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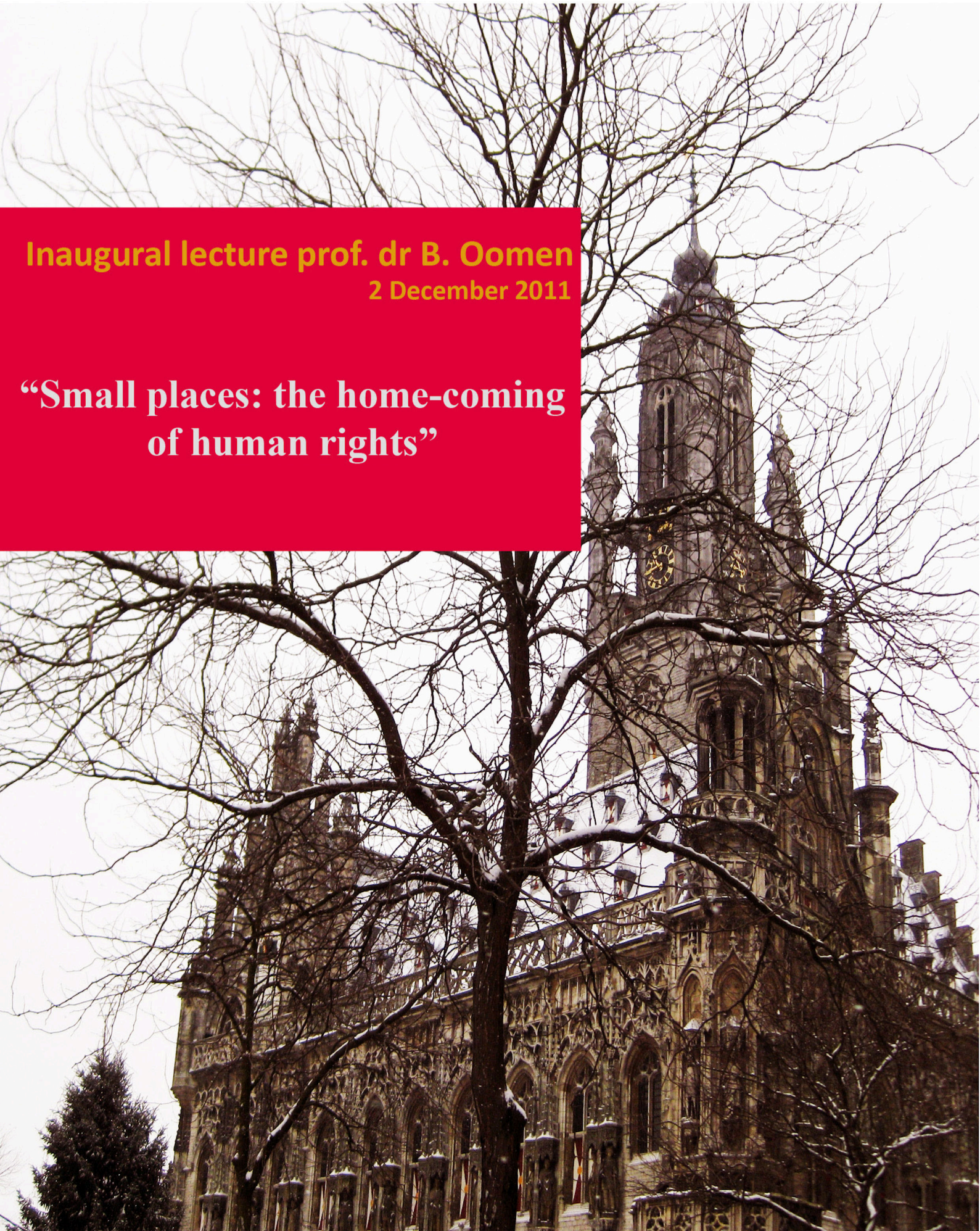

Inaugural lecture prof. dr B. Oomen

2 December 2011

"Small places: the home-coming of human rights"

SMALL PLACES:
THE HOME-COMING OF HUMAN RIGHTS IN THE NETHERLANDS

Inaugural lecture by
Prof. dr B.M. Oomen
Utrecht University chair in the
'Sociology of Human Rights'

Short version delivered
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at 16:15, at Utrecht University's
Roosevelt Academy
In Middelburg

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Honourable rector magnificus
Honourable mayor
Honourable deans, members of the provincial and municipal executive
Dear colleagues, students and friends

You might have recognized the song that Zahra Yusifli played upon our entrance as 'Happy days are here again'. This is not only the song that some of my colleagues would like to see as the Roosevelt Academy theme song, but most of all a song associated with Franklin and Eleanor Roosevelt.[1] It stands for 'A world made new', not only in the United States in the 1930s, but also after the Second World War.[2] In those days, using the small window of opportunity created by the collective dedication to never again have the world face the horrors of the Second World War, a Commission chaired by Eleanor Roosevelt drew up the Universal Declaration of Human Rights, which was adopted by the UN General Assembly on the 10th of December 1948. Ten years after the adoption of this 'magna carta for all mankind', Eleanor Roosevelt qualified its value by pointing at the importance of its realization. In what is probably one of the most famous quotes in human rights history, she said:

> "Where, after all, do universal human rights begin? In small places, close to home - so close and so small that they cannot be seen on any map of the world. Yet they are the world of the individual person; the neighborhood he lives in; the school or college he attends; the factory, farm, or office where he works. Such are the places where every man, woman, and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world."[3]

The lofty ideals that the former chair of the Human Rights Commission helped formulate in the Universal Declaration of Human Rights had to be brought home, acquire meaning in small places. It is this topic - the way in which human rights acquire meaning in small places - that I would like to discuss with you today. Let me, before I set out the outline of today's lecture, ask you to think a bit about human rights, and to reflect on what topics, and issues come to mind…If you are like the average Dutch audience, you would automatically associate human rights with people and places far away. Today, however, I would like to concentrate on how human rights acquire meaning in the Netherlands, in a province like Zeeland, in a place like Middelburg. My central thesis will be that many pressing social problems in the Netherlands are often not considered human rights violations, even where such a frame could make a difference in addressing the problems concerned.

Let me give you an example to keep in mind during the rest of this lecture. Last year, in a sad example of a death foretold, a man on temporary release awaiting trial for domestic violence and sexual abuse of his daughter shot two of his children and attempted to kill his wife here in

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[1] Not the RA Anthem, as this is the melody written by Cuyler van Dyck and Douwe Eisenga and commissioned by the Roosevelt Student Association and the Graduation Team 2011.
[2] This qualification of Eleanor Roosevelt of her times is also the title of M.A. Glendon, *A World made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, 2002, p. 333.
[3] ELEANOR ROOSEVELT, remarks at presentation of booklet on human rights, In Your Hands, to the United Nations Commission on Human Rights, United Nations, New York, March 27, 1958, cf http://www.udhr.org/history/inyour.htm for the whole speech

Zierikzee. The death had been foretold on many occasions.[4] The man had been incarcerated for a similar offence before and had neglected restraining orders. The public prosecutor and the investigating judge had pleaded with the judges not to release him, amongst others because he had attempted to buy a gun from jail. The wife had sought the assistance of the mayor and the police, and even given an interview with the local newspaper whilst he was still in prison, literally stating that she feared that her husband would kill her once released. These killings could be considered as not only a criminal act but also as a violation of the right to life for which – under the doctrine of positive obligations - at least some responsibility could be attributed to the authorities in charge. The judges who let the man go, the prosecutor who – in spite of protocols – did not warn the wife, the mayor who failed to act. Whilst all authorities strongly regretted what had happened, the issue was not discussed against the background of the right that this woman, and her children, had to the protection of their life by the authorities, and the general critiques of the Dutch approach of domestic violence. A similar approach could be seen when a son-in-law gone wild killed his parents in law, mr and mrs Schroevers, this summer here in Middelburg. In reflecting on the terrible incident there is hardly any attention for the rights of potential victims to protection by the authorities.[5]

This is merely one example, close to home, of the lack of reference to rights in formulating social policies. I will discuss this topic, and try to provide an explanation, in the following order. First, I will describe how, over the past two decades, human rights have increasingly acquired meaning in the sense as described by Eleanor Roosevelt. Subsequently, I will focus on the Dutch attitude towards human rights, which I will qualify as human rights exportism. Next, I will try to explain this Dutch attitude towards human rights on the basis of a more general model for understanding how human rights acquire meaning, a model that looks at the legal framework, legal culture and legal consciousness and at the role of the actors involved. Finally, I will concentrate on three aspects of the 'home-coming' of human rights that will function as a research agenda for the coming years: the rise of human rights cities, the role of human rights education, and processes of rights resistance. Each section: on home-coming in general, on human rights exportism, on explaining for it and on the research agenda, will be introduced by the Roosettes.

Before I continue, however, it is important to define what I mean by 'human rights' and by 'acquiring meaning'. Human rights, can simply defined as those fundamental rights enshrined in international treaties.[6] Substantively, however, there is a lot more to say. Central features of

[4] Cf www.pzc.nl (familiedrama Zierikzee); House of Representatives, 28345-102, Aanpak Huiselijk Geweld, 10 March 2010.

[5] Cf J. Naeye et al., *Van Huiselijk Geweld Naar Moord: Verslag Van Het Onderzoek Naar De Politie- En Justitiecontacten Met Fred B. Voorafgaande Aan Zijn Aanhouding Als Verdachte Van De Dubbele Moord in Middelburg Op 19 Juli 2011*, 2011.

[6] J. Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 23. This being said, there is an enormous variance in the types of obligations that the hundreds of rights laid down in international treaties put on states and, increasingly, on other entities (as duty-bearers) and the rights that they grant to, primarily, individuals (as rights holders. The flat prohibition of torture as enshrined in the ICCPR and CAT, for instance, differs strongly from the state obligation to modify the social and cultural conduct of men and women in CEDAW, or the right to shelter as laid down in the ICESCR. Some human rights, as Schmidt put it, are more of a damp squid than others S. Halliday et al., *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004, p. 278.In general terms, social and economic rights will call for positive action, and extensive resources, whereas civil and political rights are – grossly - easier to implement. (D. Galligan et al., 'Implementing Human Rights', in S.

all fundamental rights are the fact that their normative power does not derive from their mere codification and institutionalization, but also from their assumedly 'suprapositive' character.[7] Human rights, in addition, have a number of features in addition to the fundamental rights called constitutional rights here. They, as Gardbaum has convincingly argued, give states an interest in how other governments treat their populations, create an external stage for the development of constitutionalism, add an international dimension to the separation of powers and – most notably – enshrine the rights of human beings instead of those of citizens.[8]

If one looks at Dutch law, it is important to first set out how human rights are part of the law of the land, and even have privileged status above constitutional rights. There is also a large overlap between human rights as laid down in international treaties and fundamental rights included in the Dutch constitution – even if this overlap is not as large as many people expect. But there are also differences between the rights that I will call international human rights and constitutional rights. For one, constitutional rights are often formulated more precisely, with the grounds on which and the ways in which they can be limited clearly defined. Human rights are often formulated much less precisely, amongst others as a result of the fact that they are negotiated in multilateral settings and are even more of a political compromise than is the case domestically.[9] Whilst the need for an international treaty, with specific rights, does not need to have originated in the Netherlands, new constitutional rights are only taken up after a lengthy period of concerted citizen effort in the country itself.

Whilst it is virtually impossible to compare the hundreds of rights laid down in international treaties to the rights defined in the Dutch constitution, it is safe to say that – for all the overlap – a number of accents in international human rights discourse differ from the protection given to citizens by the Dutch constitution. For one, a number of the most fundamental and non-derogable rights laid down internationally are not included in the Dutch constitution: the right to life and the prohibition of cruel, degrading and inhuman treatment, for instance through torture. Generally, international human rights discourse and its interpretation by courts and legal scholars, puts more emphasis on responsibilities than the Dutch constitution and other laws do.[10] Next, a number of social and economic rights that are considered as subjective rights – in the sense that individuals can call on them in court – like the right to education, and the right to health care, in the international realm are phrased as mere programmatic rights in the Dutch constitution.[11] Finally, the international attention given to the rights of particular groups – be it the children, the disabled or women as in the UN Conventions – or the cultural and minority rights guaranteed by many other international legal instruments, lack a domestic counterpart in the Netherlands. Because of these different accents, explicit reference to the international human rights framework instead of domestic laws, whether in court or – my concern here – social and

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Halliday et al. (eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004, pp. 23-55).

[7] G.L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', 2003 *SLR*, pp. 1865.

[8] S. Gardbaum, 'Human Rights and International Constitutionalism', in J.L. Dunoff et al. (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, 2009, pp. 253-254.

[9] G.L. Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', 2003 *SLR*, pp. 1863., B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 2009

[10] Here, it is interesting to note that the Dutch discourse on citizenship in politics and society does strongly emphasize responsibilities.

[11] Cf F. Coomans, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, 2006, p. 451., F. Vlemminx, 'The Netherlands and the ICESCR: Why Didst Thou Promise such a Beautous Day?', in F. Coomans (ed.), *Justiciability of Economic and Social Rights: Experiences from Domestic Systems*, 2006, pp. 43-67.

political debate, could lead to a different assessment of the rights of individuals (as rights-holders under international human rights law) or of the responsibilities states or even of other actors (as duty-bearers).

Human rights are law, but they are also much more than that. Human rights have increasingly become a language in which to state claims, an important political resource for reasons that go much further than their legal power alone. As a discursive frame, they enable domestic actors to link their social and political concerns to global discourses and the resources that that underpin them. Frames, after all, are ways of 'packaging and presenting ideas that generate shared beliefs, motivate collective action and define appropriate strategies of action'.[12] Next to law, human rights point at values, and at good governance.[13] Rights talk, as many authors have pointed out, is increasingly 'a core aspect of a new global, transnational culture, a *sui generis* phenomenon of modernity', which entails specific constructions of the 'self and sociality, and specific modes of agency'.[14]

This wider understanding of human rights is also important in setting out how human rights acquire meaning. From a schematic point of view, the global human rights regime can acquire meaning through a number of different, and often overlapping, mechanisms, each with different actors driving the process. At the most basic level a government can sign and ratify a human rights treaty after which, in the Netherlands, it becomes part of domestic law upon promulgation. A more comprehensive effort can exist of reviewing existing legislation and policies against the human rights laid down in the treaty, and amending them where necessary: it is common, in the Netherlands, to go through this process before ratifying a treaty. A step further would consist of the formulation of new policies destined to realize the treaty rights. In all cases, the government will be the driving force, even if it can well be spurred to do so by civil society, parliament, specific governmental departments or – surprisingly often – influential individuals.

A wholly different mechanism of enforcement is via human rights litigation, in which lawyers demand, and judges order, that states comply with treaty obligations. Here, scholars have often pointed at the way in which successful litigation depends on factors like approval by parliament and the executive, vulnerable defendants and responsive judges, as well as support amongst the public at large, but also pointed at the limits of rights litigation.[15] A next phase in the continuum would be the situation in which the right in question, and the treaty in which it is laid down, actually become an important framework for public and political discourse on a given social problem, and a rallying point for a variety of actors seeking to address that problem. Finally, the right in question can be considered to (partially) have impacted upon society if the infringements upon that right actually decreased, as often measured by human rights indicators. It is in this broad sense that I will understand 'human rights acquiring meaning' today.

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[12] S.E. Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle', 2006 *American Anthropologist,* no. 1, pp. 41.

[13] S.E. Merry et al., 'Law from Below: Women's Human Rights and Social Movements in New York City', 2010 *Law & Society Review,* no. 1,

[14] J.K. Cowan et al. (eds.), *Culture and Rights: Anthropological Perspectives,* 2001, pp. 12.

[15] H. Tolley, 'Interest Group Litigation to Enforce Human Rights', 1990 *Political Science Quarterly,* no. 4, pp. 617-638. and G.N. Rosenberg, *The Hollow Hope: Can Courts Bring about Social Change?* 2008 respectively

1. THE GENERAL HOME-COMING OF HUMAN RIGHTS

Where-ever one looks, from Argentina to Zimbabwe, and whatever understanding of human rights one uses, it is clear that the body of rights laid down in the Universal Declaration has increasingly acquired meaning in small places. Human rights, it has been said, have become 'global esperanto' of our age, a 'moral lingua franca' in times of secularism, in which globalization is paired with fragmentation. After decades of emphasis on standard-setting, the formulation of human rights, recent years have brought more and more attention for their actual implementation. Here, four key forces that characterize the place of rights in global politics today: their expansion, their external enforcement, their emancipation and their domestication.

Since the formulation of the Universal Declaration of Human Rights in 1948, the seeds sowed in this non-binding document have germinated into a full-fledged human rights regime, laid down in hundreds of international and regional treaties and a host of non-binding documents complimented with monitoring bodies and other agencies to look into the interpretation.[16] From classic checks on state abuse of power, human rights have spilt over into the social, the economic and the cultural, and increasingly address the behaviour of individuals and companies. Whether it concerns combating poverty, insecurity, environmental degradation or disease: virtually all global problems have over times been reframed as rights violations with particular policy consequences attached to them.

Whilst first decades of the global ascent of human rights were mainly characterized by standard-setting, with lawyers and bureaucrats industriously negotiating and agreeing upon what many at the time still considered 'nonsense on stilts' – the real politics, after all, took place elsewhere – the end of the Cold War changed all this. By the end of the nineties the shifts in the global card play allowed for an increase in the actual external enforcement of human rights, whilst ethnic warfare provided an additional reason to make rights into realities. From Rwanda to Kosovo to East-Timor, the global community that had long been an abstract reality landed to become a palpable present, and the language it spoke was that of universal human rights.[17]

Thus, whilst the old ideal of a 'world court' is still far away, regional human rights courts like the ECHR – boosted by the accession of former East Bloc countries - demonstrate what its work could look like. Also, the ICC is a prime example of a case in which countries have agreed to partly shed their sovereignty in order to strengthen the ability of the world community to try individuals for those crimes that 'shock the conscience of mankind'. Doctrines like the notion of universal jurisdiction and the responsibility to protect, furthermore, increasingly successfully call on other states to take action when individuals shielding behind the sovereignty of another state – blatantly, grossly – commits international crimes. Additionally, a growing number of treaty bodies have a monitoring and individual complaints procedure that allow for international scrutiny of domestic politics and provide findings that – at the very least – can be raised within domestic politics.

A striking element here is the emancipation of rights talk. Human rights, in spite of all brave attempts to point out their mixed descent and links to all religious and cultural families in the world, were dominantly thought up in 18th century parlours and laid down in writing on the auspices of western powers.[18] These days, however, they are raised in the streets of Calcutta and

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[16] J. Donnelly, *Universal Human Rights in Theory and Practice*, 2003, p. 290.
[17] F. Fukuyama, *State-Building: Governance and World Order in the 21st Century*, 2004, p. 137., A. Brysk (ed.), *Globalization and Human Rights*, 2002, pp. 311.
[18] M.R. Ishay, 'The History of Human Rights: From Ancient Times to the Globalization Era', 2004.

Kampala, functioning as a weapon of the weak and directed not only towards the national governments, but also towards the international community at large. Just like, in for instance UN monitoring mechanisms, Ghanaians, Peruvians and Indians, hold to task the Americans, the English and the French in the language they once laid down.[19] This emancipation of human rights is closely related to the rise of (international) civil society as the driving force in rights realization, and the adoption of 'rights talk' as a dominant frame for a wide range of demands for social and economic justice made by these organizations.[20]

The landing of rights talk in all corners of the world has an institutional component as well. An important marker in the move from standard-setting and external enforcement towards the domestication of human rights lies in the Vienna Declaration of 1993, which opened the way towards the 'Age of Implementation' with countries promising to set up a national human rights institute and to emphasize human rights education in the so-called Paris principles.[21] Since then, the Office of the High Commissioner on Human Rights has opened field offices in countries all over the world and Special Rapporteurs carry out country visits, as does the Council of Europe Human Rights Commissioner. As crucial linchpin in the 'domestication of the international law', the agenda set out by the United Nations in 1993 has largely been carried out, with over a hundred national human rights institutions worldwide seeking to bridge international standards and their implementation at the national level.[22] In addition, human rights education both in- and outside of formal education have increasingly been implemented in all corners of the world.[23]

As a result, many western countries once at the forefront in formulating the Universal Declaration of Human Rights and the European Convention on Human Rights with as the main motivation the felt need, after the Second World War, to lay down their fundamental values as those of all humankind, were confronted with the 'home-coming' of human rights. The United Kingdom, for instance, party to the ECHR adopted a Human Rights Act in 1998, with as an explicit aim to give further effect to rights and freedoms guaranteed under the European Convention of Human Rights. In a recent book on the United States, titled *Bringing Human Rights Home* Soohoo a.o. focus on the role of the human rights movement in pressing a domestic human rights agenda.[24] Looking at Europe in *Human rights brought home,* Smith and Halliday have forms mechanisms of human-rights home-coming in countries like Sweden and France, together with mechanisms of resistance against it.[25] Whilst there are a few signs of a comparable trend taking shape in the Netherlands, they are few and far between: explicitly measuring social and economic policies against human rights is far from common in the Netherlands. In the following sections I will give a few indicators of 'the irrelevance of international human rights' to domestic policy debates, and a model for explaining this situation.

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[19] B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 2009

[20] H. Stacy, *Human Rights for the 21st Century: Sovereignty, Civil Society, Culture,* 2009, M. Glasius, *The International Criminal Court: A Global Civil Society Achievement,* 2006, p. 158.

[21] S. Cardenas, 'Human Rights in Comparative Politics', in Anonymous *Human Rights: Politics and Practice,* 2009, pp. 76-91.

[22] R. Carver, 'A New Answer to an Old Question: National Human Rights Institutions and the Domestication of International Law', 2010 *Human Rights Law Review,* no. 1, pp. 1-32.

[23] Cf www.hrea.org

[24] C. Soohoo et al., *Bringing Human Rights Home: A History of Human Rights in the United States,* 2007

[25] S. Halliday et al., *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context,* 2004, p. 278.

2. HUMAN RIGHTS EXPORTISM

On the 10th of December 2009 the Dutch minister of foreign affairs handed out the 'human rights tulip' to Shadi Sadr, an Iranian activist. The ceremony took place in the stately knights hall, at a stones throw from the Peace palace, the ICC and the other international tribunals that lead the Hague to call itself 'The city of Peace and Justice'. Surrounded by a sea of specially grown yellow tulips, the minister reminded the audience of how the human rights tulip symbolized the prominent place of human rights in Dutch foreign policy, and was intended to give political support to human rights defenders. The Dutch government, it was mentioned, was unique in giving such explicit encouragement to individuals whose main activity it is to take their governments to task.

That same afternoon, a hundred kilometers from the Hague, the national ombudsman held a speech titled 'The disappearance of human rights in the Netherlands'.[26] Referring to police shootings, the rights of children in care and the right to health in psychiatric institutions he mused at the absence of reference to human rights in public discourse in the Netherlands: 'human rights disappear in the sense that they don't figure in public and political debate, even when they are relevant'.[27] Those who frame social problems in the Netherlands as human rights violations, he said, can count on 'vehement, and often surprised, responses'.[28] The governmental response to the ombudsman's speech was furious, with the vice-president fuming that the remarks were 'irresponsible and improper'.[29] Clearly, whilst human rights were a cornerstone of Dutch foreign policies, they were deemed less suitable as a yardstick for domestic affairs.

This also becomes apparent if one looks into the way in which the Netherlands relates to the international monitoring mechanisms described above. In April 2008, for instance, the Netherlands underwent the first Universal Periodic Review of its human rights situation by the Human Rights Council. As one of the oldest democracies in the world, ranked 7th on the 2011 human development index, with a score of 0.95 for 'political stability and absence of violence' in the World Bank's 2008 governance indicators, a solid welfare state and 16 million people ranked amongst the happiest in the world, the country had long plead for such an integrated human rights test. Once the Human Rights Council agreed to the procedure, the Netherlands had offered to be part of the first batch to undergo it, with civil servants working overnighters to compile the report.[30] Fearful of critiques of the anti-Islam film Fitna just released the cabinet had asked a young female justice minister of Turkish descent to chair the 15-person Dutch delegation. She, as was later reportedly smugly to parliament, 'indicated that the government also recognizes problems, takes active measures to solve them and is open to recommendations and suggestions…thus enabling a dialogue that was evaded by other countries'.[31]

The main concerns raised during the review by countries ranging from the Holy See to Canada to Bangladesh concerned xenophobia and polarization, excessive force in repatriating migrants, the legality of prostitution, discrimination against migrants, sexual abuse of children and child pornography, the position of women in top positions, the lack of a national human

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[26] A. Brenninkmeijer, 'Verdwijnende Mensenrechten in Nederland', 2010 *NTM*, no. 3, pp. 277-285.
[27] Ibid, pp 278.
[28] Ibid., pp 277.
[29] L. Kok, 'Ombudsman Jaagt Kabinet in Gordijnen ', *Nederlands Dagblad*, p. 3.
[30] Human Rights Council, *National Report of the Netherlands*, A/HRC/WG.6/1/NLD/1, 2008.
[31] Letter to the House of Representatives, 4 September 2008, 31 200 V, 61.

rights institution, the fire in a detention centre, segregation of schools and the health rights of asylum seekers. The few newspapers to write on the review noted with some bemusement how Belarus had commented on the torture situation in the Netherlands, and were told by the minister that 'instead of wagging our finger we now show vulnerability. If other countries see this, they might dare do so as well'.[32] The recommendations by the Human Rights Council – on all the fields mentioned above - were sent to parliament but never discussed there. If the term UPR did come up in political or public discussions after 2008 it concerned human rights violations in other countries.[33] An interim-report on the Dutch progress, that indicated which recommendations the government ignored and which it carried out was never even sent to parliament. The civil servants who had worked on the report did, however, successfully offer their assistance to other countries who still had to undergo the review.

A similar mechanism is visible in the way in which the Netherlands relates to other UN monitoring mechanisms and promises made within the international context. The National Human Rights Institute, for instance, that was a part of the Vienna Program of Action and lead to the support of the Netherlands for these institutes in many other countries was only formally put in place in November 2011.[34] Whilst the Netherlands actively supports the Human Rights Education Associates, a global ngo in the field of human rights education, it still has to put in place the national action plan for human rights education promised to the UN in 2005.[35] The Concluding Observations and General Recommendations of a variety of UN monitoring mechanisms are hardly ever discussed in parliament, or in the press.[36]

To a country like the Netherlands, it seems, human rights are above all an export product, a moral cornerstone of foreign policy. This human rights 'exportism' should not be mixed up with the 'exceptionalism' often invoked to describe the American attitude towards human rights instruments.[37] Ignatieff has identified three types of American 'exceptionalism': 'exemptionalism' (the support for treaties as long as the country concerned is not subject to them), double standards and legal isolationism. The Netherlands, in contrast, has ratified virtually all of the main UN human rights treaties[38] and has a uniquely monist constitution which recognizes the supremacy and the direct effect of human rights law. Nevertheless, the main

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[32] 'Hoe Nederland mensenrechten 'net niet' naleeft: 'Vingertje heffen is voorbij', (How the Netherlands not quite lives up to human rights 'the time for wagging fingers is over') 16 april 2008, NRC Handelsblad, p. 1.

[33] Search parliamentary publications and lexisnexis, as of April 2008.

[34] Netherlands Institute for Human Rights Act 2011, as adopted by parliament on 22 November 2011, cf Kamerstukken 32467 and www.naareenmensenrechteninstituut.nl

[35] United Nations et al., *Plan of Action: World Programme for Human Rights Education,* 2006, B. Oomen et al., *Inspiratie Voor Mensenrechteneducatie: Democratisch Burgerschap En Mensenrechten in Het (Burgerschapsonderwijs),* 2010, p. 136.

[36] J. Krommendijk, *Non-Compliance with Concluding Observations of the HRC in the Netherlands: The ECHR and the ECtHR as One Explanation,* Maastricht Faculty of Law Working Paper No. 2011-8, 2011, J. Krommendijk, *The Impact and Effectiveness of State Reporting and Concluding Observations: The Case of the Netherlands,* 2010.

[37] M. Ignatieff (ed.), *American Exceptionalism and Human Rights,* 2005, J. Van der Vyver, 'American Exceptionalism: Human Rights, International Criminal Justice and National Self-Righteousness', 2001 *Emory Law Review,* no. 50, pp. 775-832.

[38] It has not yet ratified the International Convention on the Rights of All Migrant Workers and Members of Their Families of 1990 (A/RES/ 45/158) and the Convention on the Rights of Persons with Disabilities (A/RES/61/106) of 2008, nor the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/RES/63/117) of 2009.

motivation in developing international human rights law and determining its place in the domestic order seems to be to ensure its realization elsewhere: treaty ratification is not only a means to *look* good, but primarily intended to *do* good.[39] Let me illustrate this by briefly looking at the historical Dutch engagement with human rights, the way in which human rights are currently invoked in parliamentary discussions and in a number of specific current discussions.

2.1 HUMAN RIGHTS EXPORTISM: HISTORICAL BACKGROUND

A brief excursion into the history of the Dutch engagement with international human rights can serve as a first illustration. Art. 90 of the current Dutch Constitution, that calls on the government to promote the development of the international legal order, can be dated back to the intellectual tradition of, for one Grotius' commitment to developing 'that body of law, which is concerned with the mutual relations among States or rulers of states, whether derived from nature, or established by divine ordinances, or having its origin in custom and tacit agreement' for the sake of 'the welfare of man'.[40] It was in this tradition that T. Asser, for instance, organized the Hague Conference for the Unification of International Private Law in 1893 that later earned him the Nobel Peace Prize. Further Dutch steps towards the 'foundation for a world law' were taken during the Hague Peace Conferences of 1899 and 1907. When the ministers of Czar Nicholas II contacted Asser, looking for a place to further 'La paix par la justice' that would not arouse political sensitivities, the lawyer invited the hundred delegates from 26 nations to come to the mundane beachside town of Scheveningen.[41] It was here that 'a parliament of men' first came together to discuss world governance and a world court and laid the foundations for the Permanent Court of Arbitration. Whilst the 1907 follow-up conference, organized by Theodor Roosevelt, was generally considered a failure, the year did mark the start of the building of a 'temple of peace', the magnificent Peace Palace financed by the steel baron Carnegie that would house the PCA and, later, the International Court of Justice.[42]

In setting the agenda for the 3rd Peace Conference - which would never take place due to the outbreak of World War I – in 1910 the international law professor C. Van Vollenhoven gave an insight in how the Netherlands had come to see its role in the development of the international legal order.[43] In an article titled 'The Dutch mission' he argued that the Dutch history and position as a small country put it in a unique position to advocate an international court that would adjudicate both written and unwritten law, as well as an international police force. In addition, he advocated selecting half a dozen rights and obligations in the 1907 treaties which states would respect under all circumstances. Advocating this, he argued, was the Dutch vocation: 'If, in our days, the cirle of the influential and powerful other nations – its diplomats, lawyers, military – smile apathetically and in disbelief at this noble aim of world justice strengthened by a world military force, that let the Netherlands dare be the Joan of Arc'.[44] The

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[39] O. Hathaway, 'Do Human Rights Treaties make a Difference?', 2002 *Yale Law Journal*, pp. 111.
[40] H. Grotius, *The Law of War and Peace*, 1625, p. 1.
[41] A. Eyffinger, *The 1907 Hague Peace Conference, the Conscience of the Civilized World*, 2007, A. Eyffinger, *The Hague: International Centre of Justice and Peace*, 2003
[42] A. Eyffinger, *The 1907 Hague Peace Conference, the Conscience of the Civilized World*, 2007, p. 48.
[43] C. Van Vollenhoven, 'Roeping Van Holland', in C. Van Vollenhoven (ed.), *Mr. C. Van Vollenhoven's Verspreide Geschriften*, Vol. II, 1910, pp. 144-157.
[44] C. Van Vollenhoven, 'Roeping Van Holland', in C. Van Vollenhoven (ed.), *Mr. C. Van Vollenhoven's Verspreide Geschriften*, Vol. II, 1910, pp. 157., C. Van Vollenhoven, 'Holland's International Policy', 1919 *Political Science Quarterly*, pp. 467-478.

same ideals were echoed by the parliamentarian Serrarens who, in explaining Dutch neutral position in World War I, stated 'We who as neutrals are not being carried away by the passions of war, have the duty in these days to guard the higher ethical values for mankind and in particular for Europe'.[45]

This self-image of a Dutch vocation in developing international law, would continue to surface in debates on foreign policy. When the Dutch, in 1945, had managed to have inserted in art. 1 that the main aim of the United Nations would be 'to maintain international peace and security *with due regard for principles of justice and international law*', the minister of foreign affairs boasted to the Senate how 'the smaller countries are setting an example'.[46] Similarly, when the Dutch followed the UN call to set up a national advisory board on human rights the minister of foreign affairs stated that the Netherlands might be one of the first to do this because 'of our important mission in the international field, especially as the rights of man have been firmly anchored in our national spirit for centuries'.[47] Apart from this, the Netherlands' initial attitude towards the founding of the United Nations had been lukewarm. This was partly because of the fear of a reprisal of the League of Nations, that had fulfilled little of the hopes bestowed upon it by the Netherlands in joining in 1920, that 'the League will contain the gems of a true organization of peace and law for all peoples'.[48] The minister of foreign affairs Schaper described the meetings in San Francisco as 'dead boring' and 'endless blabla' destined only to seal the hegemony of the great powers by means of a bombastic document with no actual content.[49] The fear that the new organization would simply not go far enough in curbing the power of the great nations lead the Netherlands to advocate an insertion in art. 1 of the UN Charter, stating that the organization would operate with due regard for principles of justice and international law.[50]

To what extent was the formulation of the Universal Declaration considered relevant to Dutch policies? Partly as a result of its formulation a Constitutional Commission discussed the consequences of the efforts towards codification of fundamental rights at the international level for the national constitution. As prime minister Drees put it: 'The special attention [for the formulation of human rights] is understandable after all that the world has seen and sees in terms of denial of these rights…The question to what extent these rights in our constitution need to be reformulated, and whether – in addition to freedoms - a number of social rights need to be constitutionally guaranteed will be discussed by a Constitutional Commission'.[51] The first Constitutional Commission to look into these matters, however, would be divided over the issue

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[45] J.J.C. Voorhoeve, *Peace, Profits and Principles: A Study of Dutch Foreign Policy*, 1985, p. 51.
[46] N. Schrijver, 'A Missionary Burden Or Enlightened Self-Interest? International Law in Dutch Foreign Policy', 2010 *NILR*, pp. 219-220.
[47] Speech of the minister of foreign affairs B. van Boetzelaer van Oosterhout at the installation of the National Advisory Council on Human Rights, as quoted in M.C. Castermans-Holleman, *Het Nederlands Mensenrechtenbeleid in De Verenigde Naties*, 1992, p. 101.
[48] House of Representatives, debate on the 1921 national budget, III, Memorie van Antwoord, 17 December 1920, 9
[49] P. Malcontent et al., 'The Dutchman's Burden? Nederland En De Internationale Rechtsorde in De 20e Eeuw', in B. De Graaff et al. (eds.), *De Nederlandse Buitenlandse Politiek in De Twintigste Eeuw*, 2003, pp. 79.
[50] Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS xvi. Cf R. Van Ditzhuyzen et al. (eds.), *Tweehonderd Jaar Ministerie Van Buitenlandse Zaken*, , N. Schrijver, 'A Missionary Burden Or Enlightened Self-Interest? International Law in Dutch Foreign Policy', 2010 *NILR*, pp. 209-244.
[51] J. Pelle, *In De Staatsrechtgeleerde Wereld: De Politieke Geschiedenis Van Hoofdstuk 1 Van De Grondwet 1983*, 1998, p. 15.

of social and economic rights. It would also hold that the respect for certain rights in the Netherlands was so self-evident that there was no need to codify them; when the only woman on the commission argued for inclusion of the right to equality – in line with international human rights law – the chairman stated that there was no need for for the Netherlands to explicate this right: 'the international conventions aim to elevate backward countries'.[52]

The same approach, considering Conventions as yardsticks for others, guided the Dutch contribution to the European Convention on Human Rights, the first global step towards actually enforcing the rights promulgated in the UDHR. Whilst it was the Netherlands that, in May 1948, hosted the Congress of Europe during which 750 delegates, under the honourary chairmanship of Winston Churchill, decided to found the European Movement and aim for a European Convention on Human Rights together with a European Court of Justice, the Dutch attitude towards the Convention, particularly from the governmental side, would turn out to be strongly reticent.[53] The minister of foreign affairs, faced with a draft for the European Convention speedily drawn up by P.H. Teitgen in 1949, initially proposed to ditch the proposal altogether, by 'making it as small as possible', and getting rid of the notion of a monitoring mechanism.[54] During the first meeting of the Consultative Assembly the Dutch representative advised the *homo strasburgensis* to proceed in the same manner as a horse pulling a barge down the canal: 'let us proceed slowly, so the rope shall not be broken'.[55] In further negotiations this reticence remained, even if the Dutch delegates only dared to doubt explicitly doubt the use of the Convention in internal memoranda, and not during the meetings in Strasbourg.[56]

What were the reasons for these reservations? For one, the Dutch wanted to await the discussions on the UN Conventions. In addition, there was the idea that such a Convention would be superfluous 'now that the rights and freedoms are secure enough in the individual democratic countries of Europe'. [57] Also, the topics concerned lacked legal consensus: 'the international unification of the rights of man is only possible if there is consensus on the relationship between individual and community, as tailpiece of a process of international integration' and writing them down now would be premature.[58] The planned court was also considered a threat to the International Court of Justice, in the Hague. And finally, even if civil servants and ministers often reassured one another that such a Convention would be superfluous in the Netherlands, there was the nagging fear that certain Dutch practices might not be in line with the Convention, or that it would be abused by, for instance, the communists.[59]

When it became clear that movements towards a Convention could not be stopped, the Netherlands again concentrated upon inserting provisions in line with Dutch priorities and

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[52] J. Pelle, *In De Staatsrechtgeleerde Wereld: De Politieke Geschiedenis Van Hoofdstuk 1 Van De Grondwet 1983*, 1998, p. 34.

