first marriage in Morocco. After ending

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27 ACVZ Adviescommissie voor Vreemdelingenzaken (Advisory Committee on Migration Affairs), 2005, *Tegen de Wil Achtergebleven: Een Advies over in Herkomstlanden Achtergelaten Vrouwen en Kinderen*, 2005; also Flogaitis et al., supra note 17.

28 *Berrehab v The Netherlands*, ECHR Chamber Court (21 June 1988), application no. 10730/84.

29 *Ahmut v The Netherlands*, ECHR Chamber Court (28 November 1996), application no. 21702/93.

30 *Şen v the Netherlands*, ECHR First Section (21 December 2001), application no. 31465/96.

31 *Rodrigues da Silva and Hoogkamer v The Netherlands*, ECHR Former Section II (31 January 2006), application no. 50435/99. *Sezen v The Netherlands*, ECHR Former Section II (31 January 2006), application no. 50252/99.

this marriage, Salah migrated to the Netherlands in 1986, when he married a Dutch national. Salah was granted citizenship in 1990 and held dual Dutch and Moroccan nationality. In 1987, Souffiane's mother died in a traffic accident, leaving Salah as the legal guardian of his children in Morocco, though initially he arranged for relatives to care for the children. Salah and his second wife separated in February 1990 and divorced in December of that year. That same year, Souffiane and a sister came to the Netherlands without a residential visa. Salah enrolled Souffiane in a primary school and applied for a residence permit for him, which was rejected by the Deputy Minister of Justice on the grounds that family ties between Souffiane and Salah had been broken years earlier.

The Court in *Ahmut* found for the government, deciding that Salah's dual nationality allowed him to maintain family life in Morocco if he wished and that these interests did not trump the state's legitimate interest in controlling immigration to protect the labour market. The Dutch Judge S.K. Martens' notable dissent criticized the Court for abdicating its responsibility to oversee states' immigration policies: '[T]he present decision marks a growing tendency to relax control, if not an increasing preparedness to condone harsh decisions, in the field of immigration' (Para. 2). Dissenting opinions intimated that Dutch policy reflected ethnic overtones and commentators have similarly suggested that the Court's decision was based on assumptions that Ahmut's ethnicity made his primary identity (and loyalty) to Morocco.<sup>32</sup>

With only a slight change of facts, the Court soon decided against the Netherlands. In *Şen* (2001), like *Ahmut*, an immigrant parent petitioned the Netherlands to grant a residence permit to a child left behind. Nine-year old Sinem Şen's father, Zeki, a Turkish national, had been resident in the Netherlands since 1977, where he returned after marrying Gülden in 1980. Initially, Gülden remained in Turkey, where she gave birth to Sinem in 1983. Leaving Sinem in the care of her aunt, Gülden joined Zeki in the Netherlands in 1986, where they had two more children. In 1992, Zeki applied for a residence permit for Sinem, which was denied because Dutch officials held that Sinem was no longer part of Zeki and Gülden's family, but part of her aunt's family.

The Court held that forcing the Şens either to abandon their lives in the Netherlands – when two additional children had not lived in Turkey – or to forgo life with Sinem was too great an interference in family life for the gain in the state's interest. The decision of the Şens to first establish themselves in the Netherlands did not impair the familial bond with their daughter. Five years after *Ahmut*, the Court had again moved to restrict the state's room for manoeuvre by giving greater weight to family interests in reunification cases while decreasing deference to the Netherlands' protection of collective interests.<sup>33</sup>

*Rodrigues da Silva* (2006) pushed starkly further. The child in this case, Rachel Hoogkamer, was born in 1996 to an unmarried couple. Rachel's Brazilian mother, Solange Rodrigues da Silva, came to the Netherlands in 1994 with her Dutch partner Daniël Hoogkamer, but never applied for a residence permit and ended her relationship with Daniël in 1997. Daniël received custody, though Rodrigues da Silva shared in the care of Rachel. The Netherlands rejected Rodrigues da Silva's subsequent application for residence, offering the choice between Rachel living in Brazil with her mother or in the Netherlands with her father. Although the Netherlands ordered her to leave, Rodrigues da Silva stayed, continued to work illegally and cared for Rachel on weekends. Confronting a litigant who never had legal, permanent residence, the Court did not shrink from the question of whether the Netherlands had a positive obligation to grant it, notwithstanding the wider margin of appreciation the state might have in this area. The ECtHR unanimously held the Netherlands to be in violation of Article 8, because the expulsion of Rodrigues da Silva would have broken the bond between mother and daughter, who had maintained a familial arrangement. The Court dismissed the emphasis of the Dutch authorities on Rodrigues da Silva's illegal status as 'excessive formalism' and gave little weight to the state's asserted protection of the 'economic well-being of the country' (Para. 44). In this conclusion, while the Court continued to recognize the Netherlands' interest in controlling immigration, it suggested that Dutch officials had been misguided in the balancing required by evolving European human rights norms.

32 J. Bhabha, 'Enforcing the Rights of Citizens and Non-Citizens in the Era of Maastricht: Some Reflections on the Importance of States', in B. Meyer & P. Geschiere, *Globalization and Identity: Dialectics of Flow and Closure*, 1999, pp. 97-124; E. Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law*, 2004.

33 S. van Walsum, 'Comment on the Sen Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification?', 2003 *European Journal of Migration and Law* 4, no. 4, p. 518.

