
THE CEDAW after all these years: firmly rooted in Dutch clay?

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1 Introduction

The Netherlands¹ has a reputation to maintain where human rights are at stake. And yet it was not until 1991 that the Netherlands ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The delay was at least partly compensated by a unique provision included in the Act approving ratification, that required the government to periodically report to Parliament on the implementation of the Convention. This has led to more political attention and public exposure than other international human rights treaties have received. Other than that, the Convention's impact has been limited, even in the courts, despite the Dutch (moderately) monist system. A major exception is the case of a religiously orthodox political party that refused to grant women full membership. This case has centred primarily on the obligations of the state to eliminate sex-based discrimination under the CEDAW, although the applicants based their claim on other human rights instruments as well (see section 6.1 below). However, even though the highest Dutch court ordered the government no longer to condone the party's discriminatory policy, the government decided to await the decision of the European Court of Human Rights (ECtHR). This political choice to await the Court's decision seems illustrative of a decreasing feeling of urgency regarding gender equality, but also reflects the government's dwindling willingness to conform to decisions of human

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¹ The Netherlands Antilles form part of the Kingdom of the Netherlands. Presentations to the CEDAW Committee are always combined presentations by the Netherlands and the Netherlands Antilles. This contribution is limited to the situation in the Netherlands.

rights bodies, including, for that matter, the ECtHR.² Still, the impact of ECtHR decisions and EU law exceeds that of international human rights treaties, and the CEDAW in particular. In this contribution the impact of the CEDAW in the Netherlands is explored by tracing its influence in legislation, case law, policy-making, and in education and legal training. Some tentative explanations will be offered for its limited and possibly even waning influence. The conclusion is not too optimistic, but there is no reason to despair, at least not yet.

2 History of the ratification process

The CEDAW was opened for signature on 1 March 1980. The Netherlands, together with many other states, signed the document on 17 July of that same year, at the occasion of the Second United Nations World Conference on Women in Copenhagen. Ratification, however, took considerably more time: eleven years and six days to be precise. A rather remarkable delay, given the Dutch reputation as a human rights defender. The main reason for this time lapse rests in the initial idea of the government that the Dutch situation, upon accession, should be fully in compliance with the demands of the Convention. The government, perhaps, had some reason to be wary of over-hasty ratification. The optimism regarding the Dutch human rights record had, by that time, been dampened somewhat by the critical findings of other human rights bodies.

In 1984 a Ms Broeks filed a complaint against the Netherlands under the individual complaints procedure of the International Covenant on Civil and Political Rights (ICCPR). At that time, married women who lost their jobs were only granted unemployment benefits if they could show that they were the breadwinner. The Human Rights Committee found a violation of Article 26 of the ICCPR.³ Because the Dutch social security system was largely based on the breadwinner principle, the government feared huge costs and even considered withdrawing from the ICCPR.

In 1988 the Netherlands had the dubious honour of being the first state to be found to have acted in violation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), in

² In office at the time was a minority government of the Liberal Party (VVD) and the Christian Democrats (CDA), with the 'support' of the populist Party for Freedom (PVV), under Prime Minister Mark Rutte (VVD). This government was replaced on 5 November 2012 by a government of the VVD and the Labour Party (PvdA) again under Prime Minister Rutