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# **The Dutch Connection: The European Court of Human Rights and the Pursuit of Global Citizenship in the Netherlands**

Patrick Schmidt and Erik Larson

## **I. Introduction**

For centuries, the Netherlands, seen by many as an island of toleration and liberal values, has drawn those escaping intolerance and repression. It remains as attractive a destination today as it was (at least initially) for the Puritans fleeing England. Recognizing the differences among nations, the abiding questions of political life search for normative prescriptions: What obligations do governments have toward individuals and what limitations to their authority must governments observe? The idiosyncrasies of the Dutch case provide well-trodden ground for the study of civil liberties and rights, most famously the libertarian approaches to drugs and prostitution. However, those arrangements, inflected with a voyeurism for cultural understandings of deviance, tell us relatively little about the most important development in the debate about government over the past century, namely, the problem that any attempt to answer fundamental political questions cannot reside solely within the Netherlands or the boundaries of any nation, but is shared across national boundaries in the search for unifying values and settlements.

This article explores how the quest for global citizenship occurs in the dialogue between the European Court of Human Rights—the most important locus of European dialogue on the obligations of states—and the Netherlands, considered by many (and many Dutch especially) as one of the exemplars of just government. We consider the position of the Netherlands in implementing European human rights norms as a probing example of the outer limits of a global human rights vision. In particular, we focus not on the traditional core of civil liberties and rights, such as religion and speech, but on one of the most vital areas of contemporary human rights law to a world marked by the transformations of globalization: immigration, which includes those seeking asylum from inhuman treatment and the unification of families across national borders. In a climate still clouded by prejudice and fear, and with resistance to the religious, ethnic, and racial diversity that immigrants bring, what is the potential for human rights to unite nations around core values, to make global citizens out of both immigrants and host nations?

The first section of this article sets the stage by outlining a conceptual framework containing our assumptions about the nature of the problem. We follow with a section sketching the development of human rights dialogue and institutions for Europe, which illustrates how the nation-state framework has been stretched by the rise of a new sphere of actors and influences. In the third section, the discussion turns to individual cases that demonstrate how the European Court of Human Rights has grown as a regulator of state policy, which brings specificity to the kinds of dialogues that remain, even for those choosing the Netherlands as the place to vindicate their claims as asylum seekers and immigrants. Finally, we discuss the implications of these jurisprudential developments for the state, politics, and human rights. We argue, ultimately, that while the Court as a human rights institution has increased its authority over member states (*vis-à-vis* popular sovereignty), its reliance on states to implement its decisions, along with the ability of states to avoid the judgments in particular cases, serves to refract and limit the effective

autonomy of the Court. Nevertheless, lawyers and civil servants as professionals operating in both the domestic and international areas have become vital actors, setting the agenda and shaping the inputs that give the Court the possibility of rendering judgments.

## II. Global Citizenship and Human Rights

For much of the modern era, the concept of citizenship framed the answers to these most fundamental questions. Nation-states retained sovereignty for domestic affairs and a state's citizens had a particular set of claims against that state. Citizenship and governance were inextricably linked, and the rights of citizens and obligations of government followed. Throughout European history, both the breadth and depth of citizenship rights expanded. Initial civil rights merely limiting governmental authority provided a foundation for positive rights to political participation and social welfare provision, and the range of people holding rights expanded to include groups that had previously been considered non-citizens or subsidiaries in households.<sup>1</sup>

Against this backdrop, the concept of "global citizenship" appears as a puzzle. What makes it both "global" and "citizenship"? One could answer this challenge in two simple, incorrect ways—but ones that point to elements of a better answer. First, one could simply dismiss the notion of global citizenship as oxymoronic. From this perspective, since there is no true world government in which individuals participate, there is no citizenry. Furthermore, since there is no distinction between citizens and non-citizens, the concept becomes meaningless. This perspective maintains the idea that citizenship is strictly an individual attribute that comes about from relations between a person and a particular state. Claims of citizenship, however, have transcended borders (*viz.*, both expatriates and dual citizens). Additionally, international and global norms about proper relations between states and citizens remain powerful cultural forces in the contemporary world. The element of truth to this first perspective is that individual belonging to a global order often happens through specific states; that is, individual experiences of citizenship will be grounded in relation to particular governments.

A second flawed answer might be to dismiss the significance of citizenship *per se*, such that "global citizenship" is possible only in an era in which national citizenship has become hollow due to the declining power of the state. From this perspective, as governments face an increasingly powerful global market, their room for maneuver shrinks. At the same time, old notions of racial and national difference have declined. From this perspective, global citizenship becomes the new imperative and possibility for democratic governance, since governance needs to extend beyond the borders of any particular country and to involve some degree of equal participation in social and political life. Given continuing patterns of migration and debates about the status of migrants, however, this perspective does not describe global citizenship as an emergent practice, but as a political goal and an individual ideal: each person should strive to uphold the admonitions of buttons and bumper stickers (living simply so others can live, thinking globally and acting locally).

In many respects, these two attempts to understand global citizenship share the foundational idea that there is a limited practice of global citizenship. We approach the question of what constitutes global citizenship from a different perspective. Citizenship—

as a practice of defining the relationship between individuals and the authority embodied in nation-states—has become global due to the expansion of the nation-state system. From this perspective, citizenship as a set of claims that one has against a government has become global in three distinct ways:

1. The range of claims one can make has increasingly converged across states. The rights of citizens increasingly look alike, whether considered as constitutional protections, criminal laws, or human rights (the latter of which has the most universal form in the statement of the claim);
2. Rights claims have become denationalized. Individuals no longer legitimately claim rights as members of ethno-national groups, but make claims against particular governments to whose authority they are subject;<sup>2</sup>
3. Claims have become deterritorialized. Governments have obligations to people who are outside their borders and who are not expatriates. Perhaps the clearest example of this obligation is toward asylum-seekers.

We take this perspective with the assumption that nation-states do not possess the sovereignty to define actions independently; rather, nation-states are highly structured organizations in a complex environment, leading them to be subject to normative and coercive pressures.<sup>3</sup> From this perspective, then, global citizenship is as much about the regulation of states and the use of state authority as it is about the forces that encourage, persuade, or coerce state action, and in particular human rights. Human rights serve as a passive measure of the actions of states and a reference point in normative discussions.

As a particular form of the manifestation of global citizenship, “human rights” produces similar puzzles formed of the two-word concept. The assertion that a *human* right must be respected invites the assumption that this must be a universal attribute of humanity. Human rights coincide with a global and international vision, but reside in local actions. The assertion that it is a *right* invites the assumption that it is enacted constitutionally or legally, which means that the legal institutions that have primary enforcement authority at the “street-level” must be called into service.<sup>4</sup> Since the state is both the object of regulation and the site through which individuals make claims, we anticipate that political contention will influence the actual practice of rights. The influence includes both agenda-setting and refraction of international-global norms and ideas. Agenda-setting asks who is involved in bringing in the global ideas and how. Refraction examines how the bureaucratic and democratic structures influence the reception of global imperatives.<sup>5</sup>

Europe, the site of so much human tragedy as well as the source of a great proportion of the animating spirit behind the human rights regime of the last century, is “ground zero” for this inquiry. In Europe, there has been a sea change in thinking about international collaboration in the production of a shared order. It is the home to a surfeit of institutions and plays a leadership role in many others, such as the European Court of Justice, European Court of Human Rights, International Criminal Court, and International Court of Justice. These governance institutions now make claims to authority over national sovereignty. While there is a deep sense of fascination with—and indeed “buy-in” to—the project, the implementation of European mandates relies on national authorities

complying with directives and judgments. Decisions about compliance and the national debates they inspire influence the constitution of political communities. We therefore attend to concerns about the meaning of human rights in practice and the impact of this practice on a European society that contains cleavages that are more or less salient and powerful as divisors, offering both forces of change and resistance. This analysis helps us to understand how global citizenship and human rights affect the interplay of nation-states and individuals in the contemporary era.

### III. Human Rights and Europe

The codification of human rights in formal international institutions has had a powerful effect on political imagination, providing an important *telos*, or objective, that overlaps with but also stands separate from more parochial platforms of political and social reform. At the inception of the Universal Declaration of Human Rights, the human rights agenda was inspired by the unparalleled horror of two world wars and the Holocaust. The first item on the human rights agenda was to institutionalize the promise of “never again,” and the international community was supported in its confidence by its collective sense that a right to be free of genocide truly was shared universally.

The classic epistemological problem left to scholars by the diplomats was the derivation of those rights and calls for recognition of additional human rights. The idea of truly universal and actionable rights found inordinate objections, including from a Europe experiencing a broad secularization in the decades that followed. If not an equality before the eyes of one Judeo-Christian God, the work of humanists, anthropologists, and sundry others was no more likely to find a thick account of universality, especially one strong enough to ground social rights (such as a right to housing) as well as a full complement of criminal rights (such as a right to a trial by jury). Nevertheless, many pages of academic journals have been consumed with the debates between the “universalist” and “relativist” camps.