The *Sezen* decision the same year similarly showed the Court willing to hold the Netherlands to a higher standard in a sensitive area, here adding the element of a criminal conviction to the recurring pattern of a couple that separated after having a child – facts that strike at the heart of the contemporary political panic over purported connections between ethnically-diverse immigration and public safety. The case concerned Mevlut Sezen, a Turkish national granted an indefinite right to remain in the Netherlands after marriage to a fellow Turkish national who had permanent residence. The couple had two children and subsequently moved to separate apartments. A conviction for possession of over 50 kg of heroin, with intent to distribute, spurred the Ministry of Justice to seek to withdraw Mevlut's residence permit and to impose a 10-year exclusion order against him (barring entry to the country for even short visits). In applying Article 8, the Dutch authorities minimized the Sezens' familial interest, concluding that there had been a permanent breakdown of the marriage since the couple were no longer cohabiting – even though their second child was conceived while living in separate apartments after his release from prison. The Dutch courts quashed the exclusion order, but upheld the decision not to extend the residence permit.

The Court, on a 5-2 majority, held that the Netherlands had not struck a fair balance between the interests of the Sezen family and the interests of society. All parties admitted that the withdrawal of the residence permit interfered with family life, but in assessing whether the action was 'justified by a pressing social need and, in particular, proportionate to the aim pursued' (Para. 41), the Court concluded that the Netherlands had not given sufficient attention to the effects on family life that was still present, the separate living arrangements notwithstanding. It helped, in weighing public safety, that Mevlut had not reoffended and had acquired paid employment. The dissenting opinion – by the ECtHR's Dutch judge – argued that the Netherlands had not been unreasonable or arbitrary and, without using the term 'margin of appreciation,' argued that when conflicting positions 'are more or less in balance and a decision in either direction is arguable (...) it seems to me that it should be left to the national authorities to balance the interests involved' (Para. 8).

Deference, as suggested by the Dutch judge, reflects trust and the development of the ECtHR's decisions in these Article 8 cases shows a distinct direction to decrease the deference accorded to the decisions of the government of the Netherlands, while also increasing the oversight of these decisions. In tandem, the Court moved toward giving greater priority to individual rights to family life, while decreasing the weight afforded to collective interests claimed by the state. Evolving precedent, rather than unchanging principles, mobilized European human rights law against increasingly bold sets of facts. Whereas the Court in *Berrehab* made explicit reference to the fact that Berrehab had not committed any crime and was therefore more deserving of being granted a residence permit despite the harm to the economy by having a non-national take a job, in *Sezen* the state's interest in the economy did not figure at all and Mevlut Sezen's gainful employment helped the Court to reject the state's concern for public safety.

As the Court expanded its oversight, Dutch lawyers' perceptions of and professional orientation toward human rights shifted. A prominent Dutch lawyer and later a judge of the ECtHR wrote in 1990 that the dominant thought until 1970 was that the Convention was meant for the 'totalitarian countries.' No lawyer in the first decades after its conception was interested in the Convention (it was not even available in print until 1963) and it was said that one needed a really poor case before even thinking of invoking the European Convention in a domestic court.<sup>34</sup> Specialization in human rights happened first within the legal academia; even there, specialists took up the topic due to the need to find a new niche. Practising attorneys followed, also along a somewhat haphazard trajectory. Indeed, the advocate who argued Berrehab's case became involved with the case as 'just an ordinary single lawyer' due to having worked on Berrehab's divorce. In spite of other attorneys' insistence that the case had little chance of success the lawyer worked with academics who sought to expand human rights jurisprudence.

If *Berrehab* was a mark of the beginning of the professionalization of human rights practice, it was also immediately seen as a challenge to *Nederland gidsland* in the realm of human rights law for immigration. One legal scholar wrote that the European Court with this decision 'threw a massive stone through the blinded window of the Dutch immigration policy,' analogizing 'that the Dutch state stood

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34 See Myjer, *supra* note 22, pp. 272-289.

in the wrong clothes and in the wrong outfit [the wrong arguments, i.e. state sovereignty] before the Court, like an actor appearing in the wrong play'.<sup>35</sup> Rather cynically, she ended her commentary with 'Nederland gidsland'. The landmark case also helped spur a wave of interest in the Convention, as Dutch lawyers in the 1980s 'discovered' the usefulness of framing and arguing a case in terms of human rights. Even though the Dutch domestic courts sometimes acted 'as if they were having their first date,' interest boomed in courses and other material explaining the Convention.<sup>36</sup> Among lawyers working in the field of migration law, not surprisingly the decision opened the door to an increase in 'Article 8 arguments' in court.<sup>37</sup>

### 3.3. Inhuman and degrading treatment

Article 3 of the Convention is relevant not only for assessing the constraints on states under pressure from human rights accords, but also for observing how Dutch legal professionals react to decisions of violation. Article 3 reads, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' While states retain the right to expel non-citizens, individuals may have a claim to political asylum if expulsion would result in a real risk of facing inhuman, degrading treatment or torture. Such claims require the ECtHR to undertake a full assessment of the situation, drawing on material from the state and other reliable, objective sources to determine if the individual would be likely to face treatment contrary to Article 3.

In *Salah Sheekh* (2007)<sup>38</sup> the Court held that the Netherlands had violated Article 3 by attempting to return Abdirizaq Salah Sheekh, a member of the Ashraf minority who sought asylum, to Somalia. As part of a minority group, Salah Sheekh's family suffered harassment, intimidation and physical violence at the hands of the local militia, which was responsible for the death of Salah Sheekh's father and older brother and the rape of a sister. Salah Sheekh was eventually able to flee Somalia and sought asylum upon arrival in Amsterdam. Held in detention for a month, the Ministry of Immigration denied Salah Sheekh's request, stating that he had not been specifically targeted as a member of an opposition group or movement but that he had experienced the occasional effects of an unstable situation. The Minister planned to return Salah Sheekh to a 'relatively safe' area in Somalia and during the next six months the Dutch courts upheld this plan six times over appeals. Rather than appeal to the highest court in asylum cases, the Administrative Jurisdiction Division of the Council of State (*Raad van State*), Salah Sheekh filed a case with the ECtHR, which granted an interim judgment that the Netherlands should not expel Salah Sheekh prior to his case being heard. The Minister released Salah Sheekh and adopted a temporary policy under which he was eligible for a residence permit.

Relying on information from a variety of sources (including the United Nations High Commissioner for Refugees, the BBC, Médecins Sans Frontières and Amnesty International), the Court held that expulsion to the 'relatively safe' areas of Somalia would likely result in Salah Sheekh suffering treatment contrary to Article 3. As is characteristic of the Court's approach, the decision under Article 3 held only that the Netherlands could not expel Salah Sheekh; the decision did not hold that the Netherlands should grant Salah Sheekh refugee status and a residence permit. In practice, of course, such a decision has the same effect: the policy of the Netherlands had to be to offer people in such situations asylum. As a result of the decision Salah Sheekh – and hundreds of other Somalis in the Netherlands from similar backgrounds – had a more permanent basis to reside in the Netherlands on asylum. One result was new dialogues in Dutch state agencies, with coordination meetings between various ministries that included both civil servants and political officials, in order to decide on a course of compliance.

*Salah Sheekh* speaks the wider dialogue between the nation state and human rights. Decisions under Article 3 are, in concept, legally 'all or nothing': if it applies to a case, it is absolute. However, scope for disagreement occurs in the judgment of whether a person runs a real risk of undergoing inhuman or degrading treatment upon return. What is a real risk and how far is it foreseeable? 'The absoluteness' of

35 J. Bolten, 'Mensen en staten: De grote woorden in de Berrahab-zaak', 1988 *Nemesis* 4, no. 6, p. 212.

36 See Myjer, supra note 22, p. 283.

37 J.D.M. Steenbergen, 'Vijftig jaar EVRM en het Nederlandse immigratierecht', 2000 *NJCM Bulletin*, 50 jaar Europees Verdrag voor de Rechten van de Mens 25, no. 1, pp. 437-461.

38 *Salah Sheekh v The Netherlands*, ECHR Third Section (11 January 2007), application no. 1948/04.

Article 3, ‘isn’t that absolute, if you know these criteria,’ an official in the Dutch government we spoke to offered as an explanation.

Issues about the level of deference in the interplay between the ECtHR and national authorities provoked even greater attention because the Court intervened without Salah Sheekh pursuing the highest domestic appeal to the Administrative Jurisdiction Division. This action seemed to violate the rule that the Court may only hear cases if applicants have exhausted all domestic remedies. The Court justified its action by explaining that the obligation to exhaust domestic remedies is, however, limited to making use of those remedies which are likely to be effective and available, but that for Salah Sheekh ‘a further appeal would have had virtually no prospect of success’ (Para. 123). The ECtHR’s past decisions on when domestic remedies have been exhausted are ‘fraught with factual and political complexity’.<sup>39</sup> In *Salah Sheekh* the Court offered the primary goal of regulating state behaviour and giving ‘Contracting States the opportunity of preventing or putting right the violations’ (Para. 121). In this understanding, the Court serves not as a court of appeal, but as a judge of state efforts. But the willingness to take the case earlier – signalling, perhaps, a sense of having given up on national authorities – suggests growing confidence in the institution’s authority to speak authoritatively about individuals’ rights. Some commentators have suggested that *Salah Sheekh* appropriately flagged the lack of care given to expulsion decisions by the Council of State,<sup>40</sup> and research among asylum judges conducted in 2008 echoes the sense that the Council of State has sharply constrained the ability of the judges in courts of first instance to do justice.<sup>41</sup> The Court’s decision also reflects the manner in which Salah Sheekh’s lawyer presented the argument, arguing that the Court could take the case when it did because doing so really did not repudiate the principle of the exhaustion of domestic remedies despite the fact that the decision reduced the formalism of the requirement.

In the Netherlands, the discovery of human rights since the 1970s has influenced how the ECtHR’s authority has expanded incrementally, since attorneys have become well-versed in selecting and framing cases for Strasbourg. Scholars have argued persuasively that expansions of rights and healthy constitutional systems stem from the strength of the lawyers and interest groups that push issues to resolution and frame the questions for the courts.<sup>42</sup> The number of Dutch attorneys who push cases to the Court is relatively limited; specialization further divides their number across types of cases (e.g., criminal versus civil). While asylum and migration lawyers seem to use the European Convention as the primary background against which to argue their cases in domestic courts, taking a case to Strasbourg requires specialized knowledge and experience. A successful attorney selected his case from many possible causes of action and timed the filing with the Court, relying on deep knowledge of the law of European human rights and the ways of Strasbourg: ‘You have to explain to these judges how this works in the field and the only way you can do that is to read a lot of cases. If you do that systematically, you start to learn the way of thinking.’ Such knowledge also enables successful case framing. Forty-six of the forty-seven judges of the ECtHR are appointed from countries other than the Netherlands. An attorney making an application is in a position to teach many judges the ways of the country and sometimes, one lawyer said, to offer a ‘Teletubby’ legal argument to instruct a judge in the lessons of the Court’s own voluminous precedents. The ‘repeat players’ here are increasingly human rights advocates, who drive forward the human rights agenda. In doing so, they serve as the bridge between the domestic context of government practice and international network or rights principles.

The private bar helps to fuel the conflict between the state and the European Court, because the greater specialization now being observed promotes better case law and opens the window for the institution. Represented poorly, an attorney may fail to understand the distinctive law of European rights and the way that political considerations may play into a case. The trajectory of cases highlights the growing autonomy of human rights law from the Dutch state, as private practitioners have specialized in

39 H. Keller & A. Stone Sweet, ‘Assessing the Impact of the ECHR on National Legal Systems,’ in H. Keller & A. Stone Sweet (eds.), *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, 2008, p. 702.

40 De Wet, *supra* note 25, p. 267.

41 K. Groenendijk, *Een venijnig proces*, 2008, p. 14.

42 Ch. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*, 1998; M.R. Madsen, ‘From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics’, 2007 *Law and Social Inquiry* 32, no. 1, pp. 137-159.

ECtHR practice and taken a more adversarial position against the collaborative networks of politicians and bureaucrats. As specialists have developed the opportunity to choose their clients, they select cases based in part on the quality of the facts and the anticipated impacts on national law. Human rights advocates are now firmly entrenched as actors in the legal regime, a revision from earlier times when Dutch critics expressed concern that bringing human rights complaints to the Court would per se tarnish the Dutch image as being an open, welcoming society.

#### 4. Legal and political responses to ECtHR decisions

Beyond immigration, the Dutch authorities face a Court willing to shape national policies, whether through administrative law or criminal law. In exceptional cases, the greater scrutiny of the European jurists can reverberate through domestic politics, when the assertion of the failure of state institutions or of ethnic bias hits a sensitive nerve. For those seeking to realize general (or universal) human rights, the institutions of the state become both the object of international regulation and the medium through which rights must be realized. The reactions to court intervention, in the form of deliberations over implementation, electoral pressures and reflections on national self-image, are more than a side-show but are a constitutive part of the politics of human rights law. Our focus in this section turns to the political processes and reactions that mediate the implementation of Court decisions in the Netherlands. Our analysis demonstrates that the development of the Court into a more substantive human rights regime has led Dutch political leaders to increasingly call explicitly for restricting the Court's influence. The nature of resistance has evolved, generating a running battle through more prominent venues as the Dutch debate what role and posture it will take vis-à-vis the Court. Rather than hold out that Dutch exceptionalism or decency should insulate the Netherlands from the ECtHR, political leaders increasingly seek to have the state bureaucracy impede the Court's influence.

As captured in the jurisprudence of Articles 3 and 8, a progressive movement from popular sovereignty and toward legal governance characterizes the broad sweep of the paired relationship between the ECtHR and the Dutch government. The activism of the ECtHR 'has helped to propel the system forward'<sup>43</sup> and appropriately so, in the words of one Dutch lawyer interviewed, because 'the guarantees in the Convention would become very meaningless if [ECtHR judges] did not take an active approach.' While international human rights alter the course of events in national law, particularly due to the increasing sophistication of litigation, the process of fully integrating a human rights culture in government remains elusive. Such integration – or domestication – requires making human rights part of the daily practice of law and politics, going beyond how domestic judges apply law to how political leaders, civil servants, and others who contribute to policy making and implementation bring law into their work.<sup>44</sup> Although members of the bureaucracy may more fully embrace a human rights culture, an interviewee at a Dutch ministry commented critically on the slow socialization of legislative policy makers. He offered an example of recent immigration legislation, finding it typical of a wider process: 'If you look at new legislation in the Netherlands it is rarely in sync with European legislation. Rarely. (...) What we very often do is first we write the law and then we look whether it fits in.' Even more critically, but with a tinge of optimism, he added, 'we've been able to fool ourselves into believing that the Netherlands was still a sovereign country and that Europe was basically a periphery somewhere. (...) Politics here is slowly changing now. (...) It has been slowly sinking in that Europe is important.' The cultural adjustment, including changed conceptions of sovereignty, must diffuse through the political system for more fluid policy adaptation.

The Court's decisions against the Netherlands caused disappointment and irritation when 'human rights' became a stronger tool with which to make claims against the government – and a rebuke to images of Dutch exceptionalism. In the 1970s, the genuine belief was that a modern democratic state like the Netherlands naturally functioned in line with human rights; violations were temporary aberrations that the state could fix on the advice of the Court. The Dutch state, according to several lawyers involved in

<sup>43</sup> See Groenendijk, *supra* note 41.

