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A serious case of Strasbourg-bashing? An evaluation of the debates on the legitimacy of the European Court of Human Rights in the Netherlands

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Over the past several years, there has been an increase in critiques of the European Court of Human Rights, most notably and surprisingly amongst its founding members, like the Netherlands. These critiques are often understood as a crisis of legitimacy. In order to assess whether this is the case, the definition and operationalisation of legitimacy is crucial. This article evaluates the critiques in the Netherlands, using a subjective understanding of legitimacy based upon works by Sharpf and Schmidt, who emphasise input, throughput and output legitimacy, but also that of the demos concerned. The latter dimension is often overlooked in other studies. The critiques of the European Court of Human Rights in the Netherlands are discussed on the basis of archival research, literature review, interviews and survey research. On the basis of the exploratory findings for the Netherlands, the article concludes that, in taking a subjective approach to legitimacy that covers all its dimensions, including support for the European demos, into account, the crisis of legitimacy could be deeper than most scholars estimate. Both the theoretical approach and the empirical insights from the Netherlands are considered of relevance to wider research on the legitimacy of the international human rights regime.

Keywords: legitimacy; European Court of Human Rights; international human rights; the Netherlands

> Whatever the general legitimacy problem that international law faces due to its changing nature as a structure of governance does not attach to the human rights system. International human rights law may have an enforcement problem, and perhaps also an identification or a specification problem, but not a general legitimacy problem.[1]
>
> The European Court of Human Rights is an all-encompassing monster that, without a grain of legitimacy, puts aside scores of national laws and regulations'.[2]

After decades of relatively undisputed expansion of the jurisdiction, caseload and normative reach of the European Court of Human Rights (ECtHR), the past years have been marked by an explicit questioning – by politicians, lawyers and opinion-makers alike – of its legitimacy. The 55th anniversary of the court in 2013 was not only characterised by celebrations, but also by a swell of explicit critiques in some of the court's founding

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nations. In the United Kingdom, for instance, Lord Hoffman had started the debate by openly wondering 'If one accepts, as I have so far argued, that human rights are universal in abstraction but national in application, it is not easy to see how in principle an international court was going to perform this function of deciding individual cases, still less why the Strasbourg court was thought a suitable body to do so.'[3] During the 2015 elections in the United Kingdom the possibility of withdrawing from the European Convention on Human Rights (ECHR) was a central issue, and – after the election – the Tory government continues to entertain the option of withdrawing from the convention.[4] In Belgium, to give another example, law professor and human rights expert Marc Bossuyt stated that the ECtHR skated on 'thin ice' with its case law on asylum seekers, arguing that 'evaluating the credibility of the asylum seekers as well as the sometimes quite volatile political situation in countries nonparty to the Convention is certainly not the natural mission of judges, nor a fortiori of international judges'.[5] In Switzerland, former federal judge Martin Schubarth set out how 'It is unacceptable that a small panel of judges, who generally lack the expert knowledge about a legislative authority, handle matters in an undemocratic way instead of the authority itself', and was supported by a number of parties in advocating withdrawal from the ECHR.[6] Discerning a more general trend, Schaffer, in a recent volume on the legitimacy of international human rights regimes, noted how 'somewhat surprisingly, governments that pride themselves as promotors of human rights and democracy both at home and abroad, increasingly complain about international human rights regimes constraining their domestic democratic affairs'.[7]

Whereas the scholarly assessments of these debates have largely concentrated on the United Kingdom, the Netherlands is another example of a founding nation of the convention and ardent human rights supporter which has witnessed a vehement debate on the legitimacy of the ECtHR that surprised many observers.[8] The Dutch Minister of Security and Justice, for instance, spoke of a 'human rights backlash' in a volume titled *The European Court of Human Rights and its Discontents*, and pointed to the perception that 'judges – including those from the Strasbourg Court – too easily overturn decisions taken by democratically elected representatives in parliament'.[9] It is against this background that this contribution will present the recent debates on the ECtHR in the Netherlands, and discuss to what extent they can be understood as a crisis of the institution's legitimacy. The Netherlands, after all, shares many characteristics with other founding nations: the fact that support for the convention was initially spurred by the desire to set the right example for others (after which court judgments against it came as a surprise), the lack of knowledge of the convention amongst the public and politicians and the degree to which the country has experienced a turn towards populism and Euroscepticism over the past decade.[10]

In order to present the Dutch debates on the ECtHR and to assess what these mean for the legitimacy of the institution, it will be necessary to first discuss the many different ways in which the legitimacy of an institution like the ECtHR has been assessed in the context of wider discussions on the legitimacy of international human rights. Here, an often-held division is that between the *subjective* and the *objective* dimensions of legitimacy – the attitudes towards and beliefs concerning the court versus the question whether such beliefs are morally justified.[11] The first approach calls for empirical research, and the second normative and philosophical reasoning. Legitimacy, in the first perspective, lies in the eyes of the beholder. Whereas the normative foundations of the ECtHR have not changed over the past six decades, the perception of the institution in the eyes of various stakeholders has. It is for this reason that this contribution will concentrate on the *subjective* dimension of legitimacy, to be assessed empirically. In unpacking and assessing this subjective dimension of

the legitimacy of the ECtHR in the Netherlands, the fourfold distinction made by Scharpf, as adopted by Schmidt, in their work on the European polity, will be used: the subjective legitimacy of the *input* into the institution, of its *throughput*, of the *demos* that set up the institution and of its *output.*[12] The central argument to be presented is that the decline in Dutch support for the European *demos* impacts notably upon the *subjective* legitimacy of the ECtHR in the country, and should not be overlooked.