As discussed by Dianna Shandy and Marlies Glasius in this volume, the conceptual problems have not prevented the emergence of a series of international criminal juridical bodies with jurisdiction over “crimes against humanity,” modeled after the Nuremberg trials.<sup>6</sup> In practice, human rights judicial institutions typically are organized on a regional basis, perhaps reflecting a pragmatic orientation. To develop a wider set of human rights principles and precedents, a possible solution to the problem is to narrow the ambition. Instead of finding global human rights, we could build shared commitments among the community of European (or American or Asian) states, where foundational similarities in political systems and traditions might allow the harmonization of views on the constitutional question of rights.

This observation about the formation of a community begs a question that needs clarification: what is Europe? Most familiar is the European Economic Community created in the 1950s initially as the European Coal and Steel Community (ECSC), later becoming the European Union, and even more specifically, the European Monetary Union with the Euro currency. These institutions began with quite limited ambitions—the emphasis has been on markets, trade, and regulation in matters of cross-border need—and membership. Many “European” countries (such as the U.K. and Sweden) remain outside the currency, and the expansion of EU membership to Eastern European countries has

been deliberate and the source of much disagreement. As an institution of the European Union, the European Court of Justice (ECJ), established as part of the ECSC treaty, has the central purpose of ensuring consistent application and interpretation of European law. The ECJ has been an important vehicle for national-level interest groups to mobilize toward the goal of altering national policymaking, and it has also helped to connect similar interest groups across national lines.<sup>7</sup>

Curiously, given how little agreement can be found even in matters of shared economic interests, the membership of the evolving schemes for European human rights is much wider. The Council of Europe in Strasbourg, under a separate treaty structure, is more flexible in its definition of “Europe” and is thus more ambitious in scope, at least geographically. Its most well-known institution, the European Court of Human Rights (the ECHR), takes in 47 member countries stretching as far east as Russia. With the exception of Belarus, the Council includes all members of the former Soviet bloc west of the Caspian Sea, and stretches south, through Azerbaijan, to Turkey. The ECHR traces its roots to the [European] Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), which was completed in 1950. Although established by the Convention, the ECHR started operations in 1959 and has experienced considerable change, becoming a full-time court only in 1998. The ECHR has 47 judges, one for each state party. Seated in Strasbourg, it hears cases before seven-judge Chambers with the possibility of a Grand Chamber of 17 judges hearing or re-hearing a case under appeal (referral) in exceptional circumstances.<sup>8</sup>

The ECHR may appear to an outsider as a European analog to the United States Supreme Court; however, the ECHR technically does not sit as an appellate court. Complaints are brought to the court as suits by aggrieved individuals, and the review is *de novo*, meaning the examination begins again into the whole record. Further, the ECHR works in one direction only: it either helps the individual or does nothing in that case. The docket thus has a built-in bias for ECHR judges, meaning that they hear nothing but complaints about the abuse of human rights by national actors. In the U.S. system, by comparison, the losing party may appeal to the Supreme Court, meaning that its justices hear the claims of complaints of governments as well as individuals. Whether due to this factor or others, by repute the “Strasbourg culture” leans strongly to the protection of individual rights, sustaining itself as the many judges come and go. Indeed, the number of complaints filed before the ECHR has increased markedly since the 1998 reform, and a significant animating question of the past decade has focused on the efficiency and fairness of the Court’s procedures for processing the thousands of cases filed each year—along with a total backlog of cases that in recent years has reached six digits. In the long perspective, the ECHR has become a vital institution for Europe, one that has centered the discourse of post-WWII Europe on rights. As Alec Stone Sweet and Helen Keller summarized, “The ECHR has evolved into a sophisticated legal system whose Court can be expected to exercise substantial influence on the national legal systems of its members. In the 21st Century, Europe is a Europe of rights.”<sup>9</sup>

Given the wide and voluminous base of participation in the European human rights project, skepticism about the potential for common agreement on the content of those rights remains. How can a convention stretching across 47 countries, from Iceland to Azerbaijan, find meaning without either hollowing out the content of the universal declarations or facing substantial noncompliance with judicial decrees? Both possibilities

call into question the legitimacy of the institutions of the Convention, especially the behavior of the judges and ECHR collectively.

Yet, it is important from the perspective of the United States to appreciate that even with centuries of maturity, a meaningful constitution of rights does not depend on a thick notion of standardization. Put another way, the U.S. demonstrates that regional variation is not inconsistent with a rights regime—indeed, regional flexibility may assist the development and entrenchment of rights. Civil liberties in the U.S. are interpreted with a complicated relationship between universalism and community. There is a general universalism assumed in the Declaration of Independence, though it is simultaneously covered by a “social contract” philosophy that links rights with the community in a sort of constitutional congregationalism. The “priests” of the Supreme Court, in the 20th century, moved with legal realism to a view of constitutional interpretation that makes social transformation (chronological change) an acceptable reason for constitutional reinterpretation. In a common law legal tradition that leaves the constitutional text intact, this tradition means that there is no “thick” theory of universalism for human rights in the U.S. system. The leading edge of conflict concerns differing understandings allowed by the scale of the American political community and the range of diversity required by federalism. Thus, the Supreme Court has been opportunistic in accepting local “community norms” into its prescriptions for the meaning of constitutional text, perhaps no more explicitly than in defining the permissible limits of obscenity regulations under the First Amendment’s protection of freedom of speech and press.

The question of what constitutes community has renewed salience in many European countries, including the Netherlands. If the growth of European-wide governance raises the question of what Europe is, then the movement of peoples within and across putative regional boundaries puts the significance of that question into sharp relief. A simple stroll along the streets of The Hague alone makes clear just how diverse Dutch civil and political society has become. Whether in the restaurants, stores, mosques, or the faces of those lining up to vote in the June 9, 2010, Dutch elections, the apparent racial, ethnic, and religious diversity has put on the political and legal agenda the question of membership in the national and continental system. Some of the New Dutch emanate from the geographic fringes of the continent, including Turkey and Russia, while others arrived in Europe from the Global South.

The category of New Dutch from the Global South includes both people from former colonies and those who arrived in Europe without that historic tie to their new home. The Netherlands, like France, the United Kingdom, and other European powers, faces the question of the government’s responsibility toward former colonial subjects from Indonesia, the Antilles, and Suriname. The Netherlands is an ideal case for studying its understanding and response to emerging human rights ideas because of its relationship to the second sub-category, non-colonial immigration. Colonial subjects might, in some sense, be regarded as the “legacy” duty of the state. Examining non-colonial subjects seeking entry into Holland isolates a separate vein, especially given the historic commitment of the Dutch to toleration and openness. In short, as the seat of international justice institutions, and with a cultural heritage that valorizes success in treating judiciously those who seek the respect of human rights conventions, the Netherlands serves in many respects as a paradigmatic case for assessing how far human rights works as a normative tool toward convergence within Europe.

In the next section we examine select conflicts that have reached the ECHR on issues of the entry of individuals. We focus on the legal engagement of human rights in the area of immigration and asylum as a case study of the law's encounter with significant, long-term changes in demographics and national identity. Our analysis draws on published ECHR decisions concerning the Netherlands and interviews we conducted with practitioners in the Netherlands. The starting point for that analysis is the political dynamic that has made immigration a highly salient question, a potential backlash and a consideration of the Dutch government when it confronts the nature and limits of its relationships to the individual.

#### **IV. Foreign Nationals, the Netherlands, and the ECHR**

During the last decade, immigration and asylum have figured prominently in the political debate in the Netherlands. The results of the 2010 elections, in which the far-right Party for Freedom (PVV), headed by the colorful Geert Wilders, won the opportunity to play a significant role in the resulting coalition government, are not a part a momentary swing in national views. Instead, they are the result of a decade-long conversation in which the role of Muslims (and to a lesser extent other minorities) came to dominate the agenda. Wilders' rise to prominence built on the popularity of fellow far-right populist Pim Fortuyn, who was assassinated in 2002. Both Wilders and Fortuyn have played upon resentment, sometimes linked to concerns about crime, but ironically they have linked Muslims to the loss of human rights (i.e., the claimed compulsory wearing of the veil by women and fears about the intolerance of Islam generally and toward gay rights in particular) as an argument for a wider concern about Islam. As a result, Dutch policy in both immigration and asylum has become significantly more restrictive. For example, the Netherlands instituted new requirements for prospective immigrants to demonstrate an understanding of Dutch language and political culture. The Netherlands has also established new detention centers for asylum seekers during the period in which their case is pending. Further, the government has enacted regulations and laws making it easier to expel migrants and asylees.