<sup>44</sup> J. Christoffersen & M.R. Madsen, 'The End of Virtue? Denmark and the Internationalisation of Human Rights', 2011 *Nordic Journal of International Law* 80, no. 3, pp. 257-277.

some of the first ECtHR cases, agreed and cooperated to take cases to Strasbourg to improve the law.<sup>45</sup> By 1990, voices in 'the Hague circles' expressed discontent with discussions on human rights and, especially, the Court's decisions against the Netherlands. Policy makers who thought that human rights treaties were 'innocent' upon ratification started to see significant costs of compliance, which was particularly infuriating since – from their perspective – 'the real perpetrators' (non-democratic countries) were not held accountable for rights violations.<sup>46</sup> From this perspective, the Court's regulation of the Netherlands countered the image of *Nederland gidsland*; however, these critical voices were not yet dominant. Indeed, reactions that the Netherlands had made the incorrect arguments in *Berrehab*, as discussed earlier, echoed the ease with which political leaders dismissed the decision as an inconvenient jurisprudential accident.

Examining processes of implementation shows how political leaders sought to comply minimally with the Court's decisions by using formal procedures to limit the substantive impact on immigration practices. As a reaction to the *Berrehab* case, a letter from the Ministry of Justice explained to police officials 'how to restrictively deal with Article 8 requests' with a standard 'judge-proof' phrase to be used when rejecting applications: 'Weighing the personal interest of the applicant in staying in the Netherlands, on the one hand, against the general national interest, on the other, leads to the conclusion that the general interest in this case reasonably carries more weight'.<sup>47</sup> The Ministry sought to 'Strasbourg-proof' police practices, while simultaneously limiting the effect of *Berrehab*. The Council of State went further, adopting a new line of decision-making that virtually ruled out the application of Article 8 for family members who wanted to enter the Netherlands for the first time.<sup>48</sup>

Ten years after *Berrehab*, many Dutch people thought that the biggest blows from the Court on Dutch immigration policy had been struck and answered. The government proposed a new Law on Aliens in 2000 and apparently was so confident that no references to the European Convention were included in the accompanying elucidation.<sup>49</sup> But *Şen, Rodrigues da Silva and Hoogkamer, Sezen and Salah Sheekh* were all yet to come. Reactions to this series of decisions drove a shift in attitudes toward the Court. Among Dutch legal professionals working in state agencies and in politics, ECtHR 'raps on our knuckles' were increasingly met with distrust of the active role of the Court in expanding its oversight of the Netherlands. Peter Rodrigues, a professor of immigration law, stated in his 2010 inaugural lecture that political leaders and those involved in policy implementation felt the constraint of Court decisions as a genuine loss:

'Norms of decency in the international community are increasingly seen as annoying and a nuisance by politicians who are involved in the formulation and implementation of Dutch immigration policy. In some cases people are calling for a change in the formulations of certain provisions. Sometimes there are arguments to cancel treaties. Also at the Ministry of Justice people seriously consider whether certain treaties can be repealed, like the ECHR and the Refugee Convention. The influence of international law on immigration and asylum law is reason for the government to ask for research into all the decisions concerning Articles 3 and 8 ECHR. They want to find out whether Articles 3 and 8 of the ECHR hinder the implementation of Dutch immigration legislation.'<sup>50</sup>

The process of complying with Court interpretations of the Convention has limited the scope for policy implementation, which government leaders increasingly view as unwarranted interference. The language of decency which earlier on used to mark the Netherlands as unique – that it was a decent country against which decisions such as *Berrehab* should not apply – has now become part of the governing framework against which some leaders in the Netherlands react.

45 K. Groenendijk, 'Pioniers veertig jaar later', in M. Reurs & M. Stronks (eds.), *Pioniers in het vreemdelingenrecht*, 2011, pp. 6-13.

46 Editorial NJCM, 'De tijden zijn aan het veranderen', 1990 *NJCM Bulletin Nederlands Tijdschrift voor de Mensenrechten* 15, no. 2, p. 137.

47 A digital scan of the original letter is available at <<http://cmr.jur.ru.nl/cmr/tbv/tbv82/89/tbv-82-1989-20.pdf>> (last accessed 26 November 2013).

48 See Steenbergen, supra note 37.

49 Ibid.

50 P. Rodrigues, *De grenzen van het vreemdelingenrecht. Rede uitgesproken bij de aanvaarding van de leerstoel Immigratierecht aan de Universiteit Leiden op vrijdag 3 september 2010*, 2010.

Maintaining the self-image of a ‘guiding country’ to the rest of the world, the Dutch response to emerging human rights standards has been to blend a ‘pro-human rights’ stance with concern about the loss of sovereignty.<sup>51</sup> The contradiction in this posture has become untenable. ‘Outdated’ conceptions and traditional practices of sovereignty have undergone significant revision.<sup>52</sup> The new order advances aspirational human rights ideals similar to those long advanced by the Dutch. National policy makers may assert pragmatic reasons for preferring national self-determination about how to apply these ideals, but have little ground for rejecting in principle an assertion of regulatory control in matters of human rights by the duly constituted international authority. An editorial in one of the leading Dutch newspapers, *NRC Handelsblad*, commemorating sixty years of the Convention in November 2010, observed that, ‘[T]he Netherlands has had to adapt its self-image as a nation under the rule of law. Some changes were imposed that usually were resisted and sometimes were implemented only very slowly. At this jubilee the limit seems to have been reached. “Strasbourg” is being felt as a restriction.’<sup>53</sup> As Rodrigues said, the government had ordered a study of the state’s room for manoeuvre in asylum and migration law under Articles 3 and 8.<sup>54</sup> Independent agencies like the Advisory Council on International Affairs and the Dutch Section of the International Commission of Jurists scrutinized and criticized political leaders’ moves to limit the influence of the Court.<sup>55</sup> However difficult the political conclusion may be to justify in law, domestic pressures impose limits on external human rights intervention. More Dutch politicians and members of the public are now hearing criticisms from Strasbourg and even more from the likes of Mary Robinson; but they are increasingly rejecting these criticisms as uninvited.