This contribution will proceed by first discussing the debates on the legitimacy of the ECtHR as they arose, and the very different understandings of legitimacy that underpinned them, to argue the importance of not only assessing *objective* but also *subjective* legitimacy, with specific methodological consequences. In subsequently turning to the Netherlands, it will first discuss the relevance of the ECHR and thus also of the ECtHR within the Dutch legal order. The work of the ECtHR became fundamental to the Dutch constitutional dispensation after the 1970s, but received relatively little media, parliamentary and public attention up to 2010, when a debate on the legitimacy of the court erupted in the newspapers and in parliament. Whereas many scholars argue that this did not really constitute a crisis of legitimacy, the subsequent section, in applying Scharpf's criteria to the Dutch debate, will point out how attention to these *subjective* elements and shifts pertaining to the institution's *input, throughput* and *output* legitimacy, but particularly that of its *demos* (the Council of Europe, which – as will be discussed – is synonymous to Europe in the popular imagination) could well point to a deeper crisis. In arguing for methodological and empirical attention to the legitimacy of the *demos* involved in human rights implementation, the Dutch example also provides some more general lessons on both researching and understanding the legitimacy of international human rights regimes in this day and age.

Assessing the legitimacy of the ECtHR

Many of the recent discussions, both scholarly and political, on the ECtHR, explicitly speak of a crisis of its legitimacy. As Letsas notes, 'concerns about Strasbourg's legitimacy have risen sharply in the last few years'.[13] This crisis is often related to a more general crisis of human rights and human rights institutions, as depicted in books with titles like *The End-times of Human Rights* and *The Last Utopia*.[14] Part of the crisis, it seems, is related to the 'home-coming' of human rights, the fact that human rights are increasingly invoked in difficult political discussions in those countries – like Belgium, the Netherlands and the United Kingdom – that might have played a key role in drawing them up in the first place, but that have subsequently considered human rights as a foreign policy concern and not a discourse of local relevance.[15]

It has often been noted how legitimacy – as the conceptual place where facts and norms merge – is more important for courts than for any other institution, as courts will often take counter-majoritarian decisions and thus need to rely on other forms of support than that of the electoral majority.[16] At the same time, legitimacy is a notoriously slippery term, difficult to conceptualise and therefore also difficult to assess. Additionally, much of the research on the legitimacy of courts concerns national contexts and thus fails to capture the challenges to legitimacy posed by supranational institutions.[17]

One of the striking elements in the research on the legitimacy of the ECtHR is the number of different understandings of the concept that are used and – consequentially – the differences in the subsequent analyses of whether there is such a crisis at all, what accounts for it and what should be done about it.[18] Christoffersen and Madsen, in a historical overview of the various phases in the court's history, consider legitimacy as the mechanism by which the court, from the early years of its existence onwards, made unpopular

decisions palpable to the member states and straddled its role between law and politics (2011). In their opinion, the court went through four distinct phases: the development of its institutional autonomy, the development of a progressive jurisprudence based upon notions like the margin of appreciation and dynamic interpretation, the contribution to democracy in Eastern Europe and the recent discussions on the effectiveness of the court in domestic law. A commonly used but very different understanding of legitimacy is that employed by Zwart, who follows Caldeira in considering legitimacy as diffuse support: the preparedness to accept unfavourable outcomes because of a general acceptance of the institution.[19] Given the fact that human rights are, by definition, counter-majoritarian and often concern claims against the state, the emphasis on diffuse support brings Zwart to the observation that the court's controversial rulings will, in the long term, undermine its legitimacy.

Many other authors point out combined sources of legitimacy. One of the few empirical studies on the legitimacy of the court, by Çalı and others, makes a distinction between the constitutive, performance and social dimensions of legitimacy: constitutive legitimacy is about assessing whether there are good reasons for an institution to exist in the first place, performance legitimacy is about assessing the actual protection of human rights by the court as well as the way in which it is managed whilst social legitimacy draws attention to people's views on the institution.[20] In using this yardstick for their empirical analysis, they found a great deal of constitutive legitimacy of the court amongst lawyers, politicians and judges in the United Kingdom. In later comparative work, Çalı et al. further investigate how legal and political elites view the legitimacy of the court in Turkey, Bulgaria, the United Kingdom, Ireland and Germany, to argue that the social (and thus subjective) legitimacy of the court in the eyes of these elites is grounded in the logic of fair compromise.[21] Letsas, in turn, distinguishes between authority-based and commitment-based legitimacy to deal with the question of how the court can help states to comply with their human rights obligations. An emphasis on the initial commitment made by states to follow Strasbourg judgments, he concludes, is more viable than having to rely on the court's authority.[22] Bürli introduces yet another set of distinctions: that between (1) coherence and consistency based legitimacy (2) institutional legitimacy (defined as respect for democratic values) and (3) procedural legitimacy, finding problems with each of these aspects.[23] Follesdal, in turn, defines legitimacy as a standard related to, but usually exceeding, legality.[24]