[53] Y.S. Klerk et al., 'Ratificatie a Contre Coeur: De Reserves Van De Nederlandse Regering Jegens Het Europees Verdrag Voor De Rechten Van De Mens En Het Individueel Klachtrecht', 1991 *RM Themis*, no. May, pp. 220-247., J.v. Lanotte et al., 'Hoofdstuk 3. Ontstaansgeschiedenis, Ondertekening En Inwerkingtreding Van Het Europees Verdrag Voor De Rechten Van De Mens', in Anonymous *Handboek EVRM. Deel 1 Algemene Beginselen*, Vol. 1; 1, 2005, pp. 57-57-83.

[54] Y.S. Klerk et al., 'Ratificatie Ã Contre Coeur, pp. 220.

[55] Travaux Preparatoires ECHR, vol II, p. 22-26

[56] See f.i. Notes to the minister by Mr Riphagen on the Dutch position during the first session of the Committee of Experts, National Archives NA 2.05.59.02, no 1498

[57] Internal memorandum to the Minister of Foreign Affairs, 26 October 1949, National Archives 2.05.59.02, 7398

[58] Internal memorandum to the Minister of Foreign Affairs, 21 January 1950, National Archives, 2.05.117, 7399

[59] Y.S. Klerk et al., 'Ratificatie a Contre Coeur: De Reserves Van De Nederlandse Regering Jegens Het Europees Verdrag Voor De Rechten Van De Mens En Het Individueel Klachtrecht', 1991 *RM Themis*, no. May, pp. 220-247.

practices. The Dutch interpretation of the freedom of education, as the positive state obligation to grant parents the right to educate their children as they wanted in schools with state grants was presented as a breaking point. Without such a provision (to become art. 2 of the 1st protocol), the delegates held, the Convention would never obtain a parliamentary majority. In addition, the Dutch sought to safeguard the trial of war criminals as was taking place at the time through the insertion of a limitation to the *nulla poena principle*, resulting in the addition of art. 7(2): 'this Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to the general law recognised by civilised nations'.[60] Tensions signaled but unresolved between Dutch practices and the emerging Convention included – again - the prohibition of Catholic processions and the practice of dismissing female civil servants after their marriage.[61]

After it became clear that the big powers like France, Germany and the UK, but also neighbouring Belgium would sign the Convention the Dutch would concentrate on emphasizing the need for clear definitions and lack of a supervisory mechanism. [62] 'The time has not yet come to set up a Court with the authority to interfere in the internal affairs of states'.[63] In the Committee of Ministers, therefore, the Dutch still voted in favour of strict definitions but against both a European Court of Human Rights and the possibility of individual complaints to it.[64]

After approval of the Convention and the protocol in 1954 it would be parliament that nudged government into approving the individual complaints procedure. In internal memoranda, the reasons for the government's reticence shift between a fear of abuse by 'querulous people', to the fear of tensions between certain practices and the Convention, the conceited conclusion that there were none of these tensions and the fear of an activist Commission.[65] It was the self-restraint exercised by the Commission, combined with the permanent pressure from parliament – partly via motions – that caused the ministers to discuss the issue again in 1957. The prime minister at the time, Drees, was not totally opposed to the ratification but did fear legal uncertainty and extra costs. Parliament, in advising the government, pointed out the symbolic importance of a country like the Netherlands accepting the individual complaints procedure, in referring to discussions on the matter by the International Commission of Jurist in New Delhi.[66] It was against this background that the individual complaints procedure finally, in 1960, also entered into force for the Netherlands.

In the 1960s and the 1970s, however, the Dutch started to play an active role in stimulating human rights as an integral part of the international legal order.[67] In the 1960s, for instance, the Dutch initiated negotiations on the setting up an individual complaints procedure to

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[60] Ibid.
[61] See f.i. the Letter from the Minister of Justice to the Minister of Foreign Affairs, 25 July 1950, National Archives 2.05.117, 7399.
[62] Instruction to the Dutch representatives in preparation of the decision of the Committee of Ministers on the ECHR, undated, National Archives, 2.05.59.02, 7398.
[63] Travaux Préparatoires, IV, p. 114, Mr. Patijn.
[64] Travaux Préparatoires, IV.
[65] Y.S. Klerk et al., 'Ratificatie a Contre Coeur: De Reserves Van De Nederlandse Regering Jegens Het Europees Verdrag Voor De Rechten Van De Mens En Het Individueel Klachtrecht', 1991 *RM Themis*, no. May, pp. 220-247.
[66] House of Representatives, 1959, 5359, 4, report on parliamentary discussion.
[67] M.C. Castermans-Holleman, *Het Nederlands Mensenrechtenbeleid in De Verenigde Naties*, 1992, H. Reiding, *The Netherlands and the Development of International Human Rights Instruments*, 2007.

the CERD and the ICCPR.[68] Under the influence of proactive civil servants, a progressive government and a supportive population, human rights would become more and more of a cornerstone of foreign policy in the 1970s, resulting in a full-fledged policy memorandum on the issue.[69] All this was in line with a report issued by a progressive think-tank in the early 1970s, that emphasized the role that the Netherlands had to play in changing the world, with international law as the main lever towards this change.[70] In an influential article in 1973, politician B. de Gaay Fortman set out the reasons why the Netherlands should assume to the role of *guiding nation (gidsland)* on the world stage. Such a guiding country, he argued, would have to be small. In addition, the Dutch population density and its interrelationship with the global economic order strengthened the need for propagating a just international order.[71] The term *guiding nation* would continue to surface in political debates since, for instance in the 2010 policy report by the Scientific Council for Government Policy, titled 'Attached to the World' that argued for a strong Dutch role in the 'niche market' of developing the international legal order.[72]

This emphasis on both the moral and the market-related reasons to strengthen international (human rights) law are in line with political analyses of what, over the years, has motivated the Dutch 'internationalist idealist' tradition, with its emphasis on the legal machinery to enforce norms.[73] Voorhoeve, who distinguishes this tradition in addition to the maritime-commercial and the neutralist-abstentionist tradition in Dutch foreign policy, sees it as a combination of seven factors: naiveté, pacifism, legalism, moralism, anti-militarism, weak patriotism and supranationalism.[74] Many historians have pointed out how developing the international legal order was very much in line with Dutch self-interest, as ' ploutos sits on pax' lap, wealth is a child of peace'.[75] A small player like the Netherlands, that earned much of its income on the world seas and in trade, only stood to benefit from international rules and institutions to enforce them vis-à-vis the larger countries.[76]

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[68] P. Baehr et al., 'The Promotion of Human Rights - the Netherlands at the UN', in P. Baehr et al. (eds.), *The Netherlands and the United Nations - Selected Issues*, 1990, pp. 23-34.

[69] Ministry of Foreign Affairs of the Kingdom of the Netherlands, *Human Rights and Foreign Policy: Memorandum Presented to the Lower House of the States General of the Kingdom of the Netherlands on 3 may 1979 by the Minister for Foreign Affairs and the Minister for Development Co-Operation*, 1979, J. Egeland, *The Politics of Humanitarianism*, Vol. Lecture on politics and humanitarianism by the UN Undersecretary of Humanitarian Affairs, 2004, J. Egeland, 'Human Rights. Ineffective Big States, Potent Small States', *Journal of Peace Research*, no. 3, pp. 207-213.

[70] The Commission-Mansholt, consisting of the PvdA, D66 and PPR. Cf J. Kennedy, *Nieuw Babylon in Aanbouw: Nederland in De Jaren Zestig*, 1997

[71] B. De Gaay Fortman, 'De Vredespolitiek Van De Radicalen', 1973 *IS*, no. 4, pp. 112.

[72] Wetenschappelijke Raad voor het Regeringsbeleid, *Aan Het Buitenland Gehecht: Over Verankering En Strategie Van Het Nederlands Buitenlandbeleid*, Vol. WRR report 85, 2010, p. 68-70.

[73] M.C. Castermans-Holleman, *Het Nederlands Mensenrechtenbeleid in De Verenigde Naties*, 1992, J.J.C. Voorhoeve, *Peace, Profits and Principles: A Study of Dutch Foreign Policy*, 1985

[74] J.J.C. Voorhoeve, *Peace, Profits and Principles: A Study of Dutch Foreign Policy*, 1985, p. 49-53.

[75] R. Van Ditzhuyzen et al. (eds.), *Tweehonderd Jaar Ministerie Van Buitenlandse Zaken*, , pp. 147.

[76] M. Kuitenbrouwer, 'Nederland En De Mensenrechten, 1795-1995', in M. Kuitenbrouwer et al. (eds.), *Geschiedenis Van De Mensenrechten: Bouwstenen Voor Een Interdisciplinaire Benadering*, 1996, pp. 156-201., M. Kuitenbrouwer, 'Nederland Gidsland? De Ontwikkelingssamenwerking Van Nederland En Gelijkgezinde Landen, 1973-1985', in J.A. Nekkers et al. (eds.), *De Geschiedenis Van Vijftig Jaar Nederlandse Ontwikkelingssamenwerking 1949-1999*, 1999, pp. 183-200., H. Reiding, *The Netherlands and the Development of International Human Rights Instruments*, 2007. In addition to analyzing the Dutch motives, historians have also pointed at the gaps between principles and practice in the development of international law. The Netherlands might be able to point at Erasmus and Spinoza to set out a tradition of tolerance, but were also amongst the largest slave traders in the world, and one of the last western countries to abolish slavery. In colonies like the Netherlands Indies

2.2 HUMAN RIGHTS EXPORTISM: QUANTITATIVE AND QUALITATIVE EXAMPLES

Whether genuine and effective or not, human rights have played a key role in framing and focusing Dutch foreign policies since the 1970s. That this is much less often the case where it concerns domestic policies becomes clear when one analyzes the subjects pertaining to which human rights were raised in parliament and in the newspapers over the past 15 years. An investigation into the context in which the notion of human rights was raised in the Dutch House of Representatives over the past decades, for instance, lead to the following insights.[77] Human rights were mentioned much more often in 2010 than they were in 1995.[78] In nearly 73 % of the situations in which human rights were raised (1639 documents), this concerned foreign policy.[79] Human rights are most often referred to in documents sent to parliament by the government, more than in parliamentary discussions, and in questions asked to the government. Out of the ministries that refer to human rights, Foreign Affairs and Justice invoke the notion most often, whilst the Ministry of Agriculture, the Ministry of Housing, Spatial Planning and the Environment and the Ministry of Education, Culture and Sciences hardly ever refer to the general notion of human rights in their policy documentation and debates pertaining to them in parliament.

Another, more qualitative way in which to pinpoint the place of human rights in policy-making in the Netherlands is by focusing on some of the major social issues at play in the country, and investigating to what extent the rights and responsibilities involved are understood in terms of international human rights. Here, again, there is a surprising lack of explicit reference to international human rights, even where these are applicable. Take, for instance, three important discussions in the Netherlands today: the political discussion on polarization and strict immigration policies, as it was scrutinized by the courts in the Wilders case, discussions on domestic violence, a prevalent problem in the Netherlands, and discussions on access to health care.

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the notion of 'ethical politics' did not keep the Netherlands from committing excesses like torture and the killing of civilians by special units in the late 1940s M. Kuitenbrouwer, 'Nederland En De Mensenrechten, 1795-1995', in M. Kuitenbrouwer et al. (eds.), *Geschiedenis Van De Mensenrechten: Bouwstenen Voor Een Interdisciplinaire Benadering*, 1996, pp. 156-201.. In an overview of the actual Dutch human rights record, Malcontent concludes that 'the rather pale contribution of the Netherlands to actually furthering the international legal order becomes even more colourless if one specifically takes human rights into account' P. Malcontent et al., 'The Dutchman's Burden? Nederland En De Internationale Rechtsorde in De 20e Eeuw', in B. De Graaff et al. (eds.), *De Nederlandse Buitenlandse Politiek in De Twintigste Eeuw*, 2003, pp. 75.

[77] All policy documents in the Dutch 'officiele bekendmakingen' for the years 1995, 2000, 2005, 2010 were screened for reference to the general term 'human rights'. This led to 1639 documents, which were labeled according to the Ministry responsible, the policy field at stake, and the type of parliamentary documentation. The aim of this research was to acquire insight into the relative frequency of the invocation of the term human rights: in foreign or domestic policies.

[78] In 574 as opposed to 152 documents. Generally, this relates to a general increase in parliamentary documentation; the relative attention given to human rights increased from 2.27 to 2.75 %.

[79] Of the 1639 documents analyzed 59.1 % of the documents was directly related to foreign policies, 13.7 % to budgetting (and thus also coupled to foreign policies). Other fields in which human rights were raised were: Integration and migration (49 documents, 3 % of the total), Corporate Social Responsibility (1.4 %), Medical affairs (1.6 %), Terrorism (2.3 %), Justice and Migration (1.6 %), the Constitution (1.3 %), Sustainable development (0.9 %). With many thanks to Vicky van Hassel, who carried out the research.

The Wilders case, in essence, concerned a clash of a number of fundamental rights: the freedom of expression held very high in the Netherlands, but also prohibition of discrimination and the freedom of religion.[80] Here, it is important to note how the increase in xenophobia and islamophobia has long been a concern to the international human rights community and a recurrent theme in reviews of the Netherlands.[81] Put crudely, one can say that international human rights law puts far more emphasis on the responsibility that comes with the freedom of expression than the Dutch constitution.[82] Nevertheless, this international legal perspective was hardly raised in the court case and the intensive public discussion surrounding it. This had everything to do with the relatively limited standing of plaintiffs, the individuals who wanted to set out how they felt that Wilders' utterances had led to discrimination and to a violation of their right to exert their freedom of religion. That these plaintiffs are taking the case up to the UN Human Rights Committee, was hardly front-page news in the Netherlands.[83] Newspapers concentrated on explaining how the decision of the human rights committee in this case is not 'binding', but did not discuss the central grievance: that Dutch state reluctance to take measures against this type of hate speech is against the country's human rights obligations.

Another example could be the one given at the beginning of my talk: Policies in the field of domestic violence in the Netherlands. Domestic violence is a persistent problem in the Netherlands, with more than 200.000 victims on a yearly basis. Whilst the latest figures do not include the amount of deaths, 49 people died of domestic violence in 2006.[84] The Dutch government initiated policies in the field of domestic violence under the heading *Private violence, a Public affair* in 2002, and has recently taken a number of legislative measures, for instance by introducing the possibility of having the violator removed from the house and put under electronic supervision.

Over the past years, international human rights monitoring bodies have increasingly set out what state obligations are in terms of protecting people against domestic violence. The European Court of Human Rights, to start with, has increasingly emphasized state obligations in protecting the right to life in relation to domestic violence. Whilst the right to life originally sought to protect individuals from police violence, and was invoked in discussions on abortion and euthanasia and the public instead of the private sphere, in cases like *Osman* and *Opuz*, the ECHR established that the state, under certain conditions, had positive obligations in the field of the right to life.[85] These obligations arise when it is established that the state 'knew or ought to have known' of the existence of a 'real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'. Whilst the 2009 *Ozman* case concerned Turkey its legal relevance for the Netherlands is crystal clear: The case was discussed in these terms in all the major legal periodicals. Similarly, domestic violence,

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[80] Final ruling in the Wilders case, Amsterdam District Court, 23 June 2011, LJN: BQ9001.

[81] Cf Concluding observations CERD committee Committee on the Elimination of Racial Discrimination Seventy-sixth session, 15 February – 12 March 2010, CERD/C/NLD/CO/17-18 or the statement by Mr Ban Ki-moon of 28 March 2009 (UN doc. SG/SM/11483).