Two generations of scholars now put it beyond question that the work of the courts is ‘political’ at least in so far as decisions are located within an environment that structures the choices available to the judges and makes the choice dependent on the anticipation of other actors’ behaviour. It is also ‘political’ in the sense that the Convention is seen as a ‘living instrument’ that needs to be adapted to changing societal circumstances. More simply, law – even when partially removed from the state – is not autonomous from politics.<sup>56</sup> While one civil servant noted with confidence that ‘everybody will do as the Court says,’ he somewhat paradoxically also observed that the Court is one actor among many. ‘It can very often be the case,’ he observed, that ‘the political wind here in The Hague is such that a Court decision is not exactly welcome. So what happens is that you look at ways of dealing with it, sparing the political sentiment. There are a lot of difficult situations where you just have to find a solution that will satisfy everybody – which is sometimes impossible.’ Thus the answer of ‘everybody will do as the Court says’ still leaves several roads open, subject to interpretation, particularly when ministries headed by political leaders must decide how to implement changes to comply with Court decisions.

This uncertainty among political leaders about potential future compliance with ECtHR decisions puts the onus on legal expertise, because while multiple interviewees concurred that the Court has a clear style, the doctrines governing state regulation remain opaque. It can be difficult for the lawyers within the Dutch government to articulate what has transpired or what will happen in the future, requiring translation as advice is given to political decision-makers:

‘When such issues are being discussed, we play our part, we steer, we give ideas, we warn and we do so backed by the Convention in the first place and the Court’s case law in the second place and to be very honest we don’t frequently get as far as using terms like “margin of appreciation” because not all colleagues know what we’re talking about. Sometimes *I’m* not sure what we’re talking about [laughter].’

51 H. Reiding, *The Netherlands and the Development of International Human Rights Instruments*, 2007, p. 414.

52 J.H. Jackson, ‘Sovereignty-Modern: A New Approach to an Outdated Concept,’ 2003 *American Journal of International Law* 97, p. 784.

53 ‘Toets grondrechten’, *NRC.nl*, 5 November 2010, <<http://weblogs.nrc.nl/commentaar/2010/11/05/toets-grondrechten/>> (last accessed 13 December 2013).

54 *Kamerstukken II* 2009/10, 19 637, nr. 1352. As of 29 November 2013, this study has not yet been published (<[www.acvz.org](http://www.acvz.org)>).

55 See for publications of the Advisory Council <<http://www.aiv-advice.nl>> and for the Commission of Jurists <[http://www.njcm.nl/site/english/list\\_news](http://www.njcm.nl/site/english/list_news)> (both last accessed 23 September 2013).

56 Chr. Tomlins, ‘How Autonomous Is Law?’, 2007 *Annual Review of Law and Social Science* 3, pp. 45-68.

Despite the distance and mystery of international human rights law, in formulating responses political leaders and lawyers working in government agencies put the human rights principles into practice. The meaning of human rights has a textual foundation but what can be done with that text – the capacity for judicial activism – depends on other choices of interpretation.

Legal creativity helps to modulate the force and meaning of human rights. As one ministry official we interviewed explained, the lawyer must serve politics:

‘We could either say we are only there to say yes or no to a certain proposal, “this is unacceptable, you cannot do that,” or is our job rather to help the policy makers to find the proper formulations? It is the latter. I could say it’s the first but then I would be corrected by higher instances. I’m not an academic, I’m a civil servant and this is how it works, so we try to find the right formulations. And they can be found.’

The formal role expressed here helps unwilling states to expand the range of possible interpretation, thus tying compliance more closely to domestic will. Yet, in other instances, legal expertise may resist those reacting to the Court’s decisions and instead suggest a new path for leadership in human rights by taking a cue from developments in other European countries. However haltingly, the Dutch government has so far been among the states most ready to see decisions given to other nations by the ECtHR as precedential stimuli toward reform.<sup>57</sup> We suggest that the lawyers working in government circles still have the professional attitude of ‘serving the legal system,’ thus showing some restraint in finding the legal responses to serve politics. As one lawyer working for the government said: ‘I do not vouch for the policy makers, but I do for the lawyers. Those at the ministries do still think “this is a court decision and we have to deal with it in good faith and conscience”. If you do that too minimally, you will soon end up in court again.’ Another interviewee from a Dutch government agency pointed to areas of law where they find themselves communicating to other Council of Europe countries about the types of policy steps taken in response to the Court, thus forming the norms of human rights through evolutionary adaptation. These norms may then feed back into the Court’s decision-making in similar cases. Looking at the Court’s decisions as precedent, even if the cases arise from other countries and are thus not immediately binding, would provide an expression of humility. That posture is quite different from how the Dutch have understood leadership in the past, where internally generated norms were sent out to others. Instead, the human rights regime requires reflexivity rather than rhetoric in order to present oneself as a leader.