The definition of legitimacy used thus clearly influences the diagnosis of the issues at stake and the remedies needed to address them. A key distinction made in a recent volume on the legitimacy of international human rights regimes is that between the *subjective* and the *objective* dimensions of legitimacy.[25] Here, the 'descriptive, subjective' aspect of legitimacy refers to the attitudes about rightful rule held by members of a given community, whereas the 'normative, objective' aspect points out whether such beliefs are justified.[26] Whereas most legal literature will emphasise the normative, objective dimension, there are a number of reasons to also take ample account of the subjective element.[27] For one, as Follesdal and others point out, the two aspects are closely intertwined. Next, understandings of legitimacy studies in general gradually seem to be shifting towards a more subjective approach.[28] Of course, for political scientists, legitimacy has always been in the eyes of the beholder.[29] Even if, however, one opts for a more subjective understanding of legitimacy than is common amongst lawyers, it remains important to decide *what elements* of the court and its functioning are to be assessed by *whom*.

In assessing what elements should be included in a subjective assessment of legitimacy, it is useful to borrow from the empirical research into European integration, even if the

European Union (EU) – as an organisation *sui generis* beyond the state – differs from the ECtHR. One of the key concerns from a subjective perspective, as will be discussed, seems to be the international or even the specifically European character of the court. Scharpf, in his work on the EU, translated the key notions in Lincoln's Gettysburg Address – government of, by and for the people – into an emphasis on *input* legitimacy, *output* legitimacy and legitimacy of the *demos*. The input dimension emphasises that rule should be consensual, based on the widest possible agreement amongst individuals and groups affected.[30] Applied to the ECtHR, this means that people should feel that this is their court, that it monitors state compliance with their norms, put up by and for them. The underlying notion is that of *volenti non fit iniuria:* if you have consented you cannot claim damages. The *output* dimension emphasises how the decisions made should be in the common interest of the constituency even when counter-majoritarian. This means that the underlying motivation of a given court decision should be recognised as serving the wider, collective interest of upholding the rule of law. In setting out what governments are *not* allowed to do, court output serves to legitimise both the court itself and democracy as a whole. A precondition to legitimacy, however, is also the existence of what Scharpf labels a 'we-identity', a shared adherence to the polity at stake, the *demos.* Quoting Weiler on Europe, he states that 'it is a matter of empirical observation that there is no European Demos – not a people not a nation'.[31] This observation applies to the EU, but also – from a *subjective* perspective – to the Council of Europe: the two European entities are often confounded in public perception, and even by the popular media and politicians. Scharpf's threefold analysis of what constitutes legitimacy was expanded by Schmidt, who emphasised the importance of looking into the 'black box' between input and output, that of *throughput*.[32] This dimension emphasises the efficacy, accountability and transparency of government process, and – translated to the work of the court – points at the procedural justice that is so important in the work of courts.[33]

It is an emphasis on *subjective* legitimacy, made operational with an emphasis on *input, throughput, output* legitimacy but particularly also that of the European *demos*, that forms the basis of this exploratory evaluation of the Dutch critiques of the court over the past several years. This analysis is not only based on case analysis but also on archival research, literature review, interviews, an analysis of the popular media and survey data carried out from 2008 to 2014. What have been the recent Dutch critiques of the ECtHR, and to what extent can they be considered 'a serious case of Strasbourg-bashing'?[34]

Dutch engagement with the ECtHR: a historical perspective

The Netherlands is one of the founders of the ECHR. Frustrated by the fact that the Universal Declaration of Human Rights would end up as a non-binding document, it hosted the Hague Conference in May 1948 where 750 delegates responded to Churchill's call to set up a European Movement and to write a convention with a court to oversee its implementation. Nevertheless, when the convention was written up at a speed that surprised many observers, the Dutch government expressed hesitancy, arguing internally that it already had a national bill of rights, that there was already the UN system, and that the chance that the rights concerned would actually be violated within the Netherlands was minimal.[35] It was only because the government did not want to stand alone amongst the European nations that it ratified the treaty.[36] This governmental hesitancy was even more apparent when the protocol enabling the individual right to petition was on the table a few years later. Here, the main fear was that the convention would offer protection to

communist and national-socialist groups, and would be at odds with Dutch policies in a number of other matters.[37]

It was only because parliament insisted upon ratification that the Netherlands, after years of dragging its feet, signed up to the protocol that would allow individuals to petition against the Dutch state in Strasbourg.[38] Behind these efforts were a number of parliamentarians who had been present at the Hague Conference and were convinced that the Netherlands should lead the way in setting up the international legal order that would keep the world from ever again having to witness the atrocities that occurred in World War II.[39] 'It is time', they told the government, 'to take all these exclamations seriously'.[40] Parliament was also responsible for the special position that the ECHR and other international treaties would receive in the Dutch legal order. It adopted a motion in 1952 that enabled judicial review of treaty provisions; this within a constitution in which constitutional review was – and is – explicitly prohibited. The initiator, Serrarens, explained that the Dutch motivation was to 'achieve an international legal order in which not individual interests dominate, but a commonly accepted law of morality'. In order to do this, he set out, 'we will need institutions to develop newer, better, higher laws of morality, a higher order, that is the foundation for a world law'.[41] The leading parliamentarians of the 1950s not only emphasised the importance of strengthening the international legal order, they also underlined the importance of democratic input into these international organisations.[42] In spite of all these efforts, the Netherlands was one of the last drafting countries to ratify the convention in 1960.[43]

