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978-1-107-04183-7 - Rights for Others: The Slow Home-Coming of Human
Rights in the Netherlands
Barbara Oomen
Excerpt
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CHAPTER 1

INTRODUCTION: THE RIGHTS FOR OTHERS

On 10 December 2009 the Dutch Minister of Foreign Affairs handed out the ‘human rights tulip’ to Shadi Sadr, an Iranian activist. The ceremony took place in the stately *Ridderzaal* (Hall of Knights), a stone’s throw from the Peace Palace, the International Criminal Court and the other international tribunals that lead The Hague to call itself ‘The city of Peace and Justice’. Surrounded by a sea of specially grown yellow tulips, the minister reminded the audience of how the human rights tulip symbolized the prominent place of human rights in Dutch foreign policy, and was intended to give political support to human rights defenders. The Dutch government, it was said, was unique in giving such explicit encouragement to individuals whose main activity it is to take their governments to task.

That same afternoon, a hundred kilometres from The Hague, the national ombudsman held a speech titled ‘The disappearance of human rights in the Netherlands’ (Brenninkmeijer 2010: 277–85). Referring to police shootings, the rights of children in care and the right to health in psychiatric institutions, he mused at the absence of reference to human rights in public discourse in the Netherlands: ‘human rights disappear in the sense that they don’t figure in public and political debate, even when they are relevant’ (ibid.: 278). Those who frame social problems in the Netherlands as human rights violations, he said, can count on ‘vehement, and often surprised, responses’ (ibid., 277). The governmental response to the ombudsman’s speech was furious, with the Vice President fuming that the remarks were ‘irresponsible and improper’ (Kok n.d.: 3). Clearly, whilst human rights were a cornerstone of

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Dutch foreign policies, they were deemed less suitable as a yardstick for domestic affairs.

It is this latter paradox that this book seeks to describe and analyse: the contested home-coming of human rights as a discursive frame and thus a political resource in what are generally considered the most *völkerrechtsfreundliche* countries in the world (Fleuren 2010: 245–266). It draws on a growing body of socio-legal studies on the role of international human rights in domestic policies, and hopes to contribute to them in mapping the politics and the processes by which these rights acquire meaning – or not – within this particular setting. For, whilst there is a great deal of literature on the rise of ‘rights talk’ elsewhere, more socio-legal analyses of civil law countries like the Netherlands invariably focus on human rights as a component of foreign policy instead of their domestic relevance. An analysis of the interrelationship between institutions, actors and legal consciousness in the encounter between domestic problems and international human rights can thus not only shed light on the puzzling paradox presented above, but also on wider theoretical questions on the way in which human rights acquire meaning.

To start with, this introduction maps the rise of rights talk as a world-wide phenomenon and an object of socio-legal study and the way in which a country like the Netherlands has historically considered human rights as an export product but is increasingly confronted with the results of the expansion, external enforcement, the emancipation and the domestication of rights talk. It discusses the theoretical insights on the ‘home-coming’ of human rights that guide the inquiry and the multitude of methods needed to understand why international human rights acquire (or fail to acquire) meaning in addressing social and political problems in the Netherlands, and what insights this brings to the broader sociology of rights.

THE RISE OF RIGHTS TALK

Human rights, it has been said, have become ‘global esperanto’ of our age, a ‘moral lingua franca’ in times of secularism, in which globalization is paired with fragmentation. Even Eleanor Roosevelt, when she famously stated that the Universal Declaration of Human Rights could well become ‘the magna carta of all mankind’ could not have foreseen the extent of the four key forces that characterize the place of rights in global politics today: their expansion, their external enforcement, their emancipation and their domestication.

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If one considers international human rights, as this book does, as those fundamental rights laid down in international treaties, their expansion is remarkable. The seeds sowed in the non-binding Declaration of 1948 have germinated into a fully fledged human rights regime, laid down in hundreds of international and regional treaties and a host of non-binding documents complemented by monitoring bodies and other agencies with the task of scrutinizing their interpretation (Donnelly 2003). From classic checks on state abuse of power, human rights have spilt over into the social, the economic and the cultural, and increasingly address the behaviour of individuals and companies. Whether it concerns combating poverty, insecurity, environmental degradation or disease: virtually all global problems have over time been reframed as rights violations with particular policy consequences attached to them.