Human rights advocates in the Netherlands contest even this revised self-presentation, believing the commitment of the government to be superficial or secondary only, a distant concern that undercuts the value of human rights. A number of individuals interviewed for this project spoke of the ‘arrogance’ of the Netherlands, the felt assumption that its efforts were either sufficient or beyond assault, a mindset that produces no agenda for self-criticism or a call for wholesale reform. State compliance beyond that boundary becomes halting and uneven. This mindset is different from the one dominant in the 1970s and 1980s. The reception of the *Salah Sheekh* decision provides a case in point of today’s much more adversarial stance, because the approach of the ECtHR – in giving up on the possibility of finding an effective remedy in the Dutch Council of State – challenged the autonomy of the Dutch process.<sup>58</sup> That thought is echoed in the caveat, ‘worth noting (...) that it may take several years for legislative amendments to go through the Parliamentary process, during which time the Netherlands could be confronted with several determinations of violations of the ECHR that are all similar to the one prompting the legislative change in the first place.’<sup>59</sup> In the cases presented above, the Dutch government tended to react to restrictions put up by the Court in ways that limit their scope. In the context of changing public opinions – what one interviewee called the Netherlands’ ‘increasingly narcissistic approach’ to foreigners – the legal frame of human rights makes processes of implementation and law-making a vehicle for negotiating the

57 See De Wet, *supra* note 25, p. 275.

58 D. van Dam, *Who’s Right(s): International Monitoring of Compliance with Human Rights of Migrants in the Netherlands, 2000-2008*, 2009, Centre for Migration Law / Forum Institute for Multicultural Affairs, Nijmegen, pp. 97-99.

59 See De Wet, *supra* note 25.

impact of the Convention's aspirations. Recently published interviews with pioneer lawyers in asylum and migration law show the changed relationship: 'The state today looks for the boundaries of what is possible in law. The long-held faithful and generous implementation of European rules is lost. Instead, they just look as long as possible for ways to keep doing it just a little bit differently.'<sup>60</sup> This might be too negative a qualification, or a qualification that was only relevant for a short interim period in which the balance was lost. Under the 'purple' government since the summer of 2012 (purple being the result of mixing red-labour and blue-liberal), the Dutch seem to be pursuing a new course that is exemplified by the new Minister for Foreign Affairs, Frans Timmermans. In a speech delivered at the ceremony for handing out the 'Human rights tulip' on 9 January 2013, he said:

'We also have a duty. Maybe we have paid too little attention to that duty during the last few years in the Netherlands. The duty to have an open attitude toward the criticism of others. Certainly if you want to address, from a rich country such as ours, other parts of the world on what happens there. The Netherlands should not have an attitude of being above criticism. As if everything is fine here. That is why I am happy with our newly instituted Commission for Human Rights. They intend to permanently screen the human rights situation in the Netherlands and look for shortcomings. And they are there. (...) Internationally, too, the Netherlands can be remarked upon. I think that we – as state organs – should have an open attitude: to accept critique, to refute it when misplaced and to adapt our policy when it is justified. We also respect the old human rights instruments that we have submitted ourselves to, like those of the Council of Europe – including the decisions of the Strasbourg Court. We will not dispute them. We will not curb them. We will respect them, because that is the only way to be able to say to India that we are worried about the position of the Dalits. We are worried about the position of women. We are worried about social inequality.'<sup>61</sup>

This newly found stance is also reflected in the foreword of a recent book that addresses both the 'backlog' and the 'backlash' of the European Court. The foreword, written by the Minister of Security and Justice, Ivo Opstelten, states that the debate on whether the Court is too political shows that the Court, at least at a rhetorical level, is finally being taken seriously.

'(...) judicial interpretation is required. To my mind, this does not mean that judges are entering the political domain or making political choices. It means that they operate in a political context and are often asked to decide on issues that have a great societal impact. My experience as a minister responsible for the proper functioning of the judiciary is that judges are well aware of their tasks and responsibilities – including the boundaries of their mandate.'<sup>62</sup>

60 M. Tjebbes quoted in M. Reurs & M. Stronks, *Pioniers in het vreemdelingenrecht*, 2011, p. 135.

61 Taken from <<http://www.rijksoverheid.nl/regering/bewindspersonen/frans-timmermans/toespraken/2013/01/09/uitreiking-van-de-mensenrechtentulp.html>> (last visited 28 March 2013; our translation):

*'Dat roept ook een plicht op. Misschien dat we voor die plicht in de afgelopen jaren in Nederland wat te weinig aandacht hadden. De plicht – zoals Cisca Dresselhuys terecht zegt – ook jezelf open te stellen voor kritiek van anderen. Als je vanuit zo'n rijk land als het onze andere delen van de wereld wilt aanspreken op wat daar gebeurt. Nederland moet niet denken dat wij zelf boven kritiek verheven zijn. Alsof hier alles koek en ei is en alles in orde zou zijn.*

*Ik ben daarom heel blij met de instelling van het College voor de Rechten van de Mens. Het College heeft zichzelf ten doel heeft gesteld de mensenrechten in Nederland onder de loep te nemen en te houden. Ook daar waar er nog tekortkomingen zijn – en die zijn er. (...)*