As a result of this parliamentary input and a number of constitutional revisions in the 1950s, the ECHR has a uniquely privileged position within the Dutch legal order. The constitutional dispensation is characterised by its relative monism, in which art. 93 of the constitution holds that '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'. The question as to *which* provisions can be deemed binding by virtue of their contents is an often-debated one, but there is a general consensus that this applies to all ECHR provisions, which thus have direct effect in the Dutch legal order.[44] Another element strengthening the domestic position of the convention is the fact that, whereas judges cannot review domestic law against the constitution, art. 94 of the constitution explicitly allows for review against treaties like the ECHR, a power that Dutch judges have used with considerable restraint.[45] Finally, the Dutch constitution is relatively open, with an incomplete rights catalogue, which means that essential rights like the right to life, the prohibition of torture and the right to a fair trial can only be found in the convention. Also, the grounds for limiting many other rights are stipulated much more clearly in the convention than in the constitution.[46]

The ratification of the convention in combination with the constitutional amendments of the 1950s contained the potential to play a key role in Dutch debates on fundamental rights. This potential, however, only became apparent in the 1970s.[47] In *Engel*, the court held that Dutch military disciplinary law and the arrest of conscripts violated article 5 of the convention.[48] The case led to a great deal of publicity. It also marked the re-discovery of the ECtHR by Dutch lawyers and, partly for that reason, by Dutch judges. The potential impact of case law from Strasbourg became even more apparent with the ruling in *Winterwerp*, in which the court ruled that depriving psychiatric patients of their liberty without the consent of an independent and impartial body constituted a violation of art. 5 of the convention.[49] Whereas Dutch laws in this respect only changed in 1994, there was widespread recognition that it was the ECtHR ruling that had led to substantial amelioration of the position of psychiatric patients.[50] Another landmark case for the Netherlands was *Benthem*, in which

the court ruled that the right to a fair trial contained in art. 6 also applied to specific administrative disputes in the Netherlands, thus necessitating a wholesale overhaul of Dutch administrative law and settling – once and for all –the question as to who had the last say in disputes between citizens and the government: the government itself or impartial judges in the favour of the judges.[51]

The judicial and legislative response to these cases was, in general, to cautiously adopt domestic case law, policies and legislation to the Strasbourg interpretation. In discussing legislative responses in the fields of criminal, private and administrative law alike, Myjer concluded that the Dutch legislator 'acts generously when confronted with a violation of the ECHR'.[52] As a result, all these fields of law have undergone substantial revision in the Netherlands because of ECtHR case law.[53] Gerards and Fleuren state that Dutch courts have generally not only applied ECtHR rulings against the Netherlands, but also accepted and acted in accordance with the *erga omnes* character of rulings on other countries.[54] Even if the Dutch judiciary has gone a long way in implementing European human rights law, it generally does not offer more protection than required by the convention, or really incorporate its interpretative principles in a broader sense – with the exception of the margin of appreciation.[55]

In spite of the increasingly important case law of the court, both press coverage of and parliamentary discussions on the ECtHR were limited and generally factual in tone, from the ratification of the convention up to 2010.[56] The landmark cases like *Engel, Winterwerp* and *Benthem* did receive attention, but mostly in the more highbrow press and the coverage was mostly factual with no discussion of the authority of the court.[57] Many cases that belong to the standard repertoire of Dutch lawyers and law students received no media or parliamentary attention whatsoever. An exception was the 2000 *Voskuil* case, which caught the interest of the press because the court found that the Netherlands had violated art. 10 in not respecting the right of a journalist to protect his sources.[58] Another exception was *Salah Sheekh*, in which the ECtHR held that the Netherlands violated the prohibition of torture in art. 3 in sending a refugee back to Somalia.[59] This made the front pages of a number of newspapers and also led to op-eds critiquing the 'excessive formalism' of the government.

The general attitude towards the court and its case law up to 2010 was well captured in an article by the *NRC Handelsblad* in 2008 titled 'No Court Protects Human Rights Like the One in Strasbourg.' There, experts were interviewed on their favourite ECtHR case in an attempt – so it seemed – to educate the newspaper's readers about the role of the court and its value.[60] When the court received a Four Freedoms Award in May 2010, the country's most-read newspaper, the *Telegraaf*, briefly mentioned that 'the Court was praised for having decided on more than 10,000 cases in the past 50 years'.[61] The only other newspaper to report on the event, the *NRC Handelsblad*, published an interview with the court's Dutch judge who expressed concern about the court's case load but generally stated that the Netherlands plays an 'exemplary' role in protecting fundamental rights.[62] Such praise also came from the government: In handing the international Four Freedoms medal to the court's president, the Dutch Prime Minister Jan-Peter Balkenende emphasised the *input* and *output* legitimacy of the court: it 'has ensured access to justice for every person in our vast and ancient continent. It has brought security and stability to our society. It has fully earned the respect and support of the member states of the Council of Europe. And even more important, the people of Europe have found the Court to be a fair and powerful instrument of justice on their behalf'.[63]