Against this backdrop, a number of current or potential migrants and asylees have filed grievances against the Netherlands in the European Court of Human Rights. Only a small minority of these grievances result in published decisions; however, one published decision of the Court may cover issues related to a large number of cases. The published decisions of the European Court of Human Rights in two sets of issues— asylum (based on Article 3 of the Convention) and family reunification (based on Article 8)—provide a small but interesting window into the Dutch dynamics of human rights. Of more than 6,000 applications filed against the Netherlands in Strasbourg between 1983 and 2006, just 123 produced decisions on their merits; Articles 3 and 8 have accounted for over 10% of these decisions.<sup>10</sup>

##### **A. Article 3: Asylum**

If one sees human rights as imposing a duty on all governments to protect the human rights of all people, not just citizens, one of the most pressing areas of human rights law must be asylum. The Court's asylum cases usually concern Article 3 of the Convention,



which reads, “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” While there is no inherent right in the Convention to political asylum and states retain the right to expel non-citizens, individuals whom states seek to expel may have a claim against the state if the expulsion would result in a real risk of facing inhuman, degrading treatment or torture. To determine whether an expulsion would violate Article 3, the ECHR undertakes a full assessment of the situation the individual would be likely to face in the receiving country at the time of the expulsion. To make this assessment, the court draws on material from the state and “other reliable and objective sources” (*Salah Sheekh*, para. 136) to determine if the individual would be likely to face ill treatment contrary to Article 3.

In *Salah Sheekh v. The Netherlands*,<sup>11</sup> a case involving a Somali man requesting asylum, the Court held that the Netherlands had violated Article 3 by attempting to return Abdirizaq Salah Sheekh, a member of the Ashraf minority, to certain parts of Somalia after a failed asylum application. Salah Sheekh’s family fled Mogadishu when he was five. The family relocated to a village in which they were persecuted due to their minority status and the fact that they received no protection from local clans. When Salah Sheekh was nine, a local militia killed his father. The local militia continued to mete out harassment, intimidation, and physical violence toward Salah Sheekh and his family, killing an older brother and raping a sister when Salah Sheekh was in his mid-teens. His family finally was able to arrange for Salah Sheekh to flee Somalia when a relative negotiated compensation for the family from the people who took over the family house in Mogadishu. Using the services of an agent who arranged false passports and transport, Salah Sheekh flew to Nairobi, Istanbul, and then Amsterdam.

On arrival in Amsterdam, Salah Sheekh requested asylum and was brought to the application center, where he was interviewed during the next two days. The Ministry of Immigration and Integration then held him in detention during the next month as it continued to interview and examine Salah Sheekh about his background and reasons for seeking asylum. Slightly over a month after his arrival in the Netherlands, the Minister of Immigration and Integration denied Salah Sheekh’s request, holding that he had not been specifically targeted as a member of an opposition group or movement but that he had experienced the occasional effects of an unstable situation. The Minister planned to return Salah Sheekh to a “relatively safe” area in Somalia, and during the next six months Dutch courts upheld this plan six times over Sheekh’s appeals. Rather than appeal to the Administrative Jurisdiction Division (*Afdeling Bestuursrechtspraak*) of the Council of State (*Raad van State*), Salah Sheekh filed a case with the European Court of Human Rights. The Grand Chamber of the Court informed the Netherlands that it was in the best interest of justice not to expel Salah Sheekh prior to hearing the case. During the ensuing period, the Minister released Salah Sheekh from detention and adopted a temporary policy under which he was eligible for a residence permit.

Relying on information from a variety of sources (including the United Nations High Commissioner for Refugees, BBC, Médecins Sans Frontières, and Amnesty International), the Court held that expulsion to the “relatively safe” areas of Somalia would likely result in Salah Sheekh suffering treatment contrary to the stipulations of Article 3. Since he was a member of a minority group, Salah Sheekh would not receive protection from local clans and, as a result, would be forced into an internally displaced persons camp, where he would be vulnerable to further victimization. As is characteristic

of the ECHR's approach, the decision under Article 3 held only that the Netherlands could not expel Salah Sheekh; the decision did not hold that the Netherlands should grant Salah Sheekh refugee status and a residence permit. In practice, of course, the ECHR's decision has a determined effect without being explicit. Since the decision held that return to any part of Somalia would have resulted in Salah Sheekh suffering inhuman or degrading treatment, the policy of the Netherlands became to offer people in such situations asylum. As a result of the decision, Salah Sheekh—and hundreds of other Somalis in the Netherlands from similar backgrounds—had a more permanent basis to reside in the Netherlands on asylum.<sup>12</sup> Nevertheless, such decisions have immediate effects on the national government, since it needs to develop a plan for complying with the court's order. In the Netherlands, coordination meetings between various ministries that included both civil servants and political officials had to decide on a course of compliance.

*Salah Sheekh* speaks to an immediate controversy and the effective meaning of human rights, but the dialogue between the nation-state and the Court speaks to the wider question about how multiple centers of political gravity interact. Decisions under Article 3 are, in concept, all-or-nothing: if it applies to a case, it is absolute. However, scope for disagreement occurs in the judgment of whether a person runs a real risk of undergoing inhuman or degrading treatment upon return. What is a *real* risk, and how far is it foreseeable? “The absoluteness” of Article 3, “isn't that absolute, if you know these criteria,” an official in the Dutch government offered as an explanation. The politics of human rights jurisprudence is the level of deference in the interplay between ECHR and national authorities. Indeed, the case drew even more attention for the fact that the Court issued the decision without Salah Sheekh pursuing an appeal with the Administrative Jurisdiction Division of the Council of State. The Court may only hear cases if applicants have exhausted domestic remedies. In its decision, the Court explained that, “the obligation to exhaust domestic remedies is, however, limited to making use of those remedies which are likely to be effective and available in that their existence is sufficiently certain and they are capable of redressing directly the alleged violation of the Convention” (para. 121). The Court concluded that for Salah Sheekh, “a further appeal would have had virtually no prospect of success” (para. 123). The ECHR pointed to the fact that the Administrative Jurisdiction Division had recently issued a decision in a similar case that an individual seeking asylum would need to show the he was individually targeted and that the deprivations were more severe than for other members of the same ethnic group.

The ECHR's past decisions on when domestic remedies have been exhausted are “fraught with factual and political complexity.”<sup>13</sup> In providing the underlying logic of the provision requiring “exhaustion of domestic remedies,” the Court explicated that its primary goal is regulation of state behavior. “The purpose...is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Court” (para. 121). In this respect, the Court serves not as a court of appeal, but as a forum to judge state policies and, if necessary, highlight the need for corrective action. But the willingness to take on the case without the formal completion of appeals—signaling, perhaps, a sense of having given up on getting the outcome it seeks from national authorities—requires a growing confidence in the institution's authority to speak for the individual. Some commentators have suggested

that *Salah Sheekh* appropriately flagged the lack of care given to expulsion decisions by the Council of State.<sup>14</sup> One government lawyer we interviewed acknowledged this development, even if he ultimately was not keen on it. “The court has said that national authorities are best placed to assess [the risks of returning an asylum seeker],” he intoned. “Normally they would not call that into question, but more and more we see that they do it. We’re not happy with how far the Court goes in that, in part because it creates an enormous amount of work....” Dutch authorities have seen a similar willingness of the Court to intervene in other areas of policy, such as determining when the government may rely on anonymous witnesses for criminal prosecution. Through its decisions both to take a case and to issue a judgment, the Court invites reform. The response of the nation-state, even if not directly commanded, can become part of the evolving norms for other countries. One interviewee in the Dutch government pointed to areas of law where they find themselves communicating to other Council of Europe countries about the types of policy steps taken in response to the Court, thus forming the norms of human rights through evolutionary adaptation. These norms then may feed back into the Court’s decision making in similar cases.

## **B. Article 8: Family Life**

In a longer historical perspective, there might be no surprise if the Netherlands were among the European leaders in welcoming asylum seekers to residence and citizenship. The ECHR’s regulation of state actions in this area would be conducted by and through the work of nation-states in reaching toward norms to govern all countries. Yet recent years have also pointed to the possibilities of resistance to human rights. One of the most active areas for this discussion concerns Article 8 of the Convention, for which the Netherlands has been the subject of a significant number of published opinions.

### **Article 8**

Right to respect for private and family life

- (1) Everyone has the right to respect for his private and family life, his home, and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health.

In relation to immigration, Article 8 cases typically involve claims by individuals that they should be able to be in the country to be with family members (typically, partners or children). Article 8 regulates state actions in its second paragraph; however, it allows that a state may interfere with the right to private and family life when it follows a formal legal procedure and when interference is “necessary in a democratic society” for one of the many purposes of government.

Legally, Article 8 is very different from Article 3. This allowance for state interference gives exceptions for when the right supersedes state action. Under Article 3, the formal

questions of judgment lay only in the sufficiency of evidence; once the risk to the asylee has been established, the state's duty is implicit but unqualified. Article 8's exceptions impose a substantive balancing of values and question much more sharply the role of the nation-state in making those decisions in light of national values and traditions. In Article 8 cases, the Court first determines whether any interference with private and family life has occurred. If so, then the Court examines whether this interference followed the law of the country and whether the interference promoted a national interest. If there was an interference under a law that promoted a national interest, the Court finally weighs the relative collective interests against the individual interests in private and family life.