[82] R. Lawson, 'Wild, Wilders, Wildst: Over De Ruimte Die Het EVRM Laat Voor De Vervolging Van Kwetsende Politici', 2008 *NJCM-Bulletin,* no. 4, pp. 469-484., T. Van Boven, 'Wilders Niet Alleen Nederlandse Zaak', *Trouw,*

[83] The case put to the UN Human Rights Committee can be found under http://content1a.omroep.nl/37c9e807e2785e092f84e66976a986d1/4ed2a2c3/nos/docs/171111_klacht_wilders.pdf

[84] Cf www.huiselijkgeweld.nl; the Law on Temporary Domestic Exclusion Order (Wet Tijdelijke Huisverbod), of 9 October 2008.

[85] Osman v. UK [1998] ECHR 23452/94 28 October 1998; Opuz v. Turkey [2009] ECHR 33401/02 (2 June 2009)

for instance in the Netherlands has long been a concern to a number of treaty bodies, who based themselves both on the right to life, other fundamental rights and the specific rights of women and children. I don't have the time today to dwell on all the recommendations in this field as part of the universal periodic review and by the Committees overlooking the implementation of the Convention on the Rights of the Child, the ICCPR, CEDAW, the ICESCR and CERD, the special rapporteur on violence against women but there are a number of persistent conclusions: the lack of a coherent framework to combat domestic violence, the lack of a gender-specific approach and the lack of specific data on domestic and gender-based violence, particularly against immigrants.[86]

What is striking here is that, even where there is a clear relation with international developments, and international human rights law and its enforcement, this is not explicated in the policy documents and the parliamentary discussions. Combating domestic violence is presented, in short, as a policy concern, not a response to a state obligation under international human rights law. In the parliamentary discussions the question as to whether the Netherlands could pass the 'Opuz-test' was raised once but never generated a response.[87] Whilst the Netherlands played an important role in negotiating on a Council of Europe Convention on the Preventing and Combating of Violence against Women and Domestic Violence, it still has not signed the treaty concerned.[88] Of course, in communications with the treaty bodies these efforts are brushed up and explicitly related to human rights, but a parliamentarian or public servant in the Netherlands would not see the relation between state obligations under international human rights law and governmental efforts.

A final example of the lack of reference to human rights as a policy frame can be found in the major discussions on reforming the Dutch health care system at present. Here, there is a real chance of the access to health care for many handicapped diminishing, you will find that there access to health care diminishes. Whilst there is a great deal of concern about this, this is not 'framed' by reference to the Dutch treaty obligations.

Why is this the case? How can it be that in a country in which international human rights have a very strong legal position, and that clearly values human rights in its foreign policies, there is so little reference to the same rights in addressing pressing social problems? In order to explain the mechanisms by which human rights acquire meaning in general, I argue, it is important to not only pay attention to their legal position, but also to their position in legal consciousness and in legal and political culture, and to the various actors involved in human rights implementation. In the following part of this lecture, I will present a model of how human rights acquire meaning, and subsequently apply it to the Netherlands.

3. HOW HUMAN RIGHTS ACQUIRE MEANING

In discussing the mobilization of international human rights in a specific social and cultural context, one can draw on an ever-expanding socio-scientific literature on international rights.

[86] The country reports of the various human rights bodies on the Netherlands can be found via http://www.bayefsky.com/ . Cf the CEDAW concluding observations CEDAW/C/NLD/CO/5, para 27; The Universal Periodic Review of the Netherlands, A/HRC/8/31, 13 May 2008, para 18

[87] House of Representatives, Verslag van een algemeen overleg, 30388, no 36, 9 March 2010

[88] Open for signature as of 11 May 2011

Over the past years, historians, sociologists, anthropologists and political scientists have described the processes by which this universalist discourse takes on meaning in a variety of settings.[89] This literature, as stated before, largely discusses common law countries and the global South. In the literature on the global South, for instance, the emphasis often lies on the clashes between universal human rights and local customary and religious norms as well as the way in which these social fields influence one another.[90] In addition, the contested role of human rights in empowering of social movements in the South has received a great deal of attention.[91]

From all this literature, the following insights can be distilled. The wide range of duties embodied in international human rights law combined with the fact that much of the power in rights talk is not limited to the legal realm, make any effort to measure their 'home-coming', or – more scientifically – the 'implementation', 'enforcement', or 'mobilization' a tricky endeavour. Apart from the legal responses to rights obligations, there are also the social and political responses to map out.[92] Whilst lawyers will generally understand enforcement as the passing of enabling legislation and the absence of violations of particular rights, social scientists have increasingly developed other methods for measuring rights implementation. In one of the most comprehensive studies of why states commit to and comply with international human rights obligations, for instance, Simmons measures treaty compliance in referring to statistical data on the death penalty, educational opportunities and immunizations.[93] This is in line with the expanding field of human rights impact assessment, that calls for 'events-based data, standards-based measures, survey data including public opinion research'.[94]

But even such broad data do not capture the mechanisms and the processes by which human rights acquire meaning. Instead, any social constructivist analysis should emphasize 'the social life of rights', the role that international human rights play in social and political struggles in a given context, and how and why they are invoked by specific actors as a discursive frame to provide meaning to the situation at hand and suggests solutions to it.[95] As Cowan put the challenge that rights put to the social sciences, it is time that 'more attention is paid to empirical, contextual analyses of specific rights struggles. This intellectual strategy allows us to follow how individuals, groups, communities and states use a discourse of rights in the pursuit of particular ends, and how they become enmeshed in its logic'.[96]

Studying rights implementation as a process should not only focus on the domestic politics pertaining to human rights but also calls for an eye on the extensively theorized relationship between the 'two-level playing field' of the national and the international in this

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[89] (S. Moyn, *The Last Utopia: Human Rights in History*, 2010, M.R. Somers et al., 'Toward a New Sociology of Rights: A Genealogy of "Buried Bodies" of Citizenship and Human Rights', 2008 *Annual Review of Law and Social Science*, pp. 385-425., M. Goodale (ed.), *Human Rights: An Anthropological Reader*, 2009, B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 2009.

[90] A.A. An Na'im, *Cultural Transformation and Human Rights in Africa*, 2002.

[91] B. De Sousa Santos et al., *Law and Globalization from Below: Towards a Cosmopolitan Legality*, 2005, p. 395., B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, 2003.

[92] T. Landman, 'Measuring Human Rights', in Anonymous *Human Rights: Politics and Practice*, 2009, pp. 46-58.

[93] B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 2009.

[94] T. Landman, 'Measuring Human Rights', in Anonymous *Human Rights: Politics and Practice*, 2009, pp. 55.

[95] R.A. Wilson, 'Human Rights, Culture & Context: An Introduction', in R.A. Wilson (ed.), *Human Rights, Culture & Context: Anthropological Perspectives*, 1997, pp. 3., M. Goodale, 'Toward a Critical Anthropology of Human Rights', 2006 *Current Anthropology*, no. 3, , D. Short, 'Sociological and Anthropological Approaches', in Anonymous *Human Rights: Politics and Practice*, 2009, pp. 93-108.

[96] J.K. Cowan et al. (eds.), *Culture and Rights: Anthropological Perspectives*, 2001, pp. 21.

respect.[97] This implies an understanding of what motivates governments to 'sign away sovereignty' by means of a treaty in the first place. Some authors have suggested how international human rights treaties can be used to lock in certain policy preferences for the future, when the politicians concerned are long out of power but their countries still bound to the treaties.[98] Others have emphasized the 'expressive' element in ratification; how 'the expressive benefits that countries gain from the act of joining the treaty will be enjoyed to some extent by all those who join, regardless of whether they actually comply with the treaty's requirements'.[99] As suggested above, human rights exportism and the desire to do good elsewhere could provide an additional motivation for signing treaties.

Whilst the initial motivation of various actors to push for or sign a specific treaty matters in what subsequently happens within the domestic context, so does the relationship between the rights concerned and 'local legal consciousness' and legal culture.[100] Both are notoriously slippery terms, that run the risk of obscuring the constructed nature and the processual character of rights mobilization, suggesting fixedness where there is none. Nevertheless, it is clear that those rights that reverberate with local understandings, deep-rooted traditions, cultural and religious beliefs stand a greater chance of acquiring meaning – be it as times not explicitly – than those beliefs which are alien to a given setting. Legal consciousness, here, should be understood as a 'collective construction that simultaneously expresses, uses, and creates publicly exchanged understandings', constituted 'in relation to the legal processes available to people, the ideas and the practices of legal professionals and laypeople, and also discourses circulating nationally and internationally'.[101]

Whatever the politics and the processes of rights implementation, it is the people behind them and organizations and networks in which they participate that play a key role. In theorizing the role of actors in rights implementation, the emphasis should first be on the executive. Far from being an amorphous entity, any government consists of different departments with often conflicting interests: the ministry of foreign affairs could well be motivated to ratify treaties out of foreign policy concerns, whilst other departments could seek to limit external influences on policy. Whilst the – supposedly – highly technical work of treaty negotiation is often the work of civil servants with a legal background, the political climate in which they operate and the political coalitions from they receive their orders can differ dramatically.[102] In addition, parliamentarians can theoretically play an important in either pushing for or obstructing the implementation of particular treaty obligations.

Often the drivers, whether within the executive or within the legislature, are individuals, who might or might not work together with civil society. Davis, for instance, describes the

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[97] R. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games', 1988 *IO*, pp. 427-460.
[98] R. Keohane et al., 'Legalized Dispute Resolution: Interstate and Transnational', 2000 *International Organization*, no. 3, pp. 457-488.
[99] O. Hathaway, 'Do Human Rights Treaties make a Difference?', 2002 *Yale Law Journal*, pp. 101.
[100] R. Banakar, 'When do Rights Matter? A Case Study of the Right to Equal Treatment in Sweden', in S. Halliday et al. (eds.), *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004, pp. 165-184.
[101] P. Ewick et al., *The Common Place of Law: Stories from Everyday Life*, 1998, p. 46., S. Hirsch, 'Feminist Participatory Research on Legal Consciousness', in J. Starr et al. (eds.), *Practicing Ethnography in Law: New Dialogues, Enduring Methods*, 2002, pp. 15.
[102] B.A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, 2009, p. 127.

strategy of ‘sneaking human rights in’, and how CERD was craftily introduced into municipal legislation in San Francisco thanks to the legislative skills of one progressive American quoted as saying: ‘International law is complicated and not a lot of people understood it, so they just said 'we are not going to vote either way': it only got attention once it was on the books’.[103] This legal technical character of human rights law also offers expert legal networks a privileged position in their implementation. The human rights community, for instance, has recently been subject to a number of critical studies, with Tuomisaari concluding that the Scandinavian human rights community is predominantly Northern and masculine, with importance for the inclusiveness of its activities.[104] Kennedy even suggest that the human rights community is “part of the problem”, by – amongst others - formulating human rights concerns too narrowly, generalizing too much, promising more than it can deliver and creating a non-effective bureaucracy.[105] Here, a point of critique concerns the ability of human rights experts to ‘think up’ instead of down, and to couple domestic concerns to international standards.

Where human rights are not ‘snuck in’ via technical provisions, but enter the stage via public and political discourse, this is often due to the work of civil society and advocacy networks. Human rights often provide a rallying point for domestic and international groups working on specific themes, often even named after treaties or specific articles; the Coalition on the Rights of the Child, the CEDAW network, the Dutch non-discrimination coalition Art. 1 or the international free expression coalition labeled Article 19 after the relevant ICCPR provision. Risse has described the important role of transnational advocacy networks in ‘norms socialization’, and how – in particular - the interaction between international ngo’s, other states and domestic society can create a ‘boomerang’ pattern of influence, with human rights spiraling into the domestic order.[106] These networks can link less powerful actors, with local concerns, to global cosmopolitan networks, providing a global language for their concerns and a great deal of experience in how to successfully bring them to the public domain.[107] In these processes, too, people are key, for instance in their role as translators between the global and the local.[108]

For civil society (coalitions), rights-framed approaches in obtaining social goals, can be truly empowering. Ideally, they motivate, mobilize and legitimate collective action, advance aspirations, demobilize antagonists, transform the terms and the nature of the debate and fit within favourable institutional venues.[109] Nevertheless, they are also invoked in often highly unequal power relations, both in- and outside advocacy coalitions. In addition, public funding, internal interests and pure chance can lead civil society to adopt certain rights agenda’s whilst completely neglecting others.[110]

In a broader sense, many scholars of rights have also emphasized how framing social and political problems in terms of rights also entails losses. Rights talk, for one, tends to ‘narrow or

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[103] M. Davis, 'Thinking Globally, Acting Locally: States, Municipalities, and International Human Rights', in C. Soohoo et al. (eds.), *Bringing Human Rights Home: A History of Human Rights in the United States*, 2007, pp. 274.
[104] M. Halme-Tuomisaari, *Human Rights in Action: Learning Expert Knowledge*, 2010.
[105] D. Kennedy, 'The International Human Rights Movement: Part of the Problem?', 2002 *HHRJ*, pp. 101-125.
[106] T. Risse et al., *The Power of Human Rights: International Norms and Domestic Change*, 1999, p. 318.
[107] S.E. Merry et al., 'Law from Below: Women's Human Rights and Social Movements in New York City', 2010 *Law & Society Review*, no. 1,
[108] S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, 2006, p. 269.
[109] H. Miller, '
'from 'Rights-Based' to 'Rights-Framed' Approaches: A Social Constructionist View of Human Rights Practice", 2010 *The International Journal of Human Rights*, no. 6, pp. 915-931.
[110] C. Bob, *The International Struggle for New Human Rights*, 2008

limit the discursive resources available to civil society groups by suppressing alternative claims rooted in labor-based organizing, nonalignment or nationalism'.[111] This is in line with earlier critiques of rights talk as overemphasizing the interests of the individual and standing in the way of a broader balancing of competing interests in the public sphere, and leading to a judicialization of politics.[112] The domestication of rights, other have noted, can also lead to its 'taming', and thus the loss of its revolutionary potential.[113]

The most vehement strand of critique of international human rights as a frame for social and political action, however, is directed towards the supposedly universal nature of these rights. Since its inception, the UDHR has met philosophical critiques of the western nature of rights and demands for cultural relativism, with as a current strand the work of authors who primarily consider rights talk as a form of neo-imperialism, functioning within the Enlightenment paradigms of modernity and rationality.[114] This need, however, not entail the wholesale rejection of rights talk: Rajagopal, for instance, calls for the 'de-elitizing' of international law by writing sub-altern voices into it.[115]

Rights resistance exists, however, not only amongst philosophers but also in political and public debates worldwide. In an empirical sense, this resistance can be understood as closely related to the constitutional pluralism that characterizes today's world. Lawyers use the notion of pluralism descriptively, and consider the co-existence of various fundamental rights as an asset in 'crystallizing' the essence of core values.[116] Legal anthropologists, however, have, in looking at 'mutually constitutive normative orders' interacting in unequal power relations pointed out the dialectics between these orders, including the way in which in which 'subordinate' systems subvert, resist and evade the dominant legal order. These processes of 'glocalization' can lead to an emphasis on 'autochtony', 'indigeneity' or 'home-grown rights'.[117] Whilst such dynamics are visible in the rise of indigenous peoples movements worldwide, similar processes are at work in the resistance against the Human Rights Act and the call for a home-grown Bill of Rights in Britain and – as we shall see – in resistance against the European Court of Human Rights in the Netherlands.[118]

Studying how human rights acquire meaning thus calls for an understanding of the legal framework, but also of legal consciousness, legal and political culture and the role of actors. In addition, it is important to realize how rights talk can also generate resistance, and the

[111] M.F. Massoud, 'Do Victims of War Need International Law? Human Rights Education Programs in Authoritarian Sudan', 2011 *Law and Society Review*, no. 1, pp. 17.
[112] J.O. Goldstein et al., 'Introduction: Legalization and World Politics', 2000 *International Organization*, no. 3, pp. 385-399., M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 1991
[113] S. Halliday et al., *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004, p. 8.
[114] C. Douzinas, *The End of Human Rights*, 2000, S. Moyn, *The Last Utopia: Human Rights in History*, 2010
[115] B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance*, 2003, S. Moyn, *The Last Utopia: Human Rights in History*, 2010, C. Douzinas, *The End of Human Rights*, 2000
[116] D. Halberstam, 'Constitutional Heterarchy: The Centrality of Conflict in the European Union and the United States', in J.L. Dunoff et al. (eds.), *Ruling the World? Constitutionalism, International Law and Global Governance*, 2009, pp. 326-355.
[117] V. Roudometof, 'Transnationalism, Cosmopolitanism, and Glocalization', 2005 *Current Sociology*, no. 1, pp. 113-135.
[118] M. Pinto-Duschinsky, *Bringing Rights Back Home: Making Human Rights Compatible with Parliamentary Democracy in the UK*, 2011.

importance of processes of vernacularization. How does this model, now, apply to the Netherlands?

4. THE DUTCH CONSTITUTION AND INTERNATIONAL HUMAN RIGHTS LAW

In trying to explain the irrelevance of international human rights to Dutch policy debates from a *legal* side, it is important to focus on the constitution as the linchpin between the international and the domestic legal order. Here, two main features characterize the Dutch constitution and give international human rights a uniquely strong position in the legal dispensation. First, there is the open character of the Bill of Rights, which means that not all fundamental rights are included in it. Next, there is the internationalism that characterizes the way in which international human rights treaties become part of the domestic legal order. Whilst this combination, theoretically, could lead to an important place of international human rights, it is important to also draw attention to the 'filter' introduced in the Dutch constitution.

4.1 AN OPEN CONSTITUTION

One of the reasons why international human rights are relatively important in the Dutch constitutional dispensation is the incomplete character of the Bill of Rights.[119] Codification of certain fundamental rights obviously has a long and deeply-rooted history in the Netherlands, going back to the Act of Abjuration's statement that 'God did not create the subjects for the benefit of the prince … but the Prince for the benefit of the subjects, without which he is no Prince'.[120] Nevertheless, it was only in 1983 that the Dutch Constitution came to include a full-fledged Bill of Rights, spearheaded by a brand-new equality clause, article 1.[121] The Bill placed together civil and political rights codified over nearly two centuries: the right to vote (art. 4) and to petition (art. 5), the freedom of religion and belief (art. 7), the freedom of association (art. 8) and of assembly (art. 9) and the right to privacy (art. 8) also of one's home (art. 12) and correspondence (art. 13). It also introduced a new freedom: the inviolability of the body (art. 11). In addition, it introduced a set of social and economic rights, be it as topics that are the 'concern of the government' instead of subjective rights: employment (art. 19), the spread of wealth (art. 20), the environment (art. 21) and public health (art. 23). The only fundamental right that was not reformulated at all was the freedom of education including the state obligation to fund both public and denominational education that had been inserted in 1917 (art. 23).

Many rights considered fundamental both in- and outside the Netherlands were thus not included in this Bill. The right to a fair trial is one of them. The constitution might codify related principles like *nulla poena* (art. 16), the principle of *ius de non evocando* (art. 17) and the right to legal assistance (art. 18) but the right to a fair, public and expedient hearing by an impartial

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[119] D.J. Elzinga et al., *Handboek Van Het Nederlandse Staatsrecht*, 2008.

[120] 1581. This is rumoured and is rumoured to have inspired Thomas Jefferson in writing up the American Declaration of Independence S.E. Lucas, 'The 'Plakkaat Van Verlatinge': A Neglected Model for the American Declaration of Independence', in R. Hofte et al. (eds.), *Connecting Cultures: The Netherlands in Five Centuries of Transatlantic Exchange*, 1994, pp. 189-207.

[121] C.A.J.M. Kortmann, *De Grondwetsherziening 1983*,

and competent tribunal and the presumption of innocence are not explicated.[122] Neither is there mention of the right to life, the prohibition of torture and of slavery or, for instance, the right to family life. The provisions on social and economic issues lack, as stated, the status of subjective rights. Another striking feature is the absence of a general limitations clause: most rights can be limited by ordinary law, which means that the actual meaning of a specific right for a citizen will be set out in specific criminal, civil, administrative and other codes. This, in combination with the prohibition of judicial review of acts against the constitution – not, as will be discussed later – against international treaties also impacts upon the normative force of those rights that *are* included in the constitution.

All this is also an indication of the relative amount of weight given to the constitution in Dutch law. Many fundamental rights are not explicated in the constitution, but rather guaranteed in other acts. An outsider reader of the Dutch constitution as a catalogue of rights might also not only be struck by its incomplete, but also by its sober character. There is no preamble, nor is there mention of sovereignty, the rule of law or democracy. 'The new constitution lacks the revolutionary appeal of many other constitutions. It does not refer to concepts of state or society and does not formulate … aims of the state'.[123] The cleavage between the lofty, aspirational language of international human rights instruments and the sober, at times incomprehensible prose of this layered constitution could not be wider.

4.2 INTERNATIONALISM AS A DEFINING FEATURE

A second defining feature of the Dutch constitution is its internationalism. Artts 90 – 94 make it into 'one of the most friendly constitutions towards international law in the world'.[124] They were introduced in 1950s, whilst the horrors of the Second World War still echoed through society and local branches of the European movement and the Netherlands United Nations associations cropped up all throughout the country.[125] They mandate the government to promote the development of the international legal order (art. 90), allow for the adoption of treaties in conflict with the constitution (art. 91), the transfer of sovereignty to international organizations (art. 92), for Dutch citizens to directly derive rights and obligations from international human rights law (art. 93) and for Dutch judges to review acts against international treaties. The following paragraphs will take a closer look at each of these provisions.

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[122] R. De Lange et al., *Grondwet En Het Recht Op Een Eerlijk Proces: Algemene Verkenning En Uitwerking Voor Het Strafrecht*, 2009

[123] C.A.J.M. Kortmann, *De Grondwetsherziening 1983,* , p. 357.

[124] J.W.A. Fleuren, *Een Ieder Verbindende Bepalingen Van Verdragen*, 2004, p. 1.

[125] N. Schrijver, 'A Missionary Burden Or Enlightened Self-Interest? International Law in Dutch Foreign Policy', 2010 *NILR*, pp. 209-244., L. Besselink, 'The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution', 2003 *NYIL*, pp. 89-138. There are discussions on changing this: As the Council of State wrote in its advice on the mandate of the Commission: 'In the 1950s the Netherlands opted for a system of direct effect of treaties and decisions by international organizations. In the years that followed responsibilities were brought to the international level…For years, this was considered to be a positive thing, in line with the constitutional provision that requires the government to promote the development of the international legal order'. Nevertheless, the Council had also continued by signaling, 'reason for concern for possible encroachment of the Netherlands democratic order by international cooperation outside the EU, which has deeper and deeper effects on Dutch society and is not always in line with fundamental principles of democracy and the rule of law'

The best-know provision is art. 90, that holds that 'The government shall promote the development of the international legal order'. It is an atypical clarion call in the constitution, and plays an important role in public debates.[126] The insertion of this particular provision, in 1953, was not the idea of government itself, but a result of a motion put forward by the Catholic parliamentarian Jos Serrarens. As one of the 'pioneers of Europe', Serrarens had not only been an advisor to the UN Ecosoc Committee, but also a member of the Constitutive Assembly of the Council of Europe. In 1948 he had already co-authored an influential motion urging the government to 'permanently join international organizations set up for particular purposes, in order to transfer power to supranational organs', thus paving the way for European integration. In 1952 Serrarens had – at the last moment – secured a parliamentary majority in favour of the possibility of judicial review against treaties .[127] In a debate on the newly adopted Universal Declaration the parliamentarian had elaborated on the underlying vision: 'If we desire that the relations between States are not governed by the law of the jungle, but by law that stands above States, and if we seek to achieve an international legal order in which not individual interests dominate, but a commonly accepted law of morality', he argued, we will need 'institutions to develop newer, better, higher laws of morality, a higher order, that is the foundation for a world law'.[128]

This line of thought also lead to the insertion of the following articles. After the clarion call firmly ordaining the government to promote the development of the international legal order, the subsequent provision, art. 91, has two aims: it sets out the interrelationship between government and parliament in closing treaties and stipulates that treaties can – be it only with strong parliamentary approval – be closed in conflict with the constitution. At first glance, the provision stating that the Kingdom will only be bound by treaties subject to parliamentary approval is a revolutionary form of democratization of foreign affairs, and was introduced to meet concerns raised by parliament after the Second World War. Parliamentarians wanted a say in what took place during these trips: partly because of the internationalist inclination shared by many of them who had experienced the war, and partly because of the fear of a managerialist revolution, in which the expansion of the international legal order would become a bureaucratic, technical process.[129]

Whilst the parliamentary demands for a greater say in foreign policy-making in general, and in treaty-making in particular, resulted in the installation of a specific Constitutional Commission, that looked into democratization of treaty negotiations, not all of its recommendations were followed. One reason for this would be given later by a senior civil servant: 'the making of treaties was (and sometimes still is) considered as beging not of such a nature as to make it possible for the procedure to be discussed coram publico'.[130] Nevertheless,

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[126] Art. 2 (4) of the Swiss Constitution states that the government should strive "to promote a just and peaceful international order". In addition, the Constitution of Surinam states in art. 7(2) that the "Republic of Surinam promotes the development of the international legal order and supports the peaceful settlement of disputes". Cf L. Besselink, 'The Constitutional Duty to Promote the Development of the International Legal Order: The Significance and Meaning of Article 90 of the Netherlands Constitution', 2003 *NYIL*, pp. 89-138.

[127] The motion Van der Goes/Serrarens II adopted in March 1948 A. Van Heerikhuizen, *Pioniers Van Een Verenigd Europa: Bovennationaal Denken in Het Nederlandse Parlement (1946-1951)*, 1998, p. 7., M.D. Bogaarts, *De Periode Van Het Kabinet-Beel: 3 Juli 1946 - 7 Augustus 1948*, Vol. A, 1989, p. 350-373.

[128] House of Representatives, 1117, Confirmation of the budget of the Ministry of Foreign Affairs for 1949, 1 February 1949, p. 27.

[129] C. Hoetink et al., *Dilemmas of Democracy. Early Postwar Debates on European Integration in the Netherlands*, 2010.

[130] H.F. Van Panhuys, 'The Netherlands Constitution and International Law', 1953 *AJIL*, no. 4, pp. 544.

the constitutional revisions proposed by the Van Eysinga commission did lead to some formal guarantees to parliament: the Kingdom would not be bound by treaties without the approval of parliament, which would have to vote with a two-thirds majority in the case of treaties deviating from the Constitution. Whilst promising in theory, the provisions would not lead to strong parliamentary involvement in treaty-negotiations in practice. For one, there was the possibility of tacit approval of these treaties. The National Law on the Approval and Publication of Treaties[131] provides that a treaty, for instance one that contains human rights, is approved silently if one–fifth of the parliamentarians has not demanded explicit approval within 30 days (art. 5). Next, only the treaties that conflict with the constitution demand two-thirds approval. The problem here is that there is no indication as to *who* decides whether there is such a conflict – government, the house of representatives or the senate.[132]

Of course, the fact that the Constitution actually allowed the government to close treaties in conflict with its provisions is an indication of the Dutch commitment towards furthering the international legal order.[133] If anything, the parliamentary proceedings on these provisions make clear that the government gave more weight to this aim than to democratization of treaty negotiations: 'The government realizes that increased international cooperation might necessitate deviation from the constitution in international agreements. Postponing these agreements until the Constitution has been amended is practically impossible'.[134] For, 'Nor the government nor parliament would want to put into place a situation in which – purely to give parliament a larger say – the Netherlands would be in a worse negotiating position internationally because of … lengthy and long-winded procedures.'[135] In response, the communists spoke about the provision as 'a Trojan horse' and the small nationalist party called it 'harikiri for an independent nation', stating that the bill would 'put aside our fundamental rights and freedoms for international organizations, whilst the questions how these organizations will be controlled has not even been considered yet'.

Nevertheless, the majority in parliament went along with the vision of the minister of the interior, who stated that the Netherlands simply had to accept that sovereignty was not as important as it used to be, and that 'this generation has the moral obligation to build the international legal order', even if this would demand 'offers'. In convincing parliament, a familiar reasoning was put forward: 'The government does not understand why the Netherlands

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[131] RIJKSWET, houdende regeling betreffende de goedkeuring en bekendmaking van verdragen en de bekendmaking van besluiten van volkenrechtelijke organisaties, 7 July 1984.

[132] L. Besselink, *De Constitutionele Bepalingen Over Verdragen Die Van De Grondwet Afwijken En De Opdracht Van Bevoegdheid Aan Internationale Organisaties,* 2002, L.F.M. Besselink et al., *De Invloed Van Ontwikkelingen in De Internationale Rechtsorde Op De Doorwerking Naar Nederlands Constitutioneel Recht: Een 'Neo-Monistische' Benadering* . The provision has only been invoked four times in its history. Three times at the instigation of government: with the foundation of the European Defence Community, concerning the agreement with Indonesia on the transfer of New-Guinea and with the Rome Statute. In addition, the Senate also felt in 1999 that the treaty allowing the Lockerbie trial to take place in the Netherlands also deviated from the Constitution, thus necessitating approval with a two thirds majority.

[133] The phrasing "Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Houses of the States General only if at least two-thirds of the votes cast are in favour" dates from 1983. Upto that time, the provision was preceded by the phrase "If the development of the international legal order makes it necessary.

[134] House of Representatives, 2374 – 7, 23 January 1952.

[135] House of Representatives, 1951-1952, 2374-3.

should not be the first country to "break open" its constitution to further the development of international law. After all, there is the proud tradition of being the "country of Grotius"'. [136]

Whilst art. 91, allowing for treaties to be closed in conflict with the constitution, fit squarely within the Grotian tradition, it was the next provision that would prompt the *Chicago Daily Tribune* to in 1952 describe the Netherlands as 'less than a nation'. Of course, the editorial held, the Dutch were free to do as they pleased. However, they would have to acknowledge in adopting a provision stating that 'Legislative, executive and judicial powers may be conferred on international institutions by or pursuant to a treaty, subject, where necessary, to the provisions of Article 91 paragraph 3', 'that one of the prices of internationalism is that those states who subscribe to it must acknowledge in the end that they have become less than a nation'.[137] As with many of the other manifestations of internationalism in the Constitution this provision was inserted at the initiative of a small group of internationalist parliamentarians, who had witnessed the war and was determined to prevent its repetition.[138] In a 1949 motion, that sought to endorse the setting up of the Council of Europe, they reiterated the need to 'transfer authority to specific supranational organizations', emphasizing the importance of parliamentary involvement in these organizations.[139] And whilst it might have baffled outsiders in the 1950s, it was deemed a mere codification of the state of events in the Netherlands.

Whilst the articles 90 – 92 reflect the Dutch post-war commitment to developing the international legal order, and the preparedness to relinquish sovereignty in order to do so, the artts 93 and 94 crucially stipulate the effects of this choice on the meaning of international human rights law for both individual citizens and for the relationship between the legislator and parliament. Art. 93 opens the possibility for individuals to directly derive rights and obligations from international human rights law (point to its direct effect or self-executing character[140]) and art. 94 allows for judicial review of acts of parliament against treaty provisions. Whilst art. 93 thus turns individuals into subjects of international law, art. 94 turns courts into agents of international law. As Baron Van Panhuys explained and justified the radical Dutch choice to an international audience in 1954: 'Moreover, it means that the national courts will be justified in considering themselves in a certain way as organs of the international community because no other power of the state to which they belong, unless, theoretically, the "pouvoir constituant" by repealing [the article] will be able legally to force their will upon them, if this "will" conflicts with international law. It cannot be denied that a state accepting the new principle runs certain risks as long as its example has not been followed by all other civilized countries, but this should not be a reason for rejecting it. The more the principle of the supremacy of international law is adopted by national legal systems the more the international legal order will become a reality'.

Art. 93, 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'. Out of the articles inserted in the 1950s, is pivotal in determining the place of international human rights law in the Dutch constitutional dispensation: it explicates that individuals can directly derive rights and obligations from international treaties, without these having to be transformed within the domestic legal order. It thus explicitly puts the Netherlands

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[136] Senate, 1951-1952, 2374 – 113a

[137] 'Less than a nation', Chicago Daily Tribune, 12 December 1952, p. 18

[138] A. Van Heerikhuizen, *Pioniers Van Een Verenigd Europa: Bovennationaal Denken in Het Nederlandse Parlement (1946-1951),* 1998

[139] House of Representatives, motion 1000-III-29, 4 February 1949

[140] For a discussion of the subtle differences between these notions see J.W.A. Fleuren, *Een Ieder Verbindende Bepalingen Van Verdragen,* 2004, p. 32-64.

in the monist tradition. Whilst the degree to which there exists such a thing as international legal subjectivity was, and continues to be, debated in others parts of the world, this article was also merely considered a codification of existing jurisprudence in the post-War Netherlands. Treaties, as Fleuren puts it, had created rights and obligations for Dutch citizens ever since the 16th century.[141]

The key term – or catchword - to be interpreted in this provision is, however, what treaties and resolutions 'may be binding on all persons by virtue of their contents'. These words were only inserted in 1956 and presented as a mere technical revision, but turned out to be much more than that.[142] A first question is of course who gets to decide on whether the provisions may be binding on all persons: the judge. Next, the question arises as to what criteria are used. Here, the case law has shifted over the years, and shows a certain degree of ambiguity. In early case law, the Supreme Court looked primarily into party's intentions upon closing the treaty. In current years, however, 'to determine whether a treaty provision is self-executing or not, the courts no longer exclusively examine its nature, contents, wording and the parties intentions, but also the domestic context in which the judge is requested to apply the treaty provision in question. If treaty law in combination with domestic law is unequivocal in its meaning, courts regard treaty law as self-executing, unless the application of the international provision would require to make a decision on a *political question* by the judiciary'.[143] This doctrine of consistent interpretation, combined with judicial restraint, has become dominant in the application of art. 93.[144]

As a rule of thumb, this approach makes that the civil and political rights in the ECHR and the ICCPR as considered to be self-executing, and to thus directly create rights and obligations for individuals. In the case of the ECHR of human rights the self-executing character also concerns all the case-law of the court: the incorporation theory.[145] When the court in Strasbourg ruled, for instance, in a case against Turkey that a lawyer needs to be present during

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[141] J.W.A. Fleuren, *Een Ieder Verbindende Bepalingen Van Verdragen,* 2004, p. 455.. The Supreme Court had already ruled in 1841 that treaties could not only bind the contracting parties but also 'subjects and citizens', even in the absence of explicit parliamentary approval.[141] This was the beginning of a long line of case law supporting the monist position, for instance a 1906 ruling that set underlined the power of the executive to close treaties binding citizens.[141] This rejection of the transformation doctrine and the notion of dualism was endorsed by the Dutch Association of Jurists in 1937, when a majority of its members voted for this interpretation of international law M. Claes et al., 'Report on the Netherlands', in J.H.H. Weiler et al. (eds.), *The European Court and National Courts - Doctrine and Jurisprudence - Legal Change in its Social Context,* 1998, pp. 171-194.. Against this background, the provision on the direct effect of international treaties was considered to be largely declaratory; the government motivated its explicit insertion in the constitution mainly because 'this is a rather unique viewpoint in the rest of the world' J.G. Brouwer, *Verdragsrecht in Nederland: Een Studie Naar De Verhouding Tussen Internationaal En Nationaal Recht in Historisch Perspectief,* 1992, p. 267..