Whilst the first decades of the global ascent of human rights were mainly characterized by standard-setting, with lawyers and bureaucrats industriously negotiating and agreeing upon what many at the time still considered ‘nonsense on stilts’ – the real politics, after all, took place elsewhere – the end of the Cold War changed all this. By the end of the nineties the shifts in the global card play allowed for an increase in the actual external enforcement of human rights, whilst ethnic warfare provided an additional reason to make rights into realities. From Rwanda to Kosovo to East Timor, the global community that had long been an abstract presence became a palpable reality, and the language it spoke was that of universal human rights (Brysk 2002: 311; Fukuyama 2004).

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

A striking element here is the emancipation of rights talk. Human rights, in spite of brave attempts to point out their mixed descent and

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links to all religious and cultural families in the world, were dominantly thought up in eighteenth-century parlours and laid down in writing under the auspices of western powers (Ishay 2004). These days, however, they are promoted in the streets of Kolkata and Kampala, functioning as a weapon of the weak and are directed not only towards the national governments, but also towards the international community at large. Just as in, for instance, UN monitoring mechanisms, Ghanaians, Peruvians and Indians hold to task the Americans, the English and the French in the language they once laid down (Simmons 2009).

The arrival of rights talk in all corners of the world has an institutional component as well. An important marker in the move from standard-setting and external enforcement towards the domestication of human rights lies in the Vienna Declaration of 1993 (Cardenas 2009: 76–91). Since then, the Office of the High Commissioner on Human Rights has opened field offices in countries all over the world and Special Rapporteurs carry out country visits, as does the Council of Europe Human Rights Commissioner. A crucial linchpin in the ‘domestication of the international law’, over one hundred national human rights institutions worldwide seek to bridge international standards and their implementation at the national level (Carver 2010: 1–32). In addition, human rights education both in- and outside of formal education has increasingly been implemented in all corners of the world.

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It was against this background that, in April 2008, the Netherlands underwent the first Universal Periodic Review of its human rights situation by the Human Rights Council. As one of the oldest democracies in the world, ranked third on the 2012 human development index, with a score of 0.95 for ‘political stability and absence of violence’ in the World Bank’s 2008 governance indicators, a solid welfare state and 16 million people ranked amongst the happiest in the world, the country had long pleaded for such an integrated human rights test. Once the Human Rights Council agreed to the procedure, the Netherlands had offered to be part of the first batch to undergo it, with civil servants working overnights to compile the report (Human Rights Council 2008). Fearful of critiques of the anti-Islam film *Fitna* that had just been released, the cabinet had asked a young female Justice Minister of Turkish descent to chair the fifteen-person Dutch delegation. She, as was later smugly reported to parliament, ‘indicated that the government

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also recognizes problems, takes active measures to solve them and is open to recommendations and suggestions . . . thus enabling a dialogue that was evaded by other countries'.¹

The main concerns raised during the review by countries ranging from the Holy See to Canada to Bangladesh concerned xenophobia and polarization, excessive force in repatriating migrants, the legality of prostitution, discrimination against migrants, sexual abuse of children and child pornography, the position of women in top positions, the lack of a national human rights institute, the fire in a detention centre, segregation of schools and the health rights of asylum seekers. The few newspapers to write on the review noted with some bemusement how Belarus had commented on the torture situation in the Netherlands, and were told by the minister that 'instead of wagging our finger we now show vulnerability. If other countries see this, they might dare do so as well.'² The recommendations by the Human Rights Council – on all the fields mentioned above, were sent to parliament but never discussed there. If the term UPR did come up in political or public discussions after 2008 it concerned human rights violations in other countries.³ An interim report on the Dutch progress, that indicated which recommendations the government ignored and which it carried out, was never even sent to parliament. The civil servants who had worked on the report did, however, successfully offer their assistance to other countries who still had to undergo the review.

To a country like the Netherlands, this book argues, human rights are above all an export product, a moral cornerstone of foreign policy. This human rights 'exportism' should not be mixed up with the 'exceptionalism', often invoked to describe the American attitude towards human rights instruments (Ignatieff 2005; Van der Vyver 2001: 775–832). Ignatieff has identified three types of American 'exceptionalism': 'exemptionalism' (the support for treaties as long as the country concerned is not subject to them), double standards and legal isolationism. The Netherlands, in contrast, has ratified virtually all of the main UN human rights treaties⁴ and has a

¹ Letter to the House of Representatives (4 September 2008, 31 200 V, 61).