'The human rights backlash' in the Netherlands

For many years, the general public and political attitudes towards the ECtHR, as constituent of its *subjective* legitimacy, could well be summarised as not knowing much, and not caring

much either. All this changed in 2010. A week after the Four Freedoms Award was handed out, Mark Rutte, the leader of the largest party, the liberal democrats (VVD), and future prime minister, wrote how he intended to stop 'the large stream of migrants with little chances in life who come here to end up dependent on social security', stating that his party would 'change outdated European treaties that prohibit this'.[64] Nevertheless, most observers would date the onset of a vehement media discussion on the ECtHR back to the newspaper op-ed quoted at the beginning of this article. In that op-ed, in one of the most serious Dutch newspapers, titled 'The European Court of Human Rights Constitutes a Serious Violation of Democracy,' PhD student Thierry Baudet stated that the ECtHR had turned into 'an all-encompassing monster that, without a grain of legitimacy, puts aside scores of national laws and regulations'.[65] Referring to examples such as immigration policies, religious freedom, search warrants and police hearings, Baudet stated that 'The House of Representatives – and thus the Dutch population – does not have a final say in this anymore. Strasbourg decides.' Arguing that fundamental rights are inherently vague, he stated that those who are in a position to interpret these rights have the power to 'impose their political will upon others'.

The article deserves to be quoted extensively because of the flurry of disagreement that it provoked amongst legal scholars in op-eds, at conferences and in scholarly publications.[66] In a wide variety of newspaper contributions, authors came to the general defence of the court, under headings like 'Much Good Comes from Strasbourg' and 'The ECtHR Civilizes Hungary and Greece', 'There is Nothing Wrong with the ECtHR' and 'The Strasbourg Court Remains Crucially Important'.[67] Some made suggestions for improving the position of the ECHR in the Netherlands: for example, Peters et al. stated that 'Dutch judges follow the ECHR much too diligently' and Oomen wrote 'Strengthen the Dutch Constitution instead of complaining about the Court'.[68] Baudet, who had started the debate, responded in a number of articles, in which he sided with British critiques of the court, and made statements like 'Crucifixes in classrooms, adoption, prohibition of squatting: what does all this have to do with "universal human rights"'.[69] In criticising the court, he received support from Tom Zwart, chair of the Netherlands School of Human Rights. Zwart stated that 'Politicians can solve the problems of the Court', arguing that the type of policy questions decided upon in cases like *MSS* v. *Greece*, which curtailed the possibility of sending immigrants back to Greece, should best be left to the Council of Ministers.[70]

The more scholarly responses could be divided into those seeking to address the court's *backlog* and its *backlash*. In the *Netherlands Journal of Human Rights*, the editors emphasised how the Netherlands would be better off strengthening its own constitution and enabling constitutional review.[71] A volume titled *The European Court of Human Rights and its Discontents: Turning Criticism into Strength*, co-edited by Zwart, contains the claims that 'the Court's legitimacy is slipping, its legal reasoning is poor and its jurisprudence inconsistent'. It also charged that the ECtHR neglects the principle of subsidiarity and engages in expansive interpretation of ECHR rights.[72] It also contains a summary of the results of the *Amici Curiae* project, an initiative that brought together 29 contributions on what can be done at the court level, the procedural level, the domestic level and in the field of cooperation.[73] These recommended increasing politicians' awareness of the court's work but also making changes to the court: circumscribing its role, strengthening its judicial and administrative capacity, selecting and filtering complaints, improving domestic compliance and collaborating with other courts more actively.[74]

Whereas academia was largely critical of Baudet's wholesale questioning of the legitimacy of the ECtHR, his view was in line with the governmental position and that of certain

parties in the House of Representatives at the time. The parliamentary debate went through a number of phases, with different roles for the government, the House of Representatives and the Senate, partially depending on the political composition of each of these entities. The political composition of Rutte's first cabinet, for instance, that started its rule in 2010, was that of liberal democrats (VVD) and Christian democrats (CDA) who could only rule with the support of the right-wing extremist-populist party of Geert Wilders. This led to a very critical stance towards the ECtHR. Wilders, apart from the nationalist and populist ideology of his party, had a specific reason to be wary of the ECtHR at the time: he faced criminal charges for hate speech that were largely based upon ECtHR case law.[75] Next to this, the main governmental party, the VVD, in spite of its liberal democratic origins, was concerned about the way in which tightening migration policies and curtailing the right to social benefits for migrants were prohibited by Dutch human rights obligations. Two leading VVD parliamentarians, for instance, wrote an article in 2011 quoting the *Koua Poirrez* case, in which an inhabitant of France, who did not have French nationality and had never paid taxes, was granted social benefits, as well as the *MSS* v. *Greece* case that curtailed the possibility of sending immigrants back to Greece.[76] The VVD's coalition partner, the CDA, also had parliamentarians who were very critical of the ECtHR, like Çörüz who proposed a motion in December 2010 stating that the ECtHR had fundamentally affected national legislation and that 'countries need clear space to make policies on the basis of their unique national character [*eigenheid*]'. He also called upon the Netherlands to advocate more respect for the margin of appreciation in Europe.[77]

The VVD Minister of the Interior of the time, Opstelten, indicated that Çörüz's motion (calling for a strengthening of the margin of appreciation) was an endorsement of his government's policies.[78] The government was strongly critical of the ECtHR and – in the process of negotiating on the agreement that would be the basis for the coalition government – quietly investigated whether the Netherlands could withdraw from the convention.[79] In its 2011 human rights strategy, the government recognised the importance of the court but stated that it was:

> an important means of enforcing structural human rights improvements in countries with a limited human rights tradition, particularly in Eastern Europe. At the same time, the Netherlands believes that the Court must not undermine its own authority by handing down judgements [sic] on cases that are only tangentially concerned with human rights. This can cause proliferation of case law and undermine support for the Court. It is important to prevent the Court from becoming an automatic fourth court of appeal for non-human rights-related cases'.[80]

The government promised parliament that it would advocate a stronger margin of appreciation, as well as proposing measures to reduce the court's backlog. Whereas parliament generally followed the government, this stance received severe criticism in the Senate, amongst senators affiliated to the governmental parties and others alike. The widely supported motion that Bemelmans-Videc put forward in the Senate held that the government's position that Strasbourg ruled on issues only 'tangentially' related to human rights was incorrect and called upon the government to get 'in line with 60 years of Dutch human rights policy … [and] continue the support for human rights called for by the ECHR and the case law of the court'.[81] In the same year, the president of the Dutch Supreme Court also explicitly expressed support for the ECtHR, stating that 'It is precisely in our internationalizing world that it is a great good that Europe has an international judge that stimulates that all inhabitants of the Europe of the Council of Europe, wherever they live, are treated

decently and civilly by their governments.'[82] In line with the formal governmental stance, the Dutch Minister of Security and Justice was active during the Brighton Conference of 2012 regarding stimulating court reform and addressing its backlog.

The fall of the Rutte cabinet in 2012, which so strongly depended on the extreme right Freedom Party (PVV) for support, partially put an end to explicit government critiques of the court. The political and public discussion, however, did continue as a coalition government made up of the VVD and the Social Democrats (PvdA) with the same prime minister (Rutte) came to power. In autumn 2012, VVD parliamentarian Taverne proposed an amendment to the constitution that would put an end to the supremacy of international law over national law, and to judicial review altogether.[83] A ruling by another Strasbourg monitoring body, the European Committee of Social Rights, holding that the Netherlands should provide undocumented migrants with shelter, was vehemently rejected by the Dutch government in 2014.[84] The State Secretary of Safety and Justice set out that the provisions were not binding, and that the Dutch government would wait for the Committee of Ministers before acting upon them.[85]

In all, the general governmental deference towards Strasbourg, and support for the supremacy and legitimacy of its case law, underwent a swift decline after 2010. This decline might have been instigated by discussions in the popular media and the coalition governments of the time, but it also coincided with a deeper current of populism and Euroscepticism. Support for EU membership has undergone a marked decline in the Netherlands, from 80% in 2005 to under 61% in 2013.[86] In focus group interviews, the Dutch public say they know very little about Europe, but that their main concerns include a loss of sovereignty and too much legal interference in national affairs.[87] There is good reason to assume that such Eurosceptical sentiments also extend towards the Council of Europe, even if this is a wholly different entity than the EU: the public at large, and even the media, regularly confound the EU and the Council of Europe, which both go under the heading of 'Europe'. The specific concerns voiced by the public – concerning the lack of sovereignty and legal interference – also speak to the role of the ECtHR. The op-eds and parliamentary discussions cited above often refer to 'European judges' and 'European interference' in pointing towards the Court in Strasbourg.

A crisis of legitimacy?

In exploring the degree to which the Dutch discussions point to a crisis in the legitimacy of the ECtHR in the country, this article will deploy a subjective (and thus empirically based) understanding of legitimacy and consider all four dimensions as developed by Scharpf and Schmidt: that of the *input*, the *throughput*, the *output* and also – departing from the work of others – that of the *demos* concerned. The general legal, policy and academic focus in the Netherlands is on the *throughput* and *output* dimensions of the court's work, whereas the real problem – as will be argued below – lies with *input* legitimacy and the European *demos.*

Let us begin with those dimensions that were highlighted in Dutch policy discussions and in the remedies. A large part of the focus concerned *throughput*: the efficacy, transparency and accountability of the process, interpreted here as concerns about the backlog of nearly 150,000 cases in 2012.[88] Addressing this backlog was the main aim of the conferences in Interlaken (2010), Izmir (2011) and Brighton (2012). The latter resulted in the Brighton Declaration, which emphasised implementation at the national level, reconsideration of the court's admissibility criteria, more use of pilot judgments, and adoption of protocols No. 14 and No. 15 (meant to ensure more effective implementation of judgments and faster procedures).[89] The amendments adopted during these conferences led to a reduction

of the court's backlog to 63,000 in 2013, leading the government to reflect positively on the 'visible Dutch role' in assuring 'better functioning and fighting against the backlog'.[90]