[142] J.W.A. Fleuren, 'The Application of Public International Law by Dutch Courts', 2010 *NILR,* pp. 245-266.J.W.A. Fleuren, *Een Ieder Verbindende Bepalingen Van Verdragen,* 2004, J.G. Brouwer, *Verdragsrecht in Nederland: Een Studie Naar De Verhouding Tussen Internationaal En Nationaal Recht in Historisch Perspectief,* 1992

[143] J.G. Brouwer, *Verdragsrecht in Nederland: Een Studie Naar De Verhouding Tussen Internationaal En Nationaal Recht in Historisch Perspectief,* 1992, p. 333., J.W.A. Fleuren, *Een Ieder Verbindende Bepalingen Van Verdragen,* 2004, p. 405.

[144] G. Betlem et al., 'Giving Direct Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation', 2003 *EJIL,* no. 3, pp. 569-589..

[145] WRR, *De Toekomst Van De Nationale Rechtsstaat,* Vol. 63, 2002, p. 316.

police hearings, this was also deemed to be part of the contents of art. 6 in Dutch discussions and case-law.[146] In contrast, the social and economic rights in, for instance, the European Social Charter and the ICESCR are generally not considered to be binding.[147] Neither was, for instance, the UN Charter: in a ruling on the Kosovo bombings, the Supreme Court stated that art. 2(4) of the Charter had no direct effect because it was not intended to protect the rights or interests of private parties.[148] Exceptions to this general rule exist: In 1986, the Supreme Court in its famous Railroad Strike judgment considered the right to strike in the ESC to be binding, in spite of early denial of this force in parliamentary proceedings.[149] Recently, art. 7(3) Cedaw was also considered to have direct effect in forcing the Dutch government to take effective measures against a political party that barred women from its ballot list.[150] Nevertheless, the words 'binding on all persons' form an important filter upon the full-fledged monism that *prima facie* characterize the Dutch constitution.

Whilst art. 93 grants international human rights law an important role in determining the rights and obligations of individuals in the Netherlands, art. 94 gives this body of law a special place in the interrelationship between the judiciary and the legislator.[151] For, whilst art. 120 bars the judiciary from reviewing acts against the *constitution* the current provision does allow for review against the self-executing provisions of *international treaties* and resolutions. To provide a theoretical example: a law banning headscarves from the public sphere, for instance, could not be struck down by the judiciary in referring to the constitution, but could on the basis of international human rights law laid down in treaties like the ECHR. The prohibition of *constitutional review* stems from the important role granted to the (elected) legislator in the French-inspired code law system of the Netherlands. Whilst the judge is not considered to be a mere *bouche de la loi* anymore, judicial activism in frowned upon, especially by those parliamentarians who would have to make an end to the prohibition.[152]

It is against this background that the possibility of review of acts against (human rights) treaties is all the more surprising. Even more striking is the fact that this provision, which could and would limit the powers of parliament, was inserted by a parliamentary motion in 1953. The government had shied away from inserting such a provision, arguing that the – whilst the supremacy of treaties was undisputed – the Netherlands was not yet ready for actual review against them, and that if the legislator considered its laws in line with international treaties the judiciary should not be allowed to subsequently strike these down.[153] Parliament did, in the

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[146] Salduz v Turkey [2008] ECHR 36391/02 [Grand Chamber] (27 November 2008)
[147] D.J. Elzinga et al., *Handboek Van Het Nederlandse Staatsrecht*, 2008, p. 272.
[148] Amsterdam Court of Appeal, 6 July 2000, LJN: AO0070, 759/99 SKG.
[149] Supreme Court, Spoorwegstakingarrest, 30 May 1986, NJ 1986, 688.
[150] Supreme Court, SGP, 9 April 2010, LJN BK4549 and BK4547.
[151] Art. 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
[152] The absence of constitutional review has, however, been lamented for years. The auctor intellectualis of the constitution of 1848, Thorbecke, called it a 'lock on the constitution' and warned the parliamentarians who disregard this element of his constitutional proposals that, without review, 'the constitution would seize to be a constitution' L.F. Asser, 'Reanimeer De Grondwet!', 2003 *S & D*, no. 3, pp. 18-22.. Ever since, constitutional review commissions have proposed to strike down the prohibition, but to no avail. In 2003, a parliamentary proposal to allow for review against the civil and political rights was handed in.[152] Whilst it just received the necessary majority in both the House of Representatives and the Senate in its first round, it also needs – as with all constitutional revisions - a two thirds majority in both Houses after elections.
[153] J.W.A. Fleuren, *Een Ieder Verbindende Bepalingen Van Verdragen,* 2004, p. 184..

person of the internationalist Serrarens, insist on the possibility of judicial review, even against treaties closed at a later stage (*lex posterior).*

Just as with art. 93, the provision that the treaties and resolutions to be reviewed against had to be binding upon everyone was only inserted three years later and presented as a technical revision.[154] Here too, however, the addition would have important consequences in limiting the influence of the provision. For one, it lead the Supreme Court to rule in 1959 that judges could *not* review acts against *jus cogens*.[155] This viewpoint was repeated in a case concerning the crimes committed by Desi Bouterse in 2001.[156] Also, just like art. 93 the provision would lead to a limitation of the amount of treaties against which actual review took place. Judicial review against the ECHR and the ICCPR, for instance, takes place regularly and has led to the striking down of many provisions, and at times whole Dutch acts, but review against the other human rights treaties is much less common.[157] In all, the combination of the prohibition of constitutional review and the expansion of the importance of human rights law is another element in determining the relative importance of international human rights law within the Dutch constitutional dispensation.

[154] J.G. Brouwer, *Verdragsrecht in Nederland: Een Studie Naar De Verhouding Tussen Internationaal En Nationaal Recht in Historisch Perspectief,* 1992

[155] Supreme Court, Nyugat II, 6 March 1959, NJ 1962, 2

[156] Supreme Court, Bouterse, 18 September 2001, LJN AB1471; L.F.M. Besselink et al., *De Invloed Van Ontwikkelingen in De Internationale Rechtsorde Op De Doorwerking Naar Nederlands Constitutioneel Recht: Een 'Neo-Monistische' Benadering,*

[157] See f.i. Benthem v Netherlands, ECtHR October 23, 1985, No. 8848/80 , Marckx v Belgium, EctHR, 13 June 1979, app. 6833/74, In ratifying the Convention, the government had insisted that there were no tension with existing Dutch legislation. Whilst the Supreme Court supported this view in one of the first cases brought to it, concerning the prohibition of certain Catholic processions, this prohibition was struck from the Constitution in 1983 D.J. Elzinga et al., *Handboek Van Het Nederlandse Staatsrecht,* 2008, p. 377.. In later years, however, Supreme Court rulings necessitated a full-fledged revision of Dutch family law and social benefits legislation deemed discriminatory D.J. Elzinga et al., *Handboek Van Het Nederlandse Staatsrecht,* 2008, p. 273.. Of course, it were not only rulings by Dutch courts, but also incompatibilities between acts and the Convention signaled by the court in Strasbourg that lead to legislative revisions, be it in the field of administrative procedure, the rights of mental patients or the right to family life

5. LEGAL CONSCIOUSNESS, LEGAL AND POLITICAL CULTURE

An explanation for the place of rights in public discourse, however, does not lie in the legal dispensation alone. Rather, it is important to also look at the place of human rights in legal consciousness, and in legal culture. The Dutch constitution, as the audience knows by now, thus contains an incomplete bill of rights and grants international human rights a privileged position. Few Dutch people, however, share this knowledge. A representative survey research into knowledge of and attitude towards the constitution that I conducted with colleagues in 2008 showed how 94 % of the respondents lacked basic knowledge of the constitution, and indicated themselves that they knew little of its contents, even if they did feel the document to be (very) important. This section moves from looking at the place of rights in law to their position in society, in social and political discourse. In part, it presents some of the survey data referred to above, and more qualitative research on what the Dutch know about fundamental rights in general, and human rights in particular, and how they feel about them. Whilst pointing out how, generally, rights consciousness is relatively low in Dutch society, it also pays attention to those rights that do figure often in the political arena and Dutch self-understanding: the freedom of expression, of religion and of education and the right to equal treatment. Seeking to move beyond a mere representation of attitudes towards rights to a dynamic understanding of the way in which (perceptions of) rights are negotiated within the public sphere it focuses on two issues: fear of juridification as indicative of wider legal culture, and the rise and the conceptualization of the notion of citizenship in politics and society in the beginning of the millennium.

This, then, calls for a venture onto the slippery slopes of legal consciousness and – even more perilous – legal culture. As stated in the introduction, legal consciousness – dubbed external legal culture by some– will be taken as a ‘collective construction that simultaneously expresses, uses, and creates publicly exchanged understandings', constituted ‘in relation to the legal processes available to people, the ideas and the practices of legal professionals and laypeople, and also discourses circulating nationally and internationally’.[158] Legal culture, then, is wider. As Nelken defines it: ‘The identifying elements of legal culture range from facts about institutions such as the number and the role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour, such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are, not just what we do’.[159] Both concepts, crucially, can function as explanatory variables but are, in turn, also in need of explanation.[160]

A large part of this explanation lies, of course, in Dutch history and the social, economic and political conditions that shaped the Dutch republic and the Kingdom of the Netherlands, and the shifts and continuities that characterize it. The Dutch republic, which was formed as a result of the rebellion against the Spanish, has often been described as unique.[161] This only partly because of the unprecedented wealth that it brought to the seven provinces in the 17th century,

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[158] L.M. Friedman et al. (eds.), *Legal Culture and the Legal Profession,* 1996, pp. 183.; P. Ewick et al., *The Common Place of Law: Stories from Everyday Life*, 1998, p. 46., S. Hirsch, 'Feminist Participatory Research on Legal Consciousness', in J. Starr et al. (eds.), *Practicing Ethnography in Law: New Dialogues, Enduring Methods*, 2002, pp. 15.

[159] D. Nelken, 'Three Problems in Employing the Concept of Legal Culture', in F. Bruinsma et al. (eds.), *Explorations in Legal Cultures,* Vol. Special Issue Recht der Werkelijkheid, 2007, pp. 11.

[160] D. Nelken, 'Legal Culture', in D. Clarke (ed.), *Encyclopedia of Law and Society*, 2007, pp. 369-374.

[161] J. De Vries, 'On the Modernity of the Dutch Republic', 1973 *Journal of Economic History*, no. 1, pp. 191-202.

with the formation of the East India Company (VOC) and the central Dutch role in world trade (leading prime minister Balkenende to yearn for more 'VOC-mentality' in 2006, which in turn caused opposition leaders to ask whether this included the slave trade). Another reason lies in the religious freedoms partially laid down in the 1579 Union of Utrecht and expanded in the 1581 Act of Abjuration that allowed scholars like Erasmus and Spinoza to flourish. The Dutch, as Daalder phrased it in the 17th century 'had many liberties and rights that others could only claim via revolution'.[162] This, in turn, was possible because it was the urban bourgeoisie, with its variety of opinions, instead of an aristocracy, that held power from the 16th to the 18th century. Even if strife between the cities was rampant and brought down the republic, these regents founded the tradition of cooperation, consensus and pluralism that still forms a central feature of Dutch legal culture.[163] This tradition, historians have argued, in turn goes back to the fight against the water and the waterboards that were put in place to manage it in the middle ages.[164]

In this sense, the 19th century is often described as a departure from the decentralized and pluralist Dutch political tradition. It brought, after 1795, the formation of a centralist unitary state with, for instance, a common civil and criminal code and a court hierarchy. Even if the Batavian republic was moulded upon the French example, and in essence a client state of France, it was put in place more smoothly and democratically, with the 1798 constitution paving the way for the 1848 foundation of the current constitution.[165] This latter established the constitutional monarchy with parliamentary sovereignty and ministerial responsibility. It, in essence, placed more emphasis on the delimitation of state powers than on nation-building and the rights of citizens, and – characteristically – does not even include a *constituendum:* reference to the political entity (we, the nation) that put in place the Constitution. As the main drafter, Leiden law professor Thorbecke, spoke about the degree to which the people were written out: 'the Constitution has left citizenship, the main motive of our century, asleep as much as possible. To avoid passion the soul was broken'.[166]

This passion, however, would characterize the late 19th century, which was marked by protracted fights over voting rights and labor rights on the one hand, and discussions on the separation of Church and State, and the institutionalization of pluralism, on the other.[167] The historical accord, the Pacification, that in 1917 put an end to this by including both universal suffrage (a socialist demand) and state recognition and funding of religious schools (a confessional demand) encapsulated a return to the pluralist politics of accommodation. It formed the basis for the pillarization of politics, a system in which the Protestants, the Catholics and the liberals each had their own political parties, schools, sports clubs, media and hospitals, with a relatively apathetic population trusting its elite to close political deals stabilizing an essentially

[162] H. Daalder, *Ancient and Modern Pluralism in the Netherlands: The 1989 Erasmus Lectures at Harvard University*, Working paper 22, 1989
[163] A. Lijphart, 'From the Politics of Accommodation to Adversarial Politics in the Netherlands: A Reassessment', in H. Daalder et al. (eds.), *Politics in the Netherlands: How Much Change?* 1989, pp. 139-153.
[164] T. Toonen et al., 'Modernization and Reform of Dutch Waterboards: Resilience Or Change?', 2006 *Journal of Institutional Economics*, no. 2, pp. 181-201.
[165] H. Te Velde, *Van Regentenmentaliteit Tot Populisme: Politieke Tradities in Nederland,* 2010
[166] Report of the Constitutional Review Commission, 11 April 1948, available via http://home.planet.nl/~janss281/Grondwet_Herziening.html
[167] A. Lijphart, 'From the Politics of Accommodation to Adversarial Politics in the Netherlands: A Reassessment', in H. Daalder et al. (eds.), *Politics in the Netherlands: How Much Change?* 1989, pp. 139-153.

volatile form of pluralism.[168] For all the impact that the Second World War had on Dutch society, it hardly impacted on this form of consensual and cooperative elite politics.[169]

This relatively calm institutional landscape, organized around religious pluralism and deference to authority, underwent massive changes in the 1960s. Kennedy has argued that there was no country in which the twin forces of emancipation and secularization had such an impact, turning the Netherlands into an epicenter of tolerance, with the Red Light District, coffee shops, gay pride and topless women as markers of its identity.[170] It was in this era that specific Dutch policies like the *gedogen* (toleration) of euthanasia and soft-drugs were put into place, and the Dutch fully developed their self-image as guiding country described in the last chapter. For all the changes of this era, there were also continuities: the elite, due to the fact that it went along with the changes, retained its position, and the immigrants that started arriving in the 1970s organized within the same pattern of pillarization.[171] The pragmatism, corporatism and consensualism with which the results of the global economic crisis were successfully mitigated in the 1980s lead to a global interest in the 'Dutch miracle' and the institutions underlying it.[172]

It could well be that the beginning of the millennium marked a transformation both as massive and as relatively uncontested as in the 1960s, wrenching Dutch politics from multiculturalism, internationalism and elite politics into the direction of anti-immigration, neo-nationalist and populist politics. The global 9-11 shock effect, in the Netherlands, was amplified by two murders. The shooting, in 2002, of the first real Dutch populist Pim Fortuyn, who flamboyantly and highly successfully kicked against the elite under the 'cheesecover' in the Hague. Subsequently, in 2003, there was stabbing by a muslim fundamentalist of the just as outspoken filmmaker Theo van Gogh because of his cooperation with Ayaan Hirsi Ali on Submission, a documentary criticizing the position of women in the Islam. These events catalyzed the discussion on the downside of multiculturalism started a few years earlier with Scheffer's denouncing of the 'apologists of diversity' and calling for a farewell to the 'cosmopolitan illusion' and an emphasis on national pride and integration.[173] Within a few years, the 'nation in bewilderment' had taken an assimilationist and culturalist turn, with discussions on national identity and Dutch values in vogue as they had not been since the early 19th century.[174]

These historical forces of bourgeois governance, consensual decision making, liberalism, pluralism and pragmatism and their current contestations are all reflected in Dutch rights consciousness and legal culture and discussions on citizenship, and in the discursive appropriation of international human rights discourse.

5.1 THE RELATIVE LACK OF RIGHTS CONSCIOUSNESS

The Dutch, thus, have in the course of history hardly known the same struggle for individual rights as safeguards against a centralist government as other countries, whilst simultaneously

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[168] A. Lijphart, 'The Politics of Accommodation: Pluralism and Democracy in the Netherlands', in H. Daalder et al. (eds.), *Politics in the Netherlands: How Much Change?* 1968

[169] W.J.M. Kickert, 'Beneath Consensual Corporatism: Traditions of Governance in the Netherlands', 2003 *Public Administration*, no. 1, pp. 119-140.

[170] J. Kennedy, *Nieuw Babylon in Aanbouw: Nederland in De Jaren Zestig*, 1995

[171] W.J.M. Kickert, 'Beneath Consensual Corporatism: Traditions of Governance in the Netherlands', 2003 *Public Administration*, no. 1, pp. 119-140.

[172] P. Scheffer, 'Het Multiculturele Drama', *NRC Handelsblad*,

[173] P. Scheffer, 'Het Multiculturele Drama', *NRC Handelsblad*,

[174] H.J. Schoo, *De Verwarde Natie: Dwarse Notities Over Immigratie in Nederland*, 2000

founding a country on values of liberalism and tolerance. How does this translate into legal consciousness, in the classic K.O.L. sense - the knowledge and opinion about law? In line with the notion of the 'invisible constitution', the Dutch generally know little about the contents and workings of rights that it contains. A representative survey, in 2008,[175] found that 84 % of the respondents indicated that they were 'not very' or 'not at all' familiar with the contents of the constitution. Of course, the analytical value of such a test depends strongly on the standards set. What is more interesting is to see what elements of the constitution were better known than others. Here, people knew most about civil rights, and relatively little about social rights. The majority of the people interviewed was not aware of the supremacy of international treaties.[176] This is in line with the findings in another research project, on Dutch knowledge of and attitudes towards human rights.[177] Here, when asked for 'treaties or other documents in which fundamental rights are laid down', 20 % of the respondents that answered at all named the Dutch constitution, 9 % the Universal Declaration of Human Rights, 5 % the Convention on the Rights of the Child and only 4 % the European Convention on Human Rights (as many as named the Geneva Conventions). This whilst the ECHR is arguably a much stronger and more important source of protection of fundamental rights in the Netherlands than the Constitution itself.