² 'Hoe Nederland mensenrechten "net niet" naleeft: "Vingertje heffen is voorbij"' (How the Netherlands does 'not quite' live up to human rights 'the time for wagging fingers is over'), *NRC Handelsblad*, 16 April 2008, p. 1.

³ Search of parliamentary publications and lexisnexis, as of April 2008, conducted January 2012.

⁴ With the International Convention on the Protection of All Migrant Workers and Member of their Families (1990) as an exception. The Convention on the Rights of Persons with Disabilities was signed but not yet ratified by 2012.

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uniquely monist constitution which recognizes the supremacy and the direct effect of human rights law. Nevertheless, the main motivation in developing international human rights law and determining its place in the domestic order seems to be to ensure its realization elsewhere: treaty ratification is not only a means to *look* good, but primarily intended to *do* good (see also Hathaway 2002: 111).

A brief excursion into the history of the Dutch engagement with international human rights can illustrate this point. This engagement, in the decades after the Second World War, moved from hesitant first steps to the Netherlands becoming widely recognized as being in the forefront of the struggle for the establishment of human rights internationally. The country's initial attitude towards the founding of the United Nations had been lukewarm. This was partly because of the fear of a repeat of the League of Nations, an experience that had fulfilled few of the hopes bestowed upon it by the Netherlands in joining in 1920, that 'the League will contain the gems of a true organization of peace and law for all peoples'.⁵ The Minister of Foreign Affairs Schaper described the meetings in San Francisco as 'dead boring' and 'endless blabla', destined only to seal the hegemony of the great powers by means of a bombastic document with no actual content (Malcontent and Baudet 2003: 79). The fear that the new organization would simply not go far enough in curbing the power of the great nations led the Netherlands to advocate an insertion in art. 1 of the UN Charter, stating that the organization would operate with due regard for principles of justice and international law (Van Ditzhuyzen et al.; Schrijver 2010: 209–44).⁶

When the Dutch learnt of the work of the Economic and Social Council to set up a commission that would look into the formulation of human rights they attempted – to no avail – to put forward a candidate, a woman who had been active in the field of minority rights before the Second World War.⁷ In addition, the Netherlands instituted a special national commission to offer advice to the Human Rights Commission. In line with earlier Dutch thinking, this Commission would argue in favour of an organization that could come up with binding decisions in case of conflict. A High Commission, consisting of independent experts and placed under the International Court of Justice, could play that role.

⁵ House of Representatives, debate on the 1921 national budget, III, *Memorie van Antwoord* (17 December 1920, 9).

⁶ Charter of the United Nations, San Francisco, 26 June 1945, in force 24 October 1945, 1 UNTS xvi.

⁷ This was Mrs Bakker-van Bosse.

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At the same time, the Commission's comments reveal the degree to which it considered the Declaration to be a utopian ideal: in discussing the limitations of rights it stated that 'a Declaration should state the ideal situation and there is no place for limitations of a situation in which the ideal cannot be reached yet'.⁸

The Dutch contribution to the Universal Declaration of Human Rights thus took place during the UN General Assembly in 1948 in Paris. Here, the Dutch delegation – consisting partly of parliamentarians – operated rather clumsily. Instructed by a motion in the Senate to include reference to man's divine origins in the preamble, it spent a great deal of time seeking to garnish support for this viewpoint, even though the Commission on Human Rights chaired by Eleanor Roosevelt had long decided to leave this out, so as not to 'rouse the opposition of delegations representing more than half of the world's population'.⁹ In addition, the largely Catholic delegation, consisting of amongst others the pastor Beaufort and M. Klompé, who would later become the first female Dutch minister, spoke out strongly in favour of the family, for instance through opposing the notion of equal rights for legitimate and illegitimate children as this would constitute 'an inducement to beget and bear children out of wedlock'.¹⁰

A great deal of the delegation's energy went into proposals that sought to defend Dutch particularities. The prohibition of Catholic processions in the Netherlands, for instance, spurred the Dutch delegation to argue that the right to assemble should not include the right to hold pageants or processions in the streets.¹¹ Similarly, the Dutch interpretation of the freedom of education as the right of parents to select where their children would be educated – a right that had been battled over in the Netherlands and codified in the Dutch Constitution in 1917 – brought the Dutch to propose a successful amendment explicating this.¹² And

⁸ Report of the National Commission of Advice on Human Rights, National Archives, Ministry of Foreign Affairs.