As suggested previously, the public debate in the Netherlands makes this dialogue politically salient. The Article 8 obligations of states extend to non-citizens (as the first paragraph applies to "everyone," not merely citizens). For migrants, these obligations can be positive (the state has the obligation to admit a migrant) as well as negative (the state must refrain from expelling a foreign national). An imposition of a positive obligation could be received very poorly, seen as outside interference in an area of pressing public need. Thus, the Court has developed a doctrinal device, or a turn of phrase, meant to capture the relationship of national and universal authority—giving a "margin of appreciation" for states' needs—with the scope wider in the case of positive obligations.<sup>15</sup>

Decisions in Article 8 cases concerning the Netherlands during the past two decades suggest that the Court has increased the weight it gives to family rights, which is to say that it has narrowed the Margin of Appreciation given to states' interests in denying entry to family members. This kind of balancing may not be particularly amenable to detailed analysis; whether that is correct, the Court seldom elaborates much on the necessity of the state's actions. Rather, the Court tends either to accept the state's claims as necessary or reject the state's unwarranted interference with or deprivation of family rights. The relative weight of individual and collective interests ties closely to the question of deference to state's decisions.

Two Dutch cases illustrate the ECHR's increasingly heavier weighting of family rights. Both *Ahmut v. The Netherlands*<sup>16</sup> and *Şen v. The Netherlands* (2001)<sup>17</sup> concerned an immigrant parent who had petitioned the Netherlands to grant a residence permit to a child left behind in the country of origin. In both cases, the Court considered whether the Netherlands had a positive obligation to issue residence permits to children. In *Ahmut*, by a five-to-four decision the Court found that the Netherlands had not violated Article 8. In *Şen*, a unanimous Court found an Article 8 violation.

The facts of the two cases pose a number of similarities, a fact not lost upon the Court. *Ahmut* concerned nine-year old Souffiane Ahmut, the youngest child from Salah Ahmut's first marriage in Morocco. After ending this marriage, Salah migrated to the Netherlands in 1986, when he married a Dutch national. Salah was granted citizenship in 1990 and held dual Dutch and Moroccan nationality. In 1987, Souffiane's mother died in a traffic accident, leaving Salah as the legal guardian of his children in Morocco, though initially he arranged for relatives to care for them. Salah and his second wife separated in February 1990 and divorced in December of that year. That same year, Souffiane and a sister came to the Netherlands without a residential visa. Salah enrolled Souffiane in a primary school and applied for a residence permit for him, which was rejected by the

Deputy Minister of Justice on the grounds that family ties between Souffiane and Salah had been broken years earlier.

The later of the two cases concerned nine-year-old Sinem Şen, whose parents married in Turkey in 1980. Her father, Zeki, a Turkish national, had been resident in the Netherlands since 1977, where he returned after the marriage. Her mother, Gülden, remained in Turkey, where she gave birth to Sinem in 1983. Leaving Sinem in the care of her aunt, Gülden joined Zeki in the Netherlands in 1986, where they had two more children. In 1992, Zeki applied for a residence permit for Sinem. Dutch officials did not grant the permit since they held that Sinem was no longer part of Zeki and Gülden's family, but part of her aunt's family.

The difference in results in the two cases from the ECHR is striking, as illustrated by a comparison of subtle factual details. In *Ahmut*, the Court held that Salah had chosen to migrate to the Netherlands and that, if he had wanted to have a familial relationship with his son, he could have done so in Morocco, since he retained dual nationality. Accordingly, since the Netherlands had a legitimate state interest in controlling immigration to protect the labor market, the slight interference in family life did not rise to a violation of Article 8. Among the dissents, most notable was Dutch Judge S. K. Martens' criticism that the Court had abdicated its responsibility to oversee states' immigration policies: "[T]he present decision marks a growing tendency to relax control, if not an increasing preparedness to condone harsh decisions, in the field of immigration" (para. 2). Martens appealed to the Court to respect the desire of Salah, with his dual nationality, to choose the Netherlands as his family's home. Another dissent (by a Greek judge) amplified this concern by pointing to the ethnic overtones. He wrote, "in any country, a national is entitled to have his son join him, even if the son does not have the same nationality. How does it come about that in the present case this right was refused him? I cannot think that it is because the Dutch father was called 'Ahmut.' However, the suspicion of discrimination must inevitably lurk in people's minds." Indeed, a number of commentators have suggested that the decision was based on assumptions that Ahmut's ethnicity joined his primary identity (and loyalty) to Morocco.<sup>18</sup>

The *Şen* case provides a striking contrast. The Court held that forcing the Şens either to abandon their lives in the Netherlands or not live with Sinem was too great an interference in family life for the perceived gain made in the state's interest. Although the Netherlands had made a similar claim to that in the *Ahmut* case—that Sinem was not part of the family in the Netherlands but of her relative's family in Turkey—the Court held that the decision of the Şens to first establish themselves in the Netherlands did not impair the familial bond with their daughter. The Court, however, distinguished the facts in *Şen* from *Ahmut* on the basis that the Şens had two more children after moving to the Netherlands and that these children had not known life in Turkey.

The Court's efforts to distinguish the cases notwithstanding, the shift echoes the sense that the ECHR had shifted its jurisprudence, not only regarding immigrants' choice of country of residence when deciding reunification cases, but also the weight of deference it gives to states. As Sarah van Walsum points out, the Netherlands made its decision in *Şen* to deny the request for the residence permit when only the first sibling had been born and was, at two-and-a-half years old, hardly entrenched in the Dutch school system or language.<sup>19</sup> As such, the Court's reliance on this fact to distinguish the cases was disingenuous. Furthermore, Salah Ahmut had, in some respects, factually stronger claims

than the Şens to a continuing connection to his child, given his record of financial support and visits. Ahmut's guardianship status also changed after the death of his first wife. Mr. Ahmut's status as a naturalized Dutch national also distinguished his position. Judge Martens's dissent suggested that some might not like the way that Ahmut gained naturalized status (marrying and divorcing soon after naturalization), but noted that the government had not suggested that his status was in question.<sup>20</sup> Similarly, the only other potential distinctions between the cases (the sex of the child and the difference between a biological mother and a step-mother) provided no legal basis to treat the cases differently. Accordingly, the Court appears to have moved toward giving greater weight to family interests in reunification cases, without making this change explicit.

The greater scrutiny of the European jurists can reverberate domestically in exceptional cases. The assertion of ethnic bias operating in national decision-making only points to the surface of a deep reservoir of political and cultural influences that works to frustrate a general or universal application of human rights jurisprudence. It can be difficult for the lawyers within the Dutch government to articulate what has transpired or what will happen in the future. The ECHR has a clear style, multiple interviewees concurred, but the doctrines governing the balance of regulations are more opaque. As represented by an interviewee, the advice given by government lawyers and other career civil servants to political decision-makers has its limits:

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

Going forward, the political winds can drive movements that may run up against the outer limits of the ECHR's tolerances, but legal creativity remains a fundamental force in modulating the meaning of human rights. As surely as the Margin of Appreciation admits of vagueness, lawyers in the Dutch government evince the spirit of giving local trends their due. One interviewee suggested that the European trend toward laws banning the wearing of the burqa could find their way to the Netherlands. "If the politics dictates that we want to do something about that phenomenon, then that can be discussed as long as you use the proper arguments," he argued. Freedom of Religion in Article 9, like Article 8's statement of competing values, allows for a state to advance arguments based on the prevention of crime and disorder, public safety, public order, or the rights of others. "You can make a case out of that," he continued. What is the role of the lawyer as interpreter of the human rights law? It must serve politics:

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

The continuing tension between state and regional authorities is a battle joined by the ECHR. The trajectory of the Court's decisions in three other cases in which the Netherlands was found to have violated Article 8 shows a similar shift in giving greater weight to family rights and narrowing the state's Margin of Appreciation. *Beerhab v. The Netherlands*<sup>21</sup> was the first ECHR case to apply Article 8 to immigrants' status. On January 31, 2006, the Court published its decisions in *Rodrigues da Silva and Hoogkamer v. The Netherlands*<sup>22</sup> and *Sezen v. The Netherlands*.<sup>23</sup> Each of the more recent cases found a violation in cases in which the applicants were in a less sympathetic position than in *Beerhab*. In other words, the state interest in the latter two cases appeared stronger than in *Beerhab*. Accordingly, the Court's decisions finding a violation narrowed the Margin of Appreciation for national interests.