*Ook internationaal is op Nederland nog wat aan te merken. Ik vind dat wij – ook als overheid – een open houding moeten hebben. Kritiek accepteren en weerleggen als deze misplaatst is. En ons beleid aanpassen als de kritiek terecht blijkt te zijn. Ook respecteren wij oude mensenrechteninstrumenten waar wij ons aan onderworpen hebben. Instrumenten zoals die in de Raad van Europa bestaan – inclusief de uitspraken van het Hof in Straatsburg. Die stellen wij niet ter discussie. Die gaan we niet inperken. Die respecteren wij. Want dat is de enige manier waarop Nederland zichzelf een positie kan verschaffen om ook tegen India te zeggen: "Wij maken ons zorgen om de positie van de Dalits. Wij maken ons zorgen om de positie van vrouwen. Wij maken ons zorgen over sociale ongelijkheid."*

Recently Timmermans in his Policy Letter 'Respect en recht voor ieder mens' (June 2013) confirmed this submissive policy by stating that 'we do not address other states from a position of moral superiority, but because they have committed themselves to certain obligations'. The Policy Letter (in Dutch) can be downloaded from <<http://www.rijksoverheid.nl/bestanden/documenten-en-publicaties/notas/2013/06/14/beleidsbrief-respect-en-recht-voor-ieder-mens/beleidsbrief-respect-en-recht-voor-ieder-mens-nl-final-2.pdf>> (last visited 19 September 2013).

62 See Flogaitis et al., *supra* note 17.

## 5. Toward other leadership?

A great array of forces has been and will continue to be necessary for a global society of nation states to codify the rights of individuals against national governments. In the immediate post-1945 period, a limited number of governments and actors brought a 'European human rights conscience' into existence.<sup>63</sup> In this article we have examined the inversion of the relative status of the national and supranational institutions, in particular the relationship between the Netherlands and the European Court of Human Rights. While it may be, as Stone Sweet and Keller have written, that the 'European Convention on Human Rights is the most effective human rights regime in the world';<sup>64</sup> the measure of the incomplete ascendancy of this regime is the extent to which domestic constituencies challenge the Court's legitimacy, whether in defence of lingering beliefs of exceptionalism or notions of parliamentary sovereignty.<sup>65</sup> The Former Liberal Party Dutch Minister for Foreign Affairs, Uri Rosenthal, said in Parliament that the Court 'weakens its legitimacy' by dealing with issues that are 'not really important' and 'only marginally connect to human rights.' He specifically addressed the interference of the Court with the expulsion of asylum seekers, which 'only leads to unrest and unnecessary delays.' Rosenthal argues that it would be better for the ECtHR to respect the margin of appreciation.<sup>66</sup> Anti-European leader Geert Wilders' suggestion that the Dutch should change or withdraw from the treaties sent a shock through legal circles that largely accept the superiority of human rights law.

The ECtHR's legal doctrines (the margin of appreciation and the exhaustion of domestic remedies) have allowed states a great deal of opportunity to avoid, or rhetorically to claim ownership over issues of sovereignty, often avoiding the underlying conflict about superiority. The narrowing margin and more assertive review have naturally produced greater annoyance by state actors. The Netherlands has a number of positive forces supporting the European Convention in domestic contests affecting human rights. The civil service is largely supportive and right-wing politics have made an impression in the Netherlands but have still failed to wrest political control from parties that have historically reflected a consensus position of openness and toleration. It seems that with the latest change in government, the civil service and politics have come closer again.

'Universal' human rights do not occur far away but in local and national decisions and the imprint is indirect and imprecise. The meaning and power of rights remain in play until national cultures share in a new understanding that constructs identity by reference to the global norms rather than national exceptionalism. The recent cautionary words of a Dutch commentator serves notice: 'In the wake of the sometimes reactionary responses by Governments and their resulting inroads in the civil liberties of individuals, it becomes clear that the rights and obligations guaranteed by the ECHR remain vulnerable, despite the progress made over the last 60 years.'<sup>67</sup> 'Leadership' no longer belongs to the country that stands apart from the regime, or too carefully seeks out to limit compliance, but instead joins others in accepting a common confession.<sup>68</sup> ¶

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63 M.R. Madsen, 'The Protracted Institutionalisation of the Strasbourg Court: From Legal Diplomacy to Integrationist Jurisprudence', in J. Christoffersen & M. Madsen (ed.), *The European Court of Human Rights between Law and Politics*, 2011, pp. 43-60.

64 See Stone Sweet & Keller, *supra* note 18, p 3.

65 K. Dzehtsiarou & A. Greene, 'Legitimacy and the Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners', 2011 *German Law Journal* 12, no. 10, pp. 1707-1715; See also Madsen, *supra* note 63.

66 F. Jensma, 'Onbeheggen over mensenrechtenhof in Straatsburg,' *NRC.nl*, 3 May 2011, <<http://weblogs.nrc.nl/rechtenbestuur/2011/05/03/onbeheggen-over-mensenrechtenhof-in-sraatsburg/#more-6176>> (last accessed 23 September 2013).

67 See De Wet, *supra* note 25.

68 E.H. Boyle & M. Thompson, 'National Politics and Resort to the European Commission on Human Rights', 2001 *Law & Society Review* 35, no. 2, pp. 321-344.