A second main focus in the analysis of what was wrong with the court, and what the remedies should be, concerned the *output* legitimacy and focused on widening the court's margin of appreciation. Protocol 15, which resulted from the Brighton conference, called for the codification of the principle of subsidiarity and the margin of appreciation in the convention. Even if the Dutch government went out of its way to assure parliamentary critics that this was a mere codification of the status quo, the reasoning here appeared to be that of Çörüz's motion in parliament the year before, that held that 'countries need room to make their own policies and respect for their national particularities and need the margin of appreciation for this'.[91] Here, it is interesting to note that the Netherlands has not been confronted with rulings against it that led to public outrage because they did not correspond with national values: cases like *Salah Sheekh* and *Jeunesse*, both a result of restrictive immigration policies, did make headlines but were not perceived as an assault on the national identity.[92] There is a contrast with the United Kingdom, where cases like *Hirst* – in which the court held that a blanket ban on voting rights for prisoners violated the ECHR – caused widespread public debate.[93] In the Netherlands, even the recent judgment in the case of *Jaloud*, on the extraterritorial application of the convention in the case of killings by Dutch soldiers, did not capture the headlines.[94] The propagators of a smaller and amended role for the court thus generally pointed towards cases against other state parties which, because of the de facto *erga omnes* jurisdiction of the court, have direct effect in the Netherlands. The *MSS* case was frequently cited as one in which the court overstepped its mandate in 'interfering' with elected parliaments' ability to set immigration laws and in which it had thus diminished its legitimacy.[95] A case that did lead to a large amount of debate within the Netherlands was that of the Staatkundig Gereformeerde Partij (SGP, *Reformed Party*) political party, which, on religious grounds, refused to admit women to the ballot list.[96] This case was highly politically sensitive in the Netherlands, as it concerned the oldest Dutch political party which had – traditionally – always been able to count on the support of other Christian parties. After a protracted set of hearings in the Netherlands, the case was put to the ECtHR, which, however, in a remarkably substantive ruling of inadmissibility pointed towards the Women's Convention and the Dutch Supreme Court's ruling that this practice violated international law in general, to declare the case to be manifestly ill-founded and thus inadmissible.[97]

The discussions above on the legitimacy of the ECtHR in the Netherlands and the measures that followed them, however, did not seem to touch upon some real shortcomings in the legitimacy of the court pertaining to other dimensions. There was very little attention to *input* – the notion that the court's rule should be based upon the widest possible consensus amongst individuals and groups affected. Here, a first concern is the lack of knowledge of the court's existence and of its activities in the Netherlands. Human rights education does not form part of the Dutch school curriculum, and the average Dutch citizen has never heard of the ECtHR or of the ECHR.[98] This explains why Dutch pupils, but also journalists and politicians, confound the European Charter of Fundamental Rights and Freedoms and the ECHR, for instance in thinking that the court in Strasbourg is an EU court. There is no specific research on the ECtHR and the convention, but a survey conducted in 2010, gives a good indication of the lack of appreciation of the importance of the convention in the Dutch constitutional dispensation. When 399 respondents were asked the open question of where they thought the human rights most relevant to them were codified, they offered the answers as shown in Table 1.

Table 1. Sources of human rights.

Source	Total (%)
Constitution	19.9
Universal Declaration on Human Rights	9.1
Convention on the Rights of the Child	4.9
European Convention on Human Rights	3.7
Geneva Conventions	3.6

Notes: Open question, N = 399. The survey was held on a train (the Freedom Train, that followed the normal schedule but was dedicated to telling stories of freedom), with a population that was relatively higher educated than the average Dutch person, and relatively younger (38 years old). A more representative survey would probably yield lower results in terms of knowledge.

The fact that even the Convention on the Rights of the Child is better known than the ECHR in the Netherlands is striking, particularly given the importance of the latter in securing rights for Dutch citizens. It is closely related to a lack of knowledge on the Council of Europe and its mission to promote democracy, human rights and the rule of law in general.

Another element that negatively affects the court's input legitimacy is the country's deep-rooted tradition of parliamentary democracy and consensual decision-making.[99] In one of the few European countries that does not allow for constitutional review, the fact that judges *are* allowed to review acts against international treaties is increasingly considered an anomaly.[100] This tendency towards majoritarian decision-making and judicial restraint is only deepened by the rise of populism in the Netherlands since the beginning of the millennium: populist parties like the PVV have not only served to 'normalise' anti-immigration viewpoints but have also strengthened majoritarianism and diminished support for minority rights.[101]

The deepest threat to the court's legitimacy, however, is the one least recognised by lawyers and scholars. It concerns Scharpf's 'we-identity', the shared adherence to the polity at stake, the *demos*. The lack of knowledge on human rights in general, and the ECHR in particular, mean that critiques of Europe are extended to the ECtHR and that there is little appreciation for the relevance of the court in safe-guarding fundamental rights in the Netherlands. Critics of the court play on general anti-European sentiments to critique the court in Strasbourg. This dimension was well captured in an op-ed by parliamentarian Halsema and constitutionalist Peters, titled 'Why Would a Russian Judge Decide on our Laws? Let Dutch Judges Review against Fundamental Rights'.[102] Apart from the flawed reasoning – Dutch judges, after all, can and do apply the ECHR every day – the article pointed to a deep and growing sentiment that values national constitutional identity over the internationalism that has classically characterised the Dutch constitution. The fact that a Constitutional Review Commission was asked, in 2008, to consider whether it would be possible to strengthen the 'fragile consciousness' of the constitution in the Netherlands, and to stop a situation in which Dutch citizens had to 'rely on the international legal order' for protection of their fundamental rights, is another tell-tale sign of a trend from internationalism towards nationalism in constitutional affairs.[103] Part of this trend concerns the general scepticism towards Europe in general as described above. Another part is all about the celebration of what are considered national, home-grown values like equality, tolerance, 'active citizenship' and willingness to assimilate in the Netherlands.[104] To give an example, the national civic education curriculum and the civic integration test emphasise an

ill-defined set of Dutch values like the preparedness to assimilate as a marker of citizenship instead of fundamental rights.[105]