⁹ The motion was proposed in the Senate on 24 June 1948 by delegate Van Voorst tot Voorst. Discussion: E/800, report of the 166th meeting, Palais de Chaillot, Paris, 29 and 30 November 1948, comments by Mr Davies.

¹⁰ E/800, report of the 144th meeting, Palais de Chaillot, Paris, 18 November 1948.

¹¹ Commission on Human Rights Drafting Committee, 21 May 1948.

¹² E/800, report of the 146th meeting, Palais de Chaillot, Paris, 19 November 1948. This particular interpretation of the right to education, much desired by the religious political parties, was incorporated in the 1917 Constitution in the Netherlands in exchange for universal suffrage, and brought an end to the *schoolstrijd* – the school wars – fought out throughout most of the nineteenth century.

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whilst the Netherlands did put in an amendment to grant equal pay for equal work for men and women workers, it also sought to defend its position that married women should not be allowed to become civil servants.¹³

The delegates' ability to negotiate was also severely limited by the Dutch reluctance to let go of the Indonesian colonies. As a Dutch parliamentarian reflected in 1947: 'Stopping the war in Indonesia would truly contribute to peace: only then will we again be able to speak about human rights and their defence in the world.'¹⁴ The Dutch attitude was thus partly caused by its domestic concerns, and partly by the fundamental belief that what the world needed was a binding convention.

Partly as a result of the formulation of the UDHR the Dutch did discuss the consequences of the efforts towards codification of fundamental rights at the international level for the national Constitution. As Prime Minister Drees put it: 'The special attention [for the formulation of human rights] is understandable after all that the world has seen and sees in terms of denial of these rights . . . The question to what extent these rights in our constitution need to be reformulated, and whether – in addition to freedoms – a number of social rights need to be constitutionally guaranteed will be discussed by a Constitutional Commission' (quoted in: Pelle 1998). The first Constitutional Commission to look into these matters, however, would be divided over the issue of social and economic rights. It would also hold that the respect for certain rights in the Netherlands was so self-evident that there was no need to codify them; when the only woman on the commission argued for inclusion of the right to equality – in line with international human rights law – the chairman stated that there was no need for the Netherlands to explicate this right: 'the international conventions aim to elevate backward countries' (Pelle 1998).

Whilst the government was, as will be described later, just as hesitant to sign the binding ECHR, the Dutch did start to play an active role in stimulating human rights as an integral part of the international legal order in the 1960s and the 1970s (Castermans-Holleman 1992; Reiding 2007). In the 1960s, for instance, the Dutch initiated negotiations on the setting up an individual complaints procedure to the CERD and the ICCPR (Baehr and Castermans-Holleman 1990: 23–34). Under the

¹³ Discussion of the budget for the Ministry of Foreign affairs, House of Representatives, 1949, and E/800, report of the 150th meeting, 20 November 1948.

¹⁴ House of Representatives, Delegate Schoonenberg (22 December 1947, 32nd meeting).

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influence of proactive civil servants, a progressive government and a supportive population, human rights would become more and more of a cornerstone of foreign policy in the 1970s, resulting in a fully fledged policy memorandum on the issue (Ministry of Foreign Affairs of the Kingdom of the Netherlands 1979; Egeland 2004; Egeland 1984; Hellema 2009).

All this was in line with a report issued by a progressive think-tank in the early 1970s, that emphasized the role that the Netherlands had to play in changing the world, with international law as the main lever towards this change.¹⁵ In an influential article in 1973, politician B. de Gaay Fortman set out the reasons why the Netherlands should assume the role of ‘guiding nation’ (*gidsland*) on the world stage. Such a guiding country, he argued, would have to be small. In addition, the Dutch population density and its interrelationship with the global economic order strengthened the need for propagating a just international order (De Gaay Fortman 1973: 112). The term ‘guiding nation’ would continue to surface in subsequent political debates, for instance in the 2010 policy report by the Scientific Council for Government Policy, titled ‘Attached to the World’, that argued for a strong Dutch role in the ‘niche market’ of developing the international legal order (Wetenschappelijke Raad voor het Regeringsbeleid 2010).