*Beerhab* presented the case of Abdellah Beerhab, who married a Netherlands national and was granted permanent residence and the right to work in the Netherlands for the purpose of the marriage. Following their divorce in 1979, and the birth one week later of their daughter Rebecca, Abdellah sought to renew his residence permit. He had been ordered to pay child support and had been granted frequent visitation to Rebecca, but he was denied a residence permit independent of his wife, and so was subsequently arrested and deported. The Court found complaint with the harsh approach, holding that Abdellah and Rebecca maintained a family life. Since there was legitimate family life during the initial marriage (the time of Rebecca's conception), by extension there was family life between Rebecca and Abdellah. Interpreting paragraph 2 of Article 8, the Court could not view the deportation as a proportionate response to "a pressing social need," even after making "allowance for the margin of appreciation that is left to the Contracting States" (para. 28). With a single dissent, the Court found the interference with family life too severe.

The facts in *Rodrigues da Silva* push the envelope further. The child in the case, Rachel Hoogkeimer, was born in 1996 to an unmarried couple. Rachel's Brazilian mother, Solange Rodrigues da Silva, came to the Netherlands in 1994 with her Dutch partner Daniël Hoogkamer, but never applied for a residence permit and broke up with Daniël in 1997. Daniël was given custody, though his former partner shared in the care. Rodrigues da Silva's subsequent application for residence was rejected. The Dutch courts stated that Rachel either had to live in Brazil with her mother or in the Netherlands with her father. Although told to leave the Netherlands in 1999, Rodrigues da Silva stayed and continued to work (illegally) in the Netherlands, caring for Rachel on weekends. Unlike Beerhab, Rodrigues da Silva had never had legal, permanent residence status so the Court asked whether the Netherlands had a positive obligation to grant it, under which the State presumably has a wider Margin of Appreciation.<sup>24</sup>

The ECHR unanimously held that the Netherlands had violated Article 8. Since the Netherlands would not transfer parental authority to Rodrigues da Silva (its Child Care and Protection Board found that moving to Brazil would require a traumatic departure from the Netherlands for Rachel), the Court concluded that Rachel would remain in the Netherlands. As a result, expelling Rodrigues da Silva would break the bond between mother and daughter, which would disrupt both Rachel's and Rodrigues da Silva's family life, since the latter had been involved in Rachel's care. Again the balancing predominates the Court's analysis: "the Court considers that in the particular

circumstances of the case the economic well-being of the country does not outweigh the applicants' rights under Article 8, despite the fact that the first applicant was residing illegally in the Netherlands at the time of Rachael's birth. Indeed, by attaching such paramount importance to this latter element, the authorities may be considered to have indulged in excessive formalism" (para. 44). In this conclusion, while the Court continues to recognize the Netherlands' interest in controlling immigration, it seems to suggest that this interest can only outweigh an individual's family interest in cases of both *de jure* and *de facto* illegal immigration. Note that the Court's weighting of parental interests in this case might reflect an unspoken preference for maintaining mother-child bonds rather than father-child bonds, although one would not expect the Court to explicitly state it.

The third case in the trio, *Sezen*, adds the element of a criminal conviction to the recurring pattern of a couple that separated after having a child—thus striking at the heart of the contemporary political panic over the purported connection between ethnically diverse immigration and public safety. Mevlut Sezen married another Turkish national (Emine Sezen-Oğuz) who had permanent residence in the Netherlands, where she had lived since she was seven years old. After their marriage, he was granted a residence permit and, one year later, given the right to remain in the Netherlands indefinitely. Shortly thereafter he was arrested and convicted of possession of over 50 kg of heroin, with intent to distribute. After his release from more than two years in custody, the couple lived in separate apartments, although they conceived a second child during this time. The Ministry of Justice sought to withdraw Mevlut's residence permit and impose a 10-year exclusion order against him (barring entry to the country for even short visits); the Netherlands had a sliding scale policy that took into account the length of time one had been in the country legally and the severity of the crime. In applying Article 8, the Dutch authorities argued that the Sezen's familial interest should not be given much weight, concluding that there had been a permanent breakdown of the marriage since the couple no longer was cohabitating. The Dutch courts quashed the exclusion order, but upheld the decision to not extend the residence permit.

Again, the European Court of Human Rights, on a 5-2 decision, held that the Netherlands had not struck a fair balance between the interests of the Sezen family and the interests of society. All parties admitted that the withdrawal of the residence permit interfered with family life, but in assessing whether the action was "justified by a pressing social need and, in particular, proportionate to the aim pursued" (para. 41), the Court drew particular attention to the fact that the family was still a functioning unit, the temporary living arrangements notwithstanding. The Netherlands had not given sufficient attention to the effects on family life.<sup>25</sup> The Court concluded that the interference in family life was quite severe and not proportionate to the protection of public safety.<sup>26</sup> The dissenting opinion, written by the ECHR's Dutch judge, argued that the Netherlands had not been unreasonable or arbitrary under its sliding scale policy. Without using the term Margin of Appreciation, the dissent vitally drew attention to the balance between nation-states and the human rights regime implemented by Court.

[T]he conflicting arguments are more or less in balance and a decision in either direction is arguable. In these circumstances, it seems to me that it should be left to the national authorities to balance the interests involved. Since the applicants' interests have not been overlooked and reasonable



and foreseeable legal principles were applied, I believe that the majority should have shown more restraint. Their conclusion sets aside the balancing exercise carried out by the national authorities without, however, giving a clear message capable of contributing to a fair national immigration policy (para. 8).

Because *Sezen* concerned a negative obligation to not remove the residence permit of one already in the country, the state would typically have had a narrower Margin of Appreciation (indeed, the term does not appear at all in the publication of the Court's opinion or the dissent). On the other hand, the case involves an additional public interest, namely public safety, that the Court and Dutch authorities consider in applying Article 8. While in *Beerhab* the Court made explicit reference to the fact that Beerhab had not committed any crime and was therefore more deserving of a residence permit despite the harm to the economy by having a non-national take a job, in *Sezen* the state's interest in the economy did not figure at all (and Mevlut Sezen's status in gainful employment was perhaps implicitly taken to mean that he was less a public safety threat). In this sense, the flexibility of the Court's doctrinal balancing appears dramatic, and the scope for the Strasbourg culture to do its work appears wide.

Some of that culture finds agreement within the Netherlands. Within multiple ministries, the tension in 2010 about the direction of Dutch politics made it apparent that human rights law is not seen by the actors themselves as entirely organic. The Court's legitimacy within the legal community has a much stronger foundation, such that criticisms of particular decisions aside, the legal community in the Netherlands entertained no doubt about the relevance of ECHR decisions to Dutch law. The prospect of the influence of Wilders over the work within the government ministries—merely hypothetical at the time of our interviews—brought the suggestion that there were limits to how far lawyers could go in creating arguments for the Court or in resisting implementation of its decrees. Viewing human rights law as taking on a concrete form, one government lawyer we interviewed added that the arguments the Court considers are not “autonomous” but based in evolving precedent.

Even so, a final case for discussion here, *Üner v. The Netherlands*,<sup>27</sup> cautions observers and cause lawyers to appreciate the effect of political context. Üner came to the Netherlands at age 12 with his family to be reunited with his father, who had been in the country for ten years. After six years, he was granted a permanent residence permit in 1988. In the next two years he was convicted of breaching the peace and of a violent offense against a person in public. A relationship with a Dutch national, begun in 1991, produced a son in early 1992. He later moved out of the house shared with his partner and son, and further criminal incidents culminated in a manslaughter conviction for the death of a man he shot in the head in a fight. His partner and son visited Üner in prison regularly; Üner and his partner conceived a second child while he was imprisoned. In 1997, the Ministry of Justice withdrew Üner's permanent residence status and issued a ten-year exclusion order on him, arguing that the interest in public safety outweighed Üner's interest in family life. After his release from prison in 1998, the Netherlands deported him, doing so a second time when he returned illegally. In March 2006, Netherlands authorities found Üner working at an illegal cannabis plantation (giving new

meaning to Üner's claim that he had turned over a new leaf) and again deported him to Turkey.

The *Üner* case was decided by a Grand Chamber after a panel of the court initially ruled in favor of the Netherlands. In the first Article 8 case heard in Grand Chamber, the Court ruled in a 14-3 decision that the deportation and exclusion of a Turkish national did not violate the Convention. Here was the law confronting the new demographic realities of Europe and facing a significant question: whether, and under what circumstances, governments could deport long-term or second-generation immigrants. The government of the Netherlands argued that if the Court held "that the expulsion of aliens belonging to the category of second-generation or long-term immigrants was always disproportionate and discriminatory ... [it] would entirely eliminate the margin of appreciation enjoyed by the State when assessing individual immigration cases" (para 48). In addition, the government of Germany submitted an intervention, arguing in favor of allowing exclusion orders and not limiting the amount of time that countries could exclude deported people from the country.

The Court's decision in favor of the Netherlands noted that there was no absolute right against expulsion. While acknowledging that some states forbid expulsion of long-term immigrants on the basis of criminal records and that while the Council of Europe's Parliamentary Assembly had recommended limited expulsion as a criminal sanction only to offenses affecting state security (and forbidding it entirely in cases in which the individual was born or raised in the host country), the Court noted that the Committee of Ministers of the Council of Europe had retained an earlier policy that allowed for expulsion based on the severity of the offense and the amount of time one had been residing in the country. Further, the Court held that Article 8 could not be construed as to forbid expulsion, since the second paragraph of the Article suggests that states may interfere with family life if it is in accordance with law and necessary for a variety of purposes. In the particular case, the Court found that the deportation and exclusion were proportionate since Üner had a history of criminal violence and since the family bonds could adapt either to life in Turkey or to Üner's absence. In its decision, the Court did not make direct reference to the Margin of Appreciation. While its analysis drawing on the second paragraph of Article 8 suggests some incorporation of Margin-of-Appreciation-based ideas, its other analysis (drawing on Council of Europe advice that argued for a sliding-scale-type policy) does not provide clear guidance as to whether the Court considers the decision based on the Margin of Appreciation applied to the state, particularly since it based the decision on the seriousness of Üner's offenses.

The dissent recognized that the family ties between Üner, his partner, and his children were strong enough to survive his imprisonment, and that his partner and children had no connection to Turkey. Further, the dissent disagreed with the weighing of factors, needing to discount the seriousness of the offense with the length of Üner's time in the Netherlands, the duration of his relationship with his partner, the well-being of Üner's children, the hardship Üner's partner and children would face if uprooted to Turkey, and the length of time that had passed since Üner's violent offenses. In a sense, too, deportation and exclusion appeared to the dissent to be more severe than imprisonment, which at least offered some window for family life.

Civil servants within the Netherlands are clearly cognizant, to quote one interviewee, of the "nationalism and xenophobia" that threatens the continued growth of the legitimacy

of the ECHR, but the *Üner* decision speaks to the two-way process of legal development. The ECHR's vision does not stand independently and universally in opposition to national level interests. The nation-state remains vital in a globalizing world. So important to the outcome in this case—an outcome that runs against the grain of Article 8 family reunification cases generally—is the one most stinging fact of this case: the death by shooting at the hands of Üner. Each factor other than the seriousness of offense argued in Üner's favor, but the severity and history of the crime made him an unsympathetic defendant. The law of human rights is not a fixed entity but a work in creation. The choices made by lawyers in the cases they bring and the mood and context of a changing Europe will shape the potential and limits of the law. For a body that stakes its claim as the authoritative interpreter of human rights in Europe, the unavoidable conclusion is that human rights is a measure of what *is* rather than what one might *wish it to be*.

## V. Regulating Human Rights in the Netherlands

The problem described in the preceding section is the conundrum of constitutional jurisprudence in many systems. Some rights are more easily described as fundamental; others are qualified rights. The right to family reunification is a key concept in the application of Article 8 and “that guarantee now plays a major role in national immigration law throughout Europe.”<sup>28</sup> Yet, policing the boundaries of a right that must be balanced against other important values becomes a sensitive political situation for the Court. Its authority does not derive from a natural law commandment for human rights. In light of changing social situations, the political feedback from aggressive expansion of the family reunification value could be pronounced. If the Court voluntarily withdrew from this front, it could placate local officials, building support for the Court and avoiding damaging conflicts, but at the expense of its perceived moral authority and its duty to do justice.

If these considerations come down, at some level, to political strategy and the choices judges and national officials will make about what meaning they will give to the law, then it is a political dialogue that occurs within a longer timeline. For a constitutional order founded less than a century ago—and one founded in the rubble of the continent—the ECHR has demonstrated staying power and more. It has been credited with influencing national decision-making across a wide range of policy areas, not merely those with a particular “judicial” tinge (such as criminal process rights). The law of Article 8 is a case in point. The Court consistently pushed countries, including the Netherlands, toward greater respect for the maintenance and reunification of families. National authorities have, to date, been willing to accept the judgments of the ECHR in this area, even though it touches on highly salient and controversial areas of public policy, especially immigration and racial/ethnic diversity.

The significant distance the ECHR has traveled during its relatively short evolution is reflected in the terms and points of reference within legal dialogue. For the Dutch lawyers interviewed in this project, the role of precedent took on a special character. Precedent matters to lawyers as much in continental Europe as in the common law systems of the Anglo-American tradition. Precedent plays a major role in how lawyers work through the arguments and define what is possible as they go to Court. It is also how nation-states decide what must be done in similar cases. But discussion of ECHR

precedent with Dutch lawyers is a qualitatively different experience than discussions in the Anglo-American world. An important reason has to do with the rapidity with which the law appears to have evolved. Precedent more than ten years old, our interviewees reported, is rarely relevant. In the United States today, political contestation occurs around decisions—such as *Roe v. Wade* or *Mapp v. Ohio* (the Exclusionary Rule)—that ushered in a doctrinal approach that remains contested. Even decades later, these classic decisions still set the terms for discussion. In Europe, the backlash has not occurred thus far, and so the ECHR’s evolving direction remains the dominant frame; old decisions do not continue to set the terms. Past may be prologue, but in the United States the book keeps repeating itself. Europe has left behind precedents that no longer appear relevant.

Geography figures into the weakness of precedent and the past for Europe’s human rights future. Decisions from other European countries are only weak precedent across the borders. The reasons for this are not the formalities of jurisdiction, as it is when a lawyer of one American state asks whether a case from another state is relevant. The differences remain lodged in a Europe that is changing quickly but also moving slowly toward integration. The particularities of the Netherlands—its culture, institutions, history—are so distinct that Dutch lawyers look at precedents from other countries as interesting (serving as an indicator of how judges of the ECHR are approaching a subject) but not determinative. The decisions in Article 8 cases, triggering consideration of factors like public safety, remain embedded in a social context that does not yet see more of the universal than the local. Local values matter, and human rights doctrine only serves to capture the balance that must be rendered. That state of affairs is ironic, then, because the rapidly changing scene for European human rights law undermines the value of old precedent but has not resulted in a sufficient convergence of conditions for more nations to see their positions (reflected in precedents) as identical.

The Dutch government may be among the most ready to look upon the decisions given to other nations by the ECHR as a stimulus toward reform. It has been generally credited with amending “legislation where this is required by decisions of the ECHR, whether rendered against the Netherlands or against other Contracting States.”<sup>29</sup> Yet human rights advocates in the Netherlands find reason to be critical, believing the commitment of the government to be only superficial or secondary, a distant concern that undercuts the value of human rights. That thought is echoed in the caveat, “worth noting, however, that it may take several years for legislative amendments to go through the Parliamentary process, during which time the Netherlands could be confronted with several determinations of violations of the CHR that are all similar to the one prompting the legislative change in the first place.”<sup>30</sup>

If one wants to understand the pitfalls of human rights as a vehicle for improving the human condition, the example of Yugoslavia or Rwanda or many other sites of human rights abuses might come to mind. A global society that said “Never again!” has borne witness to human rights tragedies with disappointing frequency. But the nature and limits of human rights are arguably better tested in the experience of a country like the Netherlands, a case of the “green wood rather than the dry.” For a global society, with states as its most prominent actors, to nevertheless begin a slow process of codifying the claims of people against national governments would require a bulwark of support. How states and nationally organized populations respond to supranational rights institutions provides insights into the limits and possibilities of that transformation. Since European

governments, in general, and the Netherlands, in particular, have been at the forefront of the universalizing rights movement, we have examined the relative status of the Netherlands and the European Court of Human Rights, a particularly important institution that hears claims of individuals against governments. As Stone Sweet and Keller have written so emphatically, “The European Convention on Human Rights is the most effective human rights regime in the world.”<sup>31</sup>

As our analysis of the jurisprudence of Articles 3 and 8 shows, a sense of progressive movement away from popular sovereignty and toward legal governance characterizes the broad historical sweep of the paired relationship between the ECHR and the Dutch government. The activism of the European Court of Human Rights “has helped to propel the system forward,”<sup>32</sup> and appropriately so, in the words of one Dutch attorney, because “the guarantees in the Convention would become very meaningless if [the ECHR judges] did not take an active approach.” In an interview painted with a brush plainly too broad but illustrative of the contemporary confidence in the Court, a Dutch civil servant claimed, “if there is one constitution of Europe, it is the European Convention on Human Rights. It is effectively the most authoritative court...Everybody will follow it. If you look at the literature, a lot of criticisms are voiced, but in the end everybody will do as the Court says.”