Conclusion

Legitimacy is in the eye of the beholder and the degree to which the ECtHR is subject to a severe crisis of legitimacy in the Netherlands depends on the dimensions of legitimacy that one takes into account. This article has argued that it is important to employ a subjective understanding of legitimacy, assessing the court's process (*throughput*) and its rulings (*output*) but also the notion of the rule of law it propagates (*input*) and, most importantly, the community that set it up (the *demos*). Given the lack of knowledge on the court, the degree to which it is associated with 'Europe', and the rise of Euroscepticism, the future of the ECtHR's legitimacy in the Netherlands is much bleaker than when one merely considers throughput and output. The increase in populism and nationalism in the Netherlands could well threaten the legitimacy of the ECtHR. The fact that the Netherlands, unlike the United Kingdom, has so far not seen any rulings against it capture media attention and the public imagination as an 'encroachment upon national identity' does not mean that this will not take place in the future. If it does, the measures taken against what were perceived as the court's problems (its backlog and a reaffirmation of the margin of appreciation) will most probably not keep the Dutch populace from a negative response. The chances of such a response are only heightened by the lack of knowledge in the Netherlands of the court's existence, rationale, case law and relevance.

Of course, this discussion is of wider relevance than just the Netherlands and the ECtHR. Here, two general lessons can be drawn. The first concerns the importance of a clear conceptualisation of what constitutes legitimacy, with an eye for its subjective dimensions. In assessing the legitimacy of international courts, all too often the way in which the population concerned views the *demos* that set up the court – be it the Council of Europe, the African Union, the Americas or the United Nations – is overlooked. Nevertheless, the public at large, and the politicians and media representing it, do relate their support for 'Europe' to their support for its courts and the rights these defend, and thus couple support for the *demos* to support for courts set up by it. These perceptions, however, also impact upon the credibility of the courts concerned and their rulings, and thus have to be part of the analysis. The emphasis on subjective legitimacy also calls for more research on the perceptions of the populace and all major stakeholders of all dimensions of the legitimacy of a given human rights regime.

A second observation is how there well might be wider trends affecting the legitimacy of human rights regimes in general, and how these always play out in, and are shaped by, particular contexts.[106] The general trends are easy to discern: the rise of populism and nationalism, a fatigue and disappointment with human rights and the rise of alternative ideologies, whether religious or otherwise. These, for one, feed the wave of anti-Strasbourg sentiments all over Europe. In this sense, the case of the Netherlands discussed here can be considered representative of anti-Strasbourg sentiments in most of the nations that founded the convention. At the same time, the case of the Netherlands shows how specific conditions play into the debate: the government in place and the rulings against a given country, the specific tradition of consensual decision-making and parliamentary sovereignty, a lack of knowledge of what the court all shape the local debate, and make it different from – for instance – the British discussion.

It is only in adopting an empirical approach to the concept of the legitimacy of a human rights court and combining this with an eye for local circumstances that it is possible to

make the type of analysis needed to not only assess whether there is a crisis of legitimacy, but also what the approach towards remedying it could and should be.

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87. Ibid., 33–7.
88. Antonio Bultrini, 'The Future of the European Convention on Human Rights after the Brighton Conference', in *IAF Working Papers* (Rome: Istituto Affari Internazionali, 2012).
89. Committee of Ministers of the Council of Europe, 19 and 20 April 2012, *Brighton Declaration*, High Level Conference on the Future of the European Court of Human Rights. See also: Alastair Mowbray, 'Protocol 14 to the European Convention on Human Rights and Recent Strasbourg Cases', *Human Rights Law Review* 4, no. 2 (2004): 331–54.
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91. House of Representatives, 4 July 2014, 33873 (R 2026), no 5, Goedkeuring van het op 24 juni 2013 te Straatsburg tot stand gekomen Protocol nr. 15 tot wijziging van het Verdrag tot bescherming van de rechten van de mens en de fundamentele vrijheden, nota naar aanleiding van verslag. See also the Motion-Çörüz, proposed 29-32500-VI on 25 November 2010 and the underlying debate, from which the quotation is taken.
92. *Salah Sheekh* v. *the Netherlands*, ECtHR, 11 January 2007, 1948/04 concerned a violation of art. 3 in sending a Somali asylum seeker back home. *Jeunesse* v. *the Netherlands*, ECtHR, 3 October 2014, 12738/10 concerned the right to family life, and held that the Netherlands could

not extradite an undocumented mother whose children were born and raised in the Netherlands. The case of *Hirst* v. *the UK*, ECtHR, 6 October 2005, 74025/01 concerned voting rights for prisoners and was widely perceived and quoted by the media as going against British traditions and national sentiments.

93. *Hirst* v. *the United Kingdom*, ECtHR, 6 October 2005, 74025/01.
94. *Jaloud* v. *the Netherlands*, ECtHR, 20 November 2014, 47708/08 on the shooting by the Dutch military at an Iraqi roadblock, and the extraterritorial application of the convention.
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