This emphasis on both the moral and the market-related reasons to strengthen international (human rights) law is in line with political analysis of what, over the years, has motivated the Dutch ‘internationalist idealist’ tradition, with its emphasis on the legal machinery to enforce norms (Castermans-Holleman 1992; Voorhoeve 1985). Voorhoeve, who distinguishes this tradition in addition to the maritime-commercial and the neutralist–abstentionist tradition in Dutch foreign policy, sees it as a combination of seven factors: naivety, pacifism, legalism, moralism, anti-militarism, weak patriotism and supranationalism (1985). Many historians have pointed out how developing the international legal order was very much in line with Dutch self-interest, as ‘Plutus sits on Pax’s lap, wealth is a child of peace’ (Van Ditzhuyzen et al. 1998: 147). A small player like the Netherlands, which earned much of its income on the world seas and in trade, only stood to benefit from international rules and institutions to enforce them

¹⁵ The Mansholt Commission, consisting of the Partij van de Arbeid (Labour Party), Democraten ’66 (Democrats ’66) and Politieke Partij Radicaten (Political Party of Radicals). See also Kennedy, *Nieuw Babylon in Ambouw: Nederland in De Jaren Zestig*. (Amsterdam: Boom, 1995).

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vis-à-vis the larger countries (Reiding 2007; Kuitenbrouwer 1996: 156–201; Kuitenbrouwer 1999: 183–200).

In addition to analysing the Dutch motives, historians have also pointed at the gaps between principles and practice in the development of international law. The Netherlands might be able to point to Erasmus and Spinoza in setting out a tradition of tolerance, but it was also amongst the largest slave-traders in the world, and one of the last western countries to abolish slavery. In colonies like the Netherlands Indies the notion of ‘ethical politics’ did not keep the Netherlands from committing excesses like torture and the killing of civilians by special units in the late 1940s (Kuitenbrouwer 1996: 156–201). In an overview of the actual Dutch human rights record, Malcontent concludes that ‘the rather pale contribution of the Netherlands to actually furthering the international legal order becomes even more colourless if one specifically takes human rights into account’ (2003: 75).

Whether genuine and effective or not, human rights have played a key role in framing and focusing Dutch foreign policies since the 1970s. That this is much less often the case where it concerns domestic policies becomes clear when one analyses the subjects pertaining to which human rights were raised in parliament and in the newspapers over the past fifteen years. An investigation into the context in which the notion of human rights was raised in the Dutch House of Representatives over the past decades, for instance, leads to the following insights.¹⁶ Human rights were mentioned much more often in 2010 than they were in 1995.¹⁷ In nearly 73% of the situations in which human rights were raised (1,639 documents), the concern related to foreign policy.¹⁸ Human rights are most often referred to in documents sent to parliament by the government, more than in parliamentary discussions, and in questions addressed to the government. Among the ministries that refer to human rights,

¹⁶ All policy documents in the Dutch Hansard, the ‘officiële bekendmakingen’ for the years 1995, 2000, 2005, 2010 were screened for reference to the general term ‘human rights’. This led to 1,639 documents, which were labelled according to the Ministry responsible, the policy field at stake, and the type of parliamentary documentation. The aim of this research was to acquire insight into the relative frequency of the invocation of the term human rights: in foreign or domestic policies.

¹⁷ In 574 as opposed to 152 documents. In general, this reflects an increase in parliamentary documentation; the relative attention given to human rights increased from 2.27 to 2.75%.

¹⁸ Of the 1,639 documents analyzed 59.1% of the documents were directly related to foreign policies, 13.7% to budgeting (and thus also coupled to foreign policies). Other fields in which human rights were raised were: integration and migration (49 documents, 3% of the total), corporate social responsibility (1.4%), medical affairs (1.6%), terrorism (2.3%), justice and migration (1.6%), the Constitution (1.3%), sustainable development (0.9%).