Just as most Dutch people appear to know little about rights in general and about the hierarchy of fundamental rights laid down in the Constitution and in international treaties, so do they also have a particular image of the essence of rights. In contrast to the classic image of rights as limits set to state power, this image strongly emphasizes individual responsibilities, and the horizontal application of rights.[178] Whilst the knowledge of fundamental rights and of the constitutional dispensation has never been comprehensively researched in a comparative perspective, and it would be difficult to do so, there are some indications that Dutch *knowledge*

[175] Hereafter: the research on the Constitution: a survey carried out by TNS Nipo amongst 1246 citizens, selected from a 200.000 person database in 2008, survey questions were drawn up and analyzed by the author, and put to the respondents via an online questionnaire. The results have been weighed pertaining to sex, age, education and region to ensure representativeness for the Netherlands.

[176] When choosing which fundamental right is not enshrined in the Dutch constitution, 77 % correctly opted for the right to property instead of the freedom of expression, the freedom of religion or the prohibition of discrimination, with significant differences depending on the level of education. A question on ministerial responsibility, and the relationship between the executive and the monarchy was answered correctly by 60 % of the respondents. In contrast, only 22 % was aware of the conditions for amending the constitution: a majority in both chambers, followed by elections of the House of Parliament, and a subsequent two-third majority in both chambers. Concerning the way in which the constitution starts, only 18 % knew that this was with the non-discrimination clause (whereas for instance 40 % did not know). Concerning the social rights, only 2 % knew that the right to safety is not enshrined in the constitution, with the majority incorrectly assuming that the document lacks due diligence provisions like care for the environment, employment and health care. Asked whether the government could close a treaty in that goes against the constitution, 71 % answered 'no, never' and only 14 % correctly indicated that this is possible, but only under certain conditions (a two-thirds majority in both chambers).

[177] Hereafter: the human rights research: Face to face interviews held by students with 399 respondents in the 'Freedom Train', a regular train that was dedicated to commemorating Dutch liberation after the Second World War, as part of the 'human rights research project' in 2010, with partly open and partly closed questions. The sample is representative for age, education, sex and region. The results presented are the answers to the open question: 'can you name three treaties or other documents that contain fundamental rights'?

[178] When asked the open question 'what is the Constitution about?', for instance, 38 % of the respondents in the research on constitutional knowledge inaccurately emphasized duties, in – for instance – answering that the constitution contained 'the rights and responsibilities of Dutch citizens' or 'duties and commandments'.

of international human rights lies lower than that in surrounding countries. A Eurobarometer on the Convention on the Rights of the Child, relatively one of the best-know Conventions in the Netherlands, found for instance that young people in the Netherlands were amongst the least aware of children's rights in Europe, ranking 24th out of 27, with 59 % awareness as opposed to an average 67 %.[179] All these figures on knowledge of rights, of course, say little about the degree to which the Dutch value fundamental rights, both at home and abroad. Here, the statistics confirm the general image of the Dutch as a liberty-loving and tolerant people who strongly values human rights within the domain of foreign policies.[180] In addition to valuing fundamental rights at home the Dutch also relatively attach a great deal of importance to the realization of human rights worldwide. In 1999, there was no country in the world in which more people belonged to a human rights organization: 24 % in relation to a global average of 3 %.

The human rights of some, thus, seem to be more important than those of others. In addition, in the Netherlands as elsewhere, some specific rights are better-known and valued more highly than others. When, in the human rights research, respondents were asked to three fundamental rights they spontaneously came with the freedom of expression (43 %), the freedom of religion (21 %), the right to education (15 %) and the right to equal treatment (10 %). In choosing *one* right that was most valuable to them, a representative sample of Utrecht citizens most often for the principle of equality (45 %), followed by freedom of religion (30 %), freedom of expression (30 %) and the right to education (20 %).[181] This corresponds with earlier results of comparative research, in which the Dutch were generally inclined to (strongly) be in favour of the protection of these particular rights.[182] Each of these rights has a deep-rooted historical background and strongly correlates with the values of tolerance and self-expression that the World Values Survey found to be characteristic of the Netherlands. In all, whilst the Dutch know very little about both constitutional and human rights they do value liberty as such, and have a particular preference for certain rights.

5.2 LEGAL CULTURE: CONSENSUALISM OVER ADVERSARIALISM

Approached at an individual level, the Dutch know little about (sources of) fundamental rights, find human rights to be an important element of foreign policy, view rights horizontally and tend to couple rights to responsibilities. How, from a more institutional perspective, does 'rights talk' feature in demarcating the interrelationship between the executive, the legislative and judicial power and in their respective relationship with citizens? Here, as said, Dutch political culture has been classically been characterized by corporatism, consensualism, judicial reticence and informal pragmatism. In political and legal culture, 'rights talk' generally tends to loose from

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[179] Another Eurobarometer indicated how 65 % of the Dutch did not feel well informed about their rights as EU citizens, ranking the Netherlands 22nd out of 27 member states European Commission, *Flash Eurobarometer European Union Citizenship,* 213, 2008, p. 7.. The actual awareness of specific EU-rights did indeed lag behind the average: 71 % of the Dutch, for instance, was aware of the right of EU citizens to be treated exactly in the same way as Dutch nationals, ranking the country 25th within the EU European Commission, *Flash Eurobarometer European Union Citizenship,* 213, 2008, p. 21..

[180] Within the World Values Survey and the European Values Survey the Dutch ranks highly in their support for secular-rational (as opposed to traditional) values and the degree to which they value post-material issues such as tolerance of outgroups and environmental protection. See ttp://www.worldvaluessurvey.org/ and http://www.europeanvaluesstudy.eu

[181] Utrecht citizens panel, November 2010, 1181 respondents, available via www.utrecht.nl/onderzoek, visited 29 June 2011

[182] WRR, *Waarden, Normen En De Last Van Het Gedrag,* 2003, p. 74.

finding common solutions, even if a movement towards for instance polarization, populism and rights talk can be discerned.

To start with the legal apparatus itself, the lack of litigiousness in the Netherlands has long captured the surprise of observers. In a classic article Blankenburg compared Dutch legal culture in this field to that of neighbouring Germany, with as much regulation, welfare state provisions and as strong a participatory democracy, to find that the Netherlands had much less courts, judges and practicing lawyers.[183] The explanation was found in the fact that the Netherlands knows much more alternatives and pre-court conflict institutions; legal behaviour, the article concluded, was determined by institutional supply instead of popular demand here. This emphasis on 'informal pragmatism' within the legal apparatus is also visible in typical Dutch policies of the prosecutorial principle of expediency, the *opportuniteitsbeginsel* which grants the prosecutor the discretionary power to only prosecute when the public interest is served by doing so.[184] As another example, the principle of *gedogen* there makes that – under conditions laid down in public policy – there is no prosecution of crimes without victims like drug use and prostitution but also of euthanasia. As Bruinsma described the underlying rationale: 'The Dutch approach to crimes without victims is usually moralistic, but permissive in practice. The law in the books symbolically keeps up moral condemnation, while the law in action formulates a *beleid* of non-enforcement'.[185]

The cases that are taken to court are considered by a judiciary consisting of civil servants, that takes decisions collectively and keeps judicial deliberations 'the secret of the chambers' and thus does not know consenting or dissenting opinions. Judges are generally conservative, and deferent to parliament, with general legal opinion holding that a judge should stand 'with his back towards the future' and not engage in judicial activism.[186] Over the years, this has resulted in a relatively high degree of public confidence in the judiciary, adding the Netherlands to the Northwest European pattern of high trust in law and legal institutions.[187] In recent years, however, the more general wave of populism and mistrust of authorities has also resulted in criticism of the judiciary, and it could well be – as Hertogh has argued – that the high degree of confidence in the statistics is more reflective of 'sullen toleration' than of solid support.[188]

This enhanced public scrutiny of the judiciary could well be related to a number of more structural power shifts within the trias politica, and in the relation between Dutch citizens and the judiciary. With regards to the latter, Van Waarden reports how globalization, economic liberalization and the rise of regulatory agencies have lead to an increase in litigation. Since the 1970s, the Netherlands have seen a shift from corporatism to 'lawyocracy', from the power of associations of civil society towards the power of courts, lawyers and judges.[189] This process is visible in civil litigation, but also in criminal law, which has increasingly taken a punitive turn,

[183] E. Blankenburg, 'Patterns of Legal Culture: The Netherlands Compared to Neighboring Germany', 1998 *American Journal of Comparative Law*, no. 1, pp. 1-42.
[184] Artt. 167 and 242 of the Code of Criminal Procedure
[185] F. Bruinsma, *Dutch Law in Action*, 2003, p. 60.
[186] D.J. Elzinga et al., *Handboek Van Het Nederlandse Staatsrecht*, 2008, p. 827.
[187] E. Blankenburg, *Legal Culture in Five Central European Countries*, W111, 2000
[188] M. Hertogh, 'The Curious Case of Dutch Legal Culture: A Reassessment of the Survey Evidence', 2010 *Journal of Comparative Law*, no. 2,
[189] F. Van Waarden et al., 'From Corporatism to Lawyocracy? on Liberalization and Juridification', 2009 *Regulation and Governance*, no. 3, pp. 259-286.

away from *gedogen* and prosecutorial discretion and in administrative law characterized by the expansion of the regulatory state.[190] Within constitutional law, the possibility of review against treaties might be exercised with caution and a fear of actual law-making, but has lead to a relative increase in judicial power. In all, the relative power of judges has been substantively strengthened over the past decades.[191]

Nevertheless, legal and political culture still firmly endorse the primacy of parliament in political and legal decision-making, and in weighing the constitutionality of these decisions. A striking feature of debates in the House of Representatives, found on virtually all sides of the varied political spectrum, is the fear of juridification and of the rise of a claimculture. Searching for 'juridification' in the parliamentary debates from 1995-2010 generated 1154 hits, invariably negative.[192] 'Juridification' was considered a threat in fields as varied as the asylum debate, health insurance, the rights of tenants, prostitution, the conditions of detention, waste processing, the organization of the public space, building permits, discrimination of homosexuals, euthanasia, addressing the economic crisis, the safety of patients and combating unemployment. The notion of a 'claimculture' was only invoked 182 times, but by as wide a variety of political parties and in relation to as many different topics. In a debate on health insurances, for instance, one parliamentarian typically remarked: 'I am very scared of the rise of a claimculture that invites people to try to receive the maximum amount possible. What is needed here is a substantive weighing of the quality of care and life, to be made by professionals and clients'.[193]

Even if the traditional parliamentary role of a place for the corporatist management of interests has partially shifted to that of a stage for the 'drama-democracy' its power in relation to the executive has diminished.[194] To some extent, within the context of consensual decision-making, parliament – in particular those parties represented in government - always functioned more as a partner than as a watchdog to the executive. Te Velde, for instance, considers the lay-out of parliament, with a secret network of corridors leading to the government - including the tiny tower in which the prime minister houses - and to the most important advisory bodies as indicative of the decentral, consensual organization of power.[195] The relative power of the executive, however, has also increased with the rise of the regulatory state and the increased importance of European and international legislation and policies.

In looking at the role of rights as a check on this executive power observers have noted with amazement how administrative review did not exist in the Netherlands for most of the 20th century.[196] The Netherlands only established general administrative courts in 1974, and it took an appeal to the European Court of Human Rights to force the Dutch legislator to replace the judicial division of the Council of State with independent administrative chambers within the courts.[197] The Council of State still challenges classic thinking on the separation of powers by

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[190] F. Pakes, 'The Politics of Discontent: The Emergence of a New Criminal Justice Discourse in the Netherlands', 2004 *The Howard Journal of Criminal Justice*, no. 3, pp. 284-298.
[191] WRR, *De Toekomst Van De Nationale Rechtsstaat*, Vol. 63, 2002, p. 69.
[192] Search conducted on 11 July 2011, with a random sample of 1 out of every 10 hits analyzed
[193] 2008/2009 parliamentary debate on the bill 'Wijziging van de Invoerings- en aanpassingswet Zorgverzekeringswet in verband met voortzetting van de subsidiëring van de MEE-organisaties (31550) (Amendment of the Health Care Act with regards to the subsidy of MEE-organizations).
[194] M. Elchardus, *De Dramademocratie*, 2002.
[195] H. Te Velde, *Van Regentenmentaliteit Tot Populisme: Politieke Tradities in Nederland,* 2010, p. 23..
[196] E. Blankenburg et al., *Dutch Legal Culture*, 1994, p. 3..
[197] EctHR, Benthem vs the Netherlands, 23 October 1985, (App;. No 8848/80, 1985).

combining the role of appeals court in administrative cases and legislative advisor, be it within two separate departments.

Policy-making in the Netherlands, according to Andeweg, resembles an orchestra without a conductor.[198] Key in this orchestra are an amalgamate of advisory bodies and corporations, within which opposition is encapsulated and muted.[199] There are the high organs of State, with a constitutional status, like the Council of State, the Ombudsman and policy advisors like the WRR but also a variety of advisory councils on various policy matters, corporations of employers and employees, the former denominational interest organizations with a wide variety of platforms in which various organizations are assembled. As Visser has sketched the function of these bodies within the political system: 'Corporatist institutions of interest mediation tend end to stabilize participation and give negotiations a long time horizon, and they operate on the norm of reciprocity, with frequent, protracted, multiple exchanges'.[200]

In all, even if Dutch legal culture is so much in flux that the standard work changed its title from *Dutch legal culture* to *Dutch law in action*, there is a red thread in corporatism and consensualism, a frowning upon litigiousness and adversarialism and an activist judiciary, and an emphasis on consensual decision-making. The 'public discussion on the right ordering of our lives' departs more from the notion of common interests and negotiated outcomes than from the idea of individual rights.[201]

6. ACTORS IN RIGHTS REALIZATION

This brings us to our last element in explaining the place of rights in understanding why international human rights play a relatively minor role in rights realization. As stated before, human rights can be raised in a variety of places: as an explicit frame of reference for the government, by actors in parliament, in the media, by civil society and in the courts.

Generally, civil society is considered as the driving force behind rights realization.[202] Behind the fuzzy but generally reassuring image of civil society in human rights implementation lies a variety of organizations, with individuals inside them, each with their own agenda's, resources and conceptualization of state-society relations. Whilst the interrelationship between ngo's and the government is always 'fraught with tension and ambivalence', there are big differences in the degree of independence from the government, and thus – arguably - the willingness took take a more adversarial position.[203] One key factor in explaining why certain ngo voices would be heard more loudly than others is the availability of resources.[204] In addition, each ngo has its specific thematic focus that determines the contents of this form of civil society advocacy. Whilst on the one hand, internet and social media have democratized advocacy, allowing everyone with a computer to set up an email account and a website and send out messages and organize (electronic) petitions. More advanced lobbying, on the other, does benefit

[198] R. Andeweg et al., *Governance and Politics of the Netherlands*, 2002, p. 139.
[199] P.H.A. Frissen, *De Staat*, 2002.
[200] J. Visser et al., *'A Dutch Miracle': Job Growth, Welfare Reform and Corporatism in the Netherlands*, 1997, p. 67.
[201] M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 1991.
[202] {{3067 Stacy, Helen 2009; 2812 Bob,Clifford 2008; 1980 Brysk,Alison 2002}}
[203] S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice*, 2006, p. 69.
[204] C. Bob, 'Globalization and the Social Construction of Human Rights Campaigns', in A. Brysk (ed.), *Globalization and Human Rights*, 2002, pp. 133-147.

from letter-headed paper and business cards. More importantly, its success depends on the degree to which individuals have the time to meet with relevant actors, reframe demands to align with them with the concerns of their conversation partners and to take the plane to speak to international monitoring bodies. In all these activities, social and cultural capital matters, as do connections with global civil society and actual finances.

An increasingly important group of actors in human rights implementation are the treaty monitoring bodies and other international organizations with an interest in human rights education. Within the UN-system alone, treaties like CERD, the ICCPR, the ICESCR, CEDAW, CAT and the CRC all have their own monitoring mechanisms in which – typically – state parties submit a report every four years, that is scrutinized by a committee of experts in New York or Geneva and that leads to concluding observations on the degree to which the country concerned complies with treaty obligations. A recent UN addition is the Universal Periodic Review (UPR) run by the Human Rights Council, that comprises an integrated 'human rights exam'. In the Netherlands, the various Concluding Observations are typically sent to parliament, with a governmental response to the concerns raised in them. The highly ritualized exchange of documents and discussions on them by governmental representatives and members of the UN Committee are generally coordinated by the Department of Foreign Affairs, which solicits input from other departments. Dutch reports tend to be extensive and – relatively – timely, with civil society often putting together a more critical shadow report. Both the contents of the government reports and of shadow reports are strongly influenced by the individuals involved in the writing. If the Department of Social Affairs, for instance, has a strong hand in the writing this becomes clear from the topics presented. Similarly, the shadow reports generally reflect the interests of the ngo's that drew them up.

In order to acquire meaning within the domestic context, however, the human rights concerns raised need to be picked up by the press, actors other than human rights organizations and parliament. Generally, both the Concluding Observations and the governmental response to them appear to go unnoticed by both parliament and the press.[205] The formal governmental responses can be divided into three categories: that the committee's 'principal areas of concern' are actually already addressed by governmental policy, that the government has the intention to change its policies, or that the government has no intention to do so. The role of individual civil servants in facilitating or obstructing human rights implementation, and the degree to which departmental and individual agenda's in this field can differ, cannot be overestimated. For one, it are often the civil servants in the ministry of foreign affairs who are involved in the process of standard setting and the word-by-word, draft-by-draft negotiations which are presented as highly legal and technical, but are of course also intrinsically political.[206] Here, other departments are only involved sporadically, just as parliamentarians do not play a role: 'Well, I suppose you could ask parliament for its ideas, but what if it would end up not wanting the treaty concerned? The negotiations will continue anyway, with 193 countries, and you want to be there with your expertise to have a realistic and manageable text.'[207] Even if civil servants leave the Hague with formal instructions, they have a great deal of negotiating freedom. Peters, for instance, states that many civil servants write their own instructions, and never report back to the minister (or at all)

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[205] J. Krommendijk, *The Impact and Effectiveness of State Reporting and Concluding Observations: The Case of the Netherlands*, 2010

[206] *S.E. Merry, Human Rights and Gender Violence: Translating International Law into Local Justice, 2006, p. 35-71.*

[207] Interview civil servant, 29 November 2010

on the outcomes of international negotiations.[208] Bovens, whilst lamenting the lack of empirical research in this field, states how the displacement of politics from the national to the international arena has substantively strengthened the power of civil servants, with the Dutch permanent representative at the EU as the leader of a virtual shadow cabinet.[209] A danger here is, of course, that the foreign affairs officials enter into commitments not supported by, or even known to, other departments.