The evolving jurisprudence of the ECHR has pushed frequently against European governments in an effort to expand the effective meaning of the Convention’s protections. Such movement, however, is made possible by the willingness of countries like the Netherlands to follow the Court’s lead and comply with its dictates. The meaning of human rights has a textual foundation but what can be done with that text—the potential for judicial activism—depends on other factors in its social and political context. Two generations of scholars now deem it beyond question that the work of courts is “political,” at least insofar as decisions are located within an environment that structures the choices available to the judges and makes the choices dependent on the anticipation of the behavior of other actors. Law is simply not autonomous from politics.<sup>33</sup> The civil servant who expressed such confidence in the ECHR somewhat paradoxically observed that the Court is one actor among many. “It can be very often,” he observed, that “the political wind here in The Hague is such that a Court decision is not exactly welcome. So what happens is that you look at ways of dealing with it, sparing the political sentiment. There are a lot of difficult situations where you just have to find a solution that will satisfy everybody, which is sometimes impossible.”

In the European context, the history of doctrines like the Margin of Appreciation confirms this essential point. As one interviewee repeated, almost as a maxim, the aim of that “wonderful device,” the Margin of Appreciation doctrine, “is not to protect human rights but to protect the Court.” The Court has doctrines (i.e., Margin of Appreciation and Exhaustion of Domestic Remedies) that have enabled states to retain a good deal of authority in relation to the scope of its decisions, affording the Court legitimacy. Over time, the narrowing margin and ECHR’s more assertive review have evidenced a growing tendency of the Court to regulate states.

In their interdependent relationship with nation-states, the institutions of human rights receive support from conditions in the Netherlands that allow their expansion. In recent years, scholars have argued persuasively that the expansion of rights and healthy constitutional systems stem from the acumen of the lawyers and interest groups that drive

issues to resolution and frame the questions for courts.<sup>34</sup> In the Netherlands, the number of attorneys who push cases to the ECHR is relatively limited; specialization further divides their number across types of cases (e.g., criminal versus civil). That portion of the bar expert in ECHR practice has expanded, such that referrals to the leading attorneys can provide a substantial practice—a form of specialization that has important consequences for the skill with which cases are brought to the ECHR and the likelihood of success. As attorneys gain experience litigating before the ECHR, they develop the ability to be selective with cases. In other words, they are now willing and able to refuse cases that have no (or only an “academic”) hope of success. In this respect, the attorneys may help to expand the Court’s authority incrementally, as *Salah Sheekh* demonstrates. The decision to file a grievance with the ECHR and forego an appeal to the *Radd van Staat* case came about due to the advice of Salah Sheekh’s attorney (who also successfully argued the case in Strasbourg). The selection of the case and the timing of the filing with the ECHR relied on deep knowledge of the Strasbourg culture. The framing of the argument provided judges with the raw material that argued that the outcome in the case really did not repudiate the principle of Exhaustion of Domestic Remedies despite the fact that the decision reduced the formalism of the requirement. Forty-six of the forty-seven judges of the ECHR are appointed from countries other than the Netherlands. An attorney making an application is in a position to teach many judges of the ways of the country at hand, and sometimes, one attorney said, offer a “Teletubby” legal argument to instruct a judge in the lessons of the Court’s own voluminous precedent. Though to be taken with a grain of salt, this lawyer’s confidence allowed him to suggest that even “the civil servants who litigate against you are not used to a big ECHR approach” to a case. The “repeat player” here may be the human rights advocates, helping to drive forward that agenda, particularly since they can serve as the bridge between the domestic context of government practice and international network or rights principles.

Equally important in forming a successful environment for human rights in the Netherlands is the strong provision of legal aid to attorneys who represent clients to the ECHR. Financial support is uneven across Europe. Some leading cases, including cases from human rights laggards such as Russia and Turkey, have been brought to the ECHR through the involvement of international organizations like Amnesty International. The structure of support in Western Europe varies. One Dutch attorney looked at English lawyers with a somewhat self-interested and dismissive posture. “What I’ve learned from the U.K.,” he observed, “is that you make your money as a lawyer with the national cases and, they think, you ought to do the ECHR out of sheer altruism—I think that’s ridiculous. It’s hard work and I don’t see why that shouldn’t be rewarded with some kind of financial support.” Critical as this lawyer may be, the altruism of the English example evidences a bar that is professionally supportive of human rights litigation. A contrast with the United States’ experience with legal aid shines a favorable light on this attorney’s ability to gloat in financial success. The conservative backlash of the 1970s and 1980s in the United States targeted what was seen as an utter lack of common sense: state funding so that lawyers could sue the state (and cost the state money). The Dutch case, though different from the English, gives evidence of a state that tolerates or even supports the work of its critics.

Notwithstanding the contributions of the Dutch government toward a meaningful system of human rights implementation, the experience at the cutting edge of human

rights work says as much about the nature of global citizenship as the outright failures and achievements in more extreme cases of human rights abuses. At the cutting edge, settlement, an important dynamic of law everywhere, has a particular impact. The empirical study of the ECHR is too new an enterprise to have fleshed out the rates of settlement in human rights litigation, but with voluminous caseloads, an agreement of the parties out of court terminates a substantial portion of the work. In the abstract, some parties settle knowing they possess a weak case; sometimes they settle from mutual uncertainty about the outcome. Whatever the reasons, settlement provides a vehicle by which a state can avoid a more substantial revision of the laws. One private attorney, critical of the Dutch ministries, recounted a suit by a traumatized asylum seeker:

[It was a] very nice case, beautifully presented, so I was really looking forward to it, but then I got a phone call by my counterpart at the Ministry of Justice saying, ‘look, we would like to invite your client to ask for asylum again.’ I was legally heartbroken, but what arrogance would I have to withhold that from my client? On the other hand, you want this ridiculous law to be changed.

Cause lawyers around the world have faced the same ethical conflict: how to win relief for the greatest number, when they are obliged to give their client the best possible individual remedy.<sup>35</sup> That answer is, mostly, clear. But the wider impact, noted this attorney, is that “the law is still in force today,” resulting in the unfortunate return of asylum seekers who happen to fall afoul of its terms.

Settlement, then, burdens the potential success of a human rights regime by allowing parties to seek out minimalist responses to conditions on the ground that are in need of change. In the context of changing public opinions—what one interviewee called the Netherlands’ “increasingly narcissistic approach” to foreigners—the legal frame of human rights makes settlement a vehicle for negotiating the impact of the Convention’s aspirations with the political context of the day. For legal insiders who know the precedents and the tenor of the ECHR, it is possible to identify several statutes that have been enforced even in the knowledge that they are not “Strasbourg proof”—able to withstand challenge should a suit reach a final decision by the Court at some point years ahead.

These relationships at the boundaries of human rights law reveal the political limits of Dutch policymaking. How far has the Netherlands transformed its laws (much less society) in the wake of European human rights decisions? The question strikes at the heart of the Dutch self-conception as a progressive leader in the field. The reception of the *Salah Sheekh* decision provides a case in point, because the approach of the ECHR—in giving up on the possibility of finding an effective remedy in the Dutch Council d’Etat—created an affront, becoming the repeated focus of parliamentary discussions and debates, along with notable media attention.<sup>36</sup> The policy was changed, and when it unavoidably must change—some rules being exactly technical—the government changes “quite quickly.” But the changes can be characterized as minimalist, narrowly finding an acceptable solution without a prolonged search to root out the underlying problems. That assessment, suggested in our interviews, finds support in academic appraisals.<sup>37</sup>

Financial considerations, while never the explicit pragmatic argument offered to the ECHR, further constrain the government's approach. Politics and society interweave in this analysis. A number of interviewees spoke of the "arrogance" of the Netherlands, the felt assumption that its efforts were either sufficient or beyond reproach, a mindset that produces no agenda for self-criticism or call for wholesale reform. Institutionally, the structure of the Dutch Constitution and the absence of a constitutional court (akin to France and vis-à-vis Germany), makes it difficult to effect broader change, since individual courts must follow developments in ECHR law rather than allowing a constitutional court to take the lead in incorporating these developments. Matters of economics constrain the Netherlands as they constrain every country.

Human rights decisions are altering the course of events in national law, particularly due to the increasing sophistication of litigation by well-networked lawyers and organizations able to use the ECHR as a vehicle for legal policymaking. However, the process of fully integrating a human rights culture in government remains elusive. An interviewee in a Dutch ministry commented critically on the slow socialization of legislative policymaking into the ways of Europe. He offered an example of recent legislation in matters of particular types of immigration, finding it typical of a wider process: "If you look at new legislation in Holland it is rarely in sync with European legislation. Rarely... Basically [the new law], it's national legislation. What we very often do is first we write the law and then we look whether it fits in." Even more critically, but with a tinge of optimism, he added, "we've been able to fool ourselves into believing that Holland was still a sovereign country and that Europe was basically a periphery somewhere... Politics here is slowly changing now... It has been slowly sinking in that Europe is important."