If ministers still have entire departments to work on their policy preferences, parliamentarians in the Netherlands are typically one-stop-shops, with at best one personal assistant, who are overloaded with information and are under a strong pressure to score in the media. In the 'drama-democracy' parliamentary priorities are generally determined more by the newspaper headlines than by the ability to persistently and over a long time period engage with tenacious policy issues, thus making it important for advocacy groups to first solicit media attention for a particular topic, and subsequently engage parliamentarians.[210] In his PhD *So, how do we tell parliament* Enthoven quotes a parliamentarian who states: 'There is no parliament, there are 150 one-person-shops. You find yourself ploughing through a 300-page explanatory memorandum. I receive at least 100-150 emails a day, and 1.5 kilo's of postage'.[211] This enables the administration to 'hide' information by leaving it out of the summaries, or sending it too parliament too late for the parliamentarians to read. This lack of time, of course, also creates ample opportunities for advocacy groups to exert influence, propose parliamentary motions, write parts of speeches and more generally influence parliamentary proceedings. Even if the Netherlands lacks the American tradition of rigid research into lobbying, journalist Luyendijk describes how the 'Nieuwspoort' bar in parliament serves as a hub for the encounter of lobbyists, the media and parliamentarians which are strongly entangled and often change roles.[212]

Whilst the role of ngo's, the media and the executive and parliament in human rights implementation receives ample attention in the literature, there is a wealth of advisory bodies, quasi-ngo's, companies, inspectorates, local and provincial governments that are just as important. This is even more so in the context of privatization and 'horizontalization' of policy-making. The corporatist and consensualist culture in the Netherlands, in which policy-making is compared to an 'orchestra without a conductor' also accounts for the diversity of actors nudging policies in, or away from, a certain direction.[213] Here, it is important that all these actors know about and adhere to the role of human rights in setting out roles and responsibilities in a certain field. This is often not the case: whilst civil servants at the ministry of foreign affairs, for instance, might be aware of Dutch treaty obligations pertaining to combating domestic violence they are not mentioned on the site www.huiselijkgeweld.nl and in trainings to the municipalities, the police and the social workers that play a key role in combating domestic violence in the Netherlands.

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[208] J. Peters, *Afscheidsrede: 'Van Wie Zijn Zij, De Ambtenaren'*, 2010.
[209] M. Bovens, *De Digitale Republiek: Democratie En Rechtsstaat in De Informatiemaatschappij*, 2003, p. 47.
[210] *M. Elchardus, De Dramademocratie, 2002.*
[211] G. Enthoven, *Hoe Vertellen Wij Het De Kamer? Een Empirisch Onderzoek Naar De Informatierelatie Tussen Regering En Parlement*, 2011, p. 82.
[212] J. Luyendijk, *Je Hebt Het Niet Van Mij, Maar ... Een Maand Aan Het Binnenhof*, 2010.
[213] *R. Andeweg et al., Governance and Politics of the Netherlands, 2002, p. 139.*

7. A RESEARCH AGENDA

This, in part, explains why, as a newly appointed professor in the sociology of rights, I would like to focus my attention the way in which human rights acquire meaning in small places, close to home. The increase in the meaning of human rights in small places all over the world has opened up a whole field of socio-scientific scholarship. Legal anthropologists, sociologists, political scientists have sought to '*catch up with the party'* and to capture the rights revolution. Most of the attention here has gone to the Global South. Nevertheless, Anglo-Saxon scholars have increasingly focused on the place of human rights in their societies.[214] As discussed, there are a number of recent volumes on 'bringing human rights home' in the West, but these do not look into the Netherlands.

This makes for, as Schmidt and Halliday set out, a gap in human rights research 'seeking focused empirical study of human rights implementation at the domestic level of developed nations, where that includes and interest in institutional and individual behaviour deeper than legislatures or constitutional courts'. [215] This applies even more to code law countries than to common law countries. One exception is the study of national human rights institutes by Mertus, in which she describes the 'tough battle' fought by the Danish human rights institute to make the discourse of practice of human rights relevant to its constituents, who deemed human rights a concern for 'over there' and not 'right here'. The institute was most successful when it reframed human rights issues to fit with domestic concerns.[216] Another exception is Tuomisaari's interesting analysis of the human rights community itself, which focuses conceptions of knowledge and expertise within the Nordic human rights community.[217] Nevertheless, it could well be that the dynamics of rights mobilization in 'mature states' in the civil law tradition differ from those in common law counterparts.[218] The emphasis on parliamentary democracy, on codes – as opposed to case law - as the prime mechanisms of legislative change, the very different role of the judiciary in the balance of power and of rights in both legal consciousness and legal culture could well lead to dynamics in the home-coming of human rights that differ from those in other founding fathers of the international human rights regime.

Three themes might provide a particularly interesting inroad to empirically investigating the mechanisms by which human rights acquire meaning in a country like the Netherlands.

7.1 HUMAN RIGHTS CITIES

An interesting world-wide trend in making human rights acquire meaning in small places is the increase in cities, municipalities and regions that explicitly take international standards as a point of departure in formulating local policies. In recent years attention for the mutually strengthening

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[214] This is in line with a long-standing research tradition, f.i. C.R. Epp, *The Rights Revolution*, 1998, S.A. Scheingold, *The Politics of Rights: Lawyers, Public Policy and Political Change*, 1974, p. 224., M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse*, 1991

[215] S. Halliday et al., *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004, p. 3.

[216] J. Mertus, *Human Rights Matters: Local Politics and National Human Rights Institutions*, 2008

[217] M. Halme-Tuomisaari, *Human Rights in Action: Learning Expert Knowledge*, 2010

[218] (S. Halliday et al., *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, 2004, p. 3.

relationship between human rights and urban policies has boomed. At the UN level, the United Cities and Local Governments initiative and its European counterpart have passed a charter to rights in the city, emphasizing how 'the local community is united by an obligation to mutual solidarity which is supported by the local authorities'.[219] Within the Council of Europe, the Congress of Local and Regional Authorities passed a resolution on the role of local authorities in implementing human rights in 2010, and decided that the local democracy week in 2011 would revolve around the theme of human rights.[220] Here, there is a specific emphasis on developing indicators for the measurement of human rights at the local level, for instance in fields like political participation, access to justice, the right to education, the right to work, the right to health, the right to social welfare and the right to housing. At the EU level, where the adoption of the Charter of Fundamental Rights as part of the Lisbon Treaty has greatly enhanced attention for human rights, the joined-up governance project explicitly addresses the role of cities in a multi-level system of human rights protection.[221]

In the Netherlands, there are also signs of an emerging interest for human rights as a basis for social policies. The city of Utrecht, for instance, is (like Maastricht and Nijmegen) part of the joined-up governance program and recently adopted a policy memorandum titled 'Human rights in Utrecht – An urban quest for social justice'. In it, policies in the field of anti-discrimination, poverty reduction, immigrants, domestic violence, shelter, human trafficking, camera-policies, human rights education and health care are explicitly measured against international obligations. Similarly, the local democracy week held in October 2011 had 'human rights' as its central theme, and sparked interest from a number of Dutch cities. Rotterdam is the Dutch member of the European Cities against Racism network. Initiatives like the Coalition for Inclusion explicitly call on local governments to realize international human rights (in this case concerning people with disabilities) and to call on the national government to ratify the Conventions concerned. Additionally, there are Dutch cities like Almelo that use human rights as inspiration for their policies, but do not explicitly refer to them in policy documents. The Middelburg municipal council, finally, recently adopted a motion calling for explicit referral to international human rights instruments in the field of domestic violence and the rights of persons with disabilities in formulating local policies.[222]

Nevertheless, with all these cities, questions remain on the added value of human rights as an overarching framework for addressing 1) the roles, rights and responsibilities of different actors in addressing social problems 2) catalyzing cooperation between actors 3) strengthening a specific urban identity, based on the notion of 'glocal citizenship', which connects the city to the wider world. Policies explicitly based on human rights, for instance, do not only have potential but also have pitfalls, for instance in pointing out lacunae in existing social policies, leading to

[219] L.O. Molin, *Developing Indicators to Raise Awareness of Human Rights at Local and Regional Level,* CG(21)10, 2011

[220] Congress Resolution 296 (2010) holds that the "most important way to enable local and regional authorities to take responsibility for human rights is through the systematic training of political leaders and the dissemination of reliable information among citizens about their rights (particularly among vulnerable groups)". Cf the work of the CoE Commissioner on Human Rights Hammarberg

[221] http://fra.europa.eu/fraWebsite/research/projects/proj_joinedupgov_en.htm

[222] http://www.middelburg.pvda.nl/binaries/content/assets/middelburg/moties-amendementen/11-143_Motie_vreemd_aan_de_orde_van_de_dag_van_de_PvdA_en_Duurzaam_Rood_over_de_Week_van_de_Mensenrechten.pdf

politicization and polarization of discussions. It is these questions, concerning the potential and the pitfalls of direct reference to international human rights in formulating urban social and participation policies, catalyzing cooperation between actors and strengthening a cosmopolitan urban identity, which I intend to research together with a group of urban and civil society stakeholders in the coming years.

7.2 HUMAN RIGHTS EDUCATION

Another line of research concerns the contents and effect of human rights education, primarily within the formal school system. Many socio-legal studies on human rights and policy documents, depart from the assumption that there is a relationship between human rights education and the actual realization of human rights. As stated before, ever since the Vienna Conference of 1993, the international community has invested heavily in human rights education, and made it a focal point in UN and Council of Europe policies.[223] Whereas the Netherlands lagged behind in introducing human rights education in the Dutch educational curriculum for a long time, there are signs that human rights will be granted a place in (civic) education in the years to come here as well.[224] The start of the Netherlands Human Rights Institute, with human rights education as one of its core tasks, is a significant step in this direction.

Nevertheless, for all the books and policy documents promoting the introduction of human rights education, or related topics like peace education, education for global citizenship and education for democratic citizenship, little is known about what interventions are best suited in this field and significantly impact on the knowledge, skills and attitudes pertaining to human rights or global citizenship. It is this question that forms the research agenda of the Going Glocal program that we will carry out in the coming years at the Roosevelt Academy.

7.3 RIGHTS RESISTANCE

A final topic on which to conduct research in the coming years is the process of rights resistance in countries like the Netherlands. In the past year, for instance, the European Court of Human Rights has received criticism of in the media and parliament in the Netherlands.[225] This is striking in a country that once was a staunch supporter of the court. The Dutch critique, however, echoes similar processes of rights resistance in the United Kingdom, Belgium, France and Denmark, and can be understood in the light of an increase in populism, anti-immigration policies and renationalization.

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[223] M. Bajaj, 'Human Rights Education: Ideology, Location, and Approaches', 2011 *Human Rights Quarterly*, pp. 481-508., United Nations et al., *Plan of Action: World Programme for Human Rights Education*, 2006. Cf www.hrea.org for a list of literature.

[224] B. Oomen et al., *Inspiratie Voor Mensenrechteneducatie: Democratisch Burgerschap En Mensenrechten in Het (Burgerschapsonderwijs)*, 2010, p. 136., B. Oomen, 'Mensen- En Kinderrechten: De Gemiste Kans Van Het Burgerschapsonderwijs?', 2009 *Nederlands Tijdschrift voor Onderwijsrecht*, pp. 100-117.. Cf parliamentary discussions on civic education .

[225] The press debate started with T. Baudet, 'Het Europees Hof voor de Rechten van de Mens vormt een ernstige inbreuk op de democratie', *NRC Handelsblad* 13 november 2010, whilst the discussion in parliament was, amongst others, started with a motion by parliamentarian Coruz ((32500-VI, no 29) with the government policy set out in a letter from the Minister of Security and Justice to the chair of the Senate on 3 October 2011 (32 500 V Y) and to the chair of the House of Representatives (32 735 nummer 32).

An important research question concerns the nature of and the background to these recent public and political critiques of the ECHR in the Netherlands, and how can they be understood in a comparative perspective. Here, an investigation will have to look at the various aspects of legitimacy as defined by Scharpf: input and output legitimacy, and legitimacy of the demos concerned.[226] Such an analysis also distinguishes the three types of resistance that seems to underpin recent critiques: the resistance against elitism, resistance against Europe, and resistance against the notion of rights in general.

8. CONCLUSION

This, then, concludes today's investigation on the ways in which human rights acquire meaning in small places, like the Netherlands. All over the world, as I have set out, there is an increase in the reference to human rights as a standard of good governance. Even if this process can be witnessed in many western countries, where it is labeled 'the home-coming' of human rights, there is a relative lack of reference to rights in framing social policies in fields like polarization, domestic violence or access to health care in the Netherlands. Explaining why this is the case necessitates attention for not only the place of human rights in Dutch law, but also for their place in legal consciousness and legal culture, and for the role of the actors involved in rights implementation. Such a model shows how the legal order might well be open to human rights, but how there is little knowledge of human rights in the Netherlands, and a frowning upon adversarialism and a juridification of disputes that roots deep in Dutch consensualist culture. In addition, the sheer variety of actors involved in policy implementation in the Netherlands, combined with the legal lack of standing of ngo's can also serve as an explanatory factors. All this merits scholarly attention in the coming years for a number of the mechanisms involved in the home-coming of human rights in the Netherlands: human rights cities, human rights education and resistance against rights talk. I very much look forward to carrying out this research together with many of you, colleagues and students alike.

But for now it is time to conclude, as is common, by expressing my gratitude to a number of people. First of all, our former dean Hans Adriaansens, who proposed this chair, the commission that formally appointed me as its holder and the interim dean Willem-Hendrik Gispen who agreed to host today's ceremony. I very much appreciate the fact that the Executive Board of Utrecht University agreed to have me hold my inaugural lecture here in Middelburg, close to home, to our colleagues and students, and the presence of the Rector Magnificus, the Dean of the Faculty of Law, Economics and Governance, the Head of the School of Law and the other colleagues from Utrecht. The fact that Utrecht University agreed to install the first Dutch chair in the 'sociology of rights' is in line with the Utrecht tradition of human rights research, and human rights practice. It is, of course, not a coincidence that Utrecht is the first Dutch human rights city, or that the Netherlands Institute of Human Rights will initially be located in Utrecht. Today's seminar, organized together with the Netherlands Institute of Human Rights, forms the starting point of what I hope will turn out to be a fruitful and lengthy cooperation.

Middelburg is a small place on the map but a great place to live and work. One reason for this is because of the support of, and the collaborations with, the province, the municipality and

[226] F.W. Scharpf, *Interdependence and Democratic Legitimation*, 98/2, 1998.

many Middelburg organizations. The presence of members of the provincial and municipal executive today bears testimony to this close relationship, which is not only highly appreciated but – in my opinion – makes for better teaching and research inside the walls of this university. The fact that we can engage on human rights, but also on many other issues, makes for a university that is connected to its environment in a way in which bigger institutions can only dream of. The Going Glocal program, in which we will work with schools, civil society partners, municipalities and the province in strengthening attention for global citizenship in schools in Zeeland is a great example of the type of cooperation that is possible within this province. Zeeland, to some, might be the forgotten backyard of the Hague, but it is also very close to the rest of Europe and the world, and this program aims to strengthen this connection.

It's also a privilege to work together with so many people dedicated to excellent teaching in this beautiful building, where snippets of insights from all scholarly disciplines come out of the classroom, and there is always music in the hallways. The students make this a great place to work, just like – if I'm only going to name one name – Simaya van Dooren – who did an excellent job in helping to organize today's event. The presence of so many students, from first-years to PhD-students with whom I've explored some of the themes discussed today is thoroughly appreciated. The Roosettes already provided a few teasers of the song 'I'm going to wash that man right out of my hair' as a tribute to women's empowerment in general, and the prospective RA theme song. Let's, before I close, listen to the two songs (…)

I've spoken about how human rights acquire meaning in small places. A final word of gratitude, however, has to go to those people who give my life meaning. Friends and family, I really appreciate you showing up for yet another lecture. Above all, there would be little meaning without the four boys that I would never want to wash out of my hair: Tom, Bram, Jeroen and – always and ever more – Herman.

Ik heb gezegd.

Human rights, as Eleanor Roosevelt famously said, begin in small places: 'Unless they have meaning there, they have little meaning anywhere'. In this inaugural lecture on the sociology of human rights, Barbara Oomen sets out a model for understanding how human rights acquire meaning in such places. Next to the laws involved, like the constitutional dispensation of a given country, it is important to look at legal culture and legal consciousness and the actors involved. She applies this model to come to an understanding of the paradox of human rights in the Netherlands. Whilst human rights play a key role in Dutch foreign policies, they are hardly ever invoked as a frame for analyzing and addressing domestic problems, like polarization, domestic violence or access to health care. This human rights exportism can be understood by not only looking at the legal framework – which is characterized by a marked openness towards human rights – but also at the lack of knowledge of rights, the culture of consensualism, the fear of juridification of disputes and at the many actors involved in policy implementation in the Netherlands. This analysis also leads to a research agenda for understanding processes of 'home-coming' of human rights in a place like the Netherlands, with attention for the role of human rights cities, human rights education and processes of rights resistance.