Here, then, lie the social and political manifestations of resistance to human rights law as a force with universalizing potential. The Netherlands has a number of positive forces, especially in support for, and availability of, legal representation able to bring the ECHR to bear on matters of Dutch law. The civil service is largely supportive, and right-wing politics has made a mark on Holland but has failed to wrest political control from parties that have historically reflected a consensus position of openness and toleration. As interviewees rushed to point out, society has changed dramatically in the Netherlands yet the worst incidents of xenophobia and social unrest in Europe—citing the mass rioting in France—have not been replicated there. However, "universal" human rights do not occur far away but in local and national decisions, and the imprint is indirect and imprecise. As a form of law, human rights fall into a pattern well observed in other areas of the law. As seen in the Dutch case, it is a matter of compliance and regulation, laden with a political economy of decision-making. The game of cat-and-mouse that defines human rights law and practice converges around these factors, against which the law is tempted into formalism as a reply. Minimal compliance, or creative ways of avoiding compliance, remains very much part of the politics of law, and the aspiration is buried in the mechanics of regulation through law.

Human rights—their meaning and power—remain in play, even in the favorable setting of the Netherlands. The recent cautionary words of a Dutch commentator serves notice: "In the wake of the sometimes reactionary responses by Governments and their resulting inroads in the civil liberties of individuals, it becomes clear that the rights and obligations



guaranteed by the ECHR remain vulnerable, despite the progress made over the last 60 years.”<sup>38</sup> Human rights and the quest for global citizenship, both fixed in a world of nation-states, remain contingent upon national politics.

## Notes

1. T. H. Marshall, *Class, Citizenship, and Social Development* (Garden City, N.Y.: Doubleday, 1963); and Charles Tilly, *Coercion, Capital, and European States: AD 990–1992* (Malden, Mass.: Blackwell, 1992).
2. Yasemin Soysal, “Citizenship and Identity: Living in Diasporas in Post-War Europe?,” *Ethnic and Racial Studies* 23 (2000): 1–15.
3. John W. Meyer, John Boli, George M. Thomas, and Francisco O. Ramirez, “World Society and the Nation-State,” *American Journal of Sociology* 103 (1997): 144–181.
4. Simon Halliday and Patrick Schmidt, eds., *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context* (Oxford: Hart Publishing, 2004).
5. Erik Larson, Zachary Johnson, and Monique Murphy. “Emerging Indigenous Governance: Ainu Rights at the Intersection of Global Norms and Domestic Institutions,” *Alternatives: Global, Local, Political* 33 (2008): 53–82.
6. As noted by Marlies Glasius, these international criminal bodies are not human rights institutions because they are not venues in which individuals pursue grievance-based claims against states.
7. Rachel A. Cichowski, *The European Court and Civil Society: Litigation, Mobilization, and Governance* (New York: Cambridge University Press, 2007).
8. Or under relinquishment, if the Chamber to which a case is assigned determines a case involves either interpretation of the Convention or risks inconsistency in Court judgments.
9. Alec Stone Sweet and Helen Keller, “The Reception of the ECHR in National Legal Orders,” in *A Europe of Rights: The Impact of the ECHR on National Legal Systems*, edited by Keller and Stone Sweet (Oxford: Oxford University Press, 2008), p. 25.
10. Erika de Wet, “The Reception Process in the Netherlands and Belgium,” in *Ibid.*, pp. 254–55.
11. Case of *Salah Sheekh v. The Netherlands*, ECHR Third Section, 11 January 2007, application nr. 1948/04. All cases were retrieved electronically from the ECHR’s HUDOC system.

12. The decision of the Court, however, has not prevented analogous situations concerning other refugee seekers from Somalia facing similar issues. See, for example, Marijke Peters, “Dutch Deportation of Somalis ‘A Death Sentence,’” *Radio Netherlands Worldwide* (22 July 2010), accessed online at [rnw.nl/english/article/dutch-deportation-somalis-a-death-sentence](http://rnw.nl/english/article/dutch-deportation-somalis-a-death-sentence).
13. Keller and Stone Sweet 2008, “Assessing the Impact of the ECHR on National Legal Systems,” p. 702.
14. De Wet in *Ibid.*, p. 267.
15. Adviescommissie voor Vreemdelingenzaken (ACVZ; Advisory Committee on Migration Affairs), *Tegen de Wil Achtergebleven: Een Advies over in Herkomstlanden Achtergelaten Vrouwen en Kinderen* (Den Haag: ACVZ, 2005).
16. Case of *Ahmut v. The Netherlands*, ECHR Chamber Court, 28 November 1996, application nr. 21702/93.
17. *Affaire Şen v. Pays-Bas*, ECHR First Section, 21 December 2001, application nr. 31465/96.
18. See, for example, Elspeth Guild, *The Legal Elements of European Identity: EU Citizenship and Migration Law* (The Hague: Kluwer Law International, 2004). She argues that the Court’s decision in *Ahmut* relates to ethnicity, since it relies on the idea that *Ahmut*’s ethnicity means his primary identity was with Morocco. See also, Jacqueline Bhabha, “Enforcing the Rights of Citizens and Non-Citizens in the Era of Maastricht: Some Reflections on the Importance of States,” in *Globalization and Identity: Dialectics of Flow and Closure*, edited by Birgit Meyer and Peter Geschiere (Oxford: Blackwell, 2003 [1999]), pp. 97-124. Bhabha argues that the *Ahmut* decision was based on ethnic assumptions and that a wide Margin of Appreciation enables states to keep unequal practices intact, but also makes states particularly important sites for implementation, since the rights in the courts offer somewhat an opening of space for claims.
19. Sarah van Walsum, “Comment on the *Sen* Case. How Wide is the Margin of Appreciation Regarding the Admission of Children for Purposes of Family Reunification?,” *European Journal of Migration and Law* 4 (2003): 518.
20. “Admittedly, one might be tempted to doubt whether he has acquired that status by means which are above suspicion. However, since the Government have not relied on this feature of the case and have accepted that Salah *Ahmut* is a Netherlands national, the principle of equality requires that the Court apply the same standards as it would apply to those whose Netherlands nationality is irreproachable” (para 6).
21. Case of *Beerhab v. The Netherlands*, ECHR Chamber Court, 21 June 1988, application nr. 10730/84.

22. Case of *Rodrigues da Silva and Hoogkamer v. The Netherlands*, ECHR Former Section II, 31 January 2006, application nr. 50435/99.

23. Case of *Sezen v. The Netherlands*, ECHR Former Section II, 31 January 2006, application nr. 50252/99.

24. The Court did not make a distinction between the positive and negative obligation in *Beerhab*. It did, however, note that, “the instant case did not concern an alien seeking admission to the Netherlands for the first time but a person who had already lawfully lived there for several years, who had a home and a job there, and against whom the Government did not claim to have any complaint” (para 29). This framing reflects a point that the Court made in *Ahmut*: the line between positive and negative obligations is imprecise. The key point, however, is that in a case in which the Court does clearly distinguish that it is a positive obligation (as it did in paragraph 38 in *Rodrigues da Silva*), one would anticipate a wider Margin of Appreciation than in cases in which the nature of the obligation is less clear.

25. The decision was grounded by criteria set out in the ECHR’s 2001 decision in *Boultif v. Switzerland*. The criteria are:

- the nature and seriousness of the offence committed by the applicant;
- the length of the applicant’s stay in the country from which he or she is to be expelled;
- the time elapsed since the offence was committed and the applicant’s conduct during that period;
- the nationalities of the various persons concerned;
- the applicant’s family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple’s family life;
- whether the spouse knew about the offence at the time when he or she entered into a family relationship;
- whether there are children of the marriage, and if so, their age; and
- the seriousness of the difficulties that the spouse is likely to encounter in the applicant’s country of origin.

(Summary quoted from para. 42 of *Sezen*).

26. While not explicitly addressed by the Court in its analysis, its decision that the response was disproportionate may also reflect the fact that Mevlut had not reoffended and had secured paid employment since his early release from custody (para 21).

27. Case of *Üner v. The Netherlands*, ECHR Grand Chamber, 18 October 2006, application nr. 46410/99.

28. Keller and Stone Sweet 2008, p. 699.

29. Erika de Wet in *Ibid.*, pp. 275–76.

30. Ibid.

31. Ibid., p. 3.

32. Ibid.

33. For a recent review and appraisal, see Christopher Tomlins, “How Autonomous Is Law?,” *Annual Review of Law and Social Science* 3 (December 2007): 45–68.

34. See, e.g., Charles Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998); and Mikael Rask Madsen, “From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics,” *Law and Social Inquiry* 32, no. 1 (2007): 137–159.

35. Austin Sarat and Stuart Scheingold, eds., *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: Oxford University Press, 1998).

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

37. De Wet in Keller and Stone Sweet 2008. “[O]ne can conclude that the Dutch Government is in principle committed to bringing its legislation into line with the jurisprudence of the ECHR. However, closer scrutiny reveals that the commitment of the Government is on occasion tainted by a minimalist interpretation of the rights in the ECHR and several years of delay in implementing the necessary legislation” (276).

38. Ibid., p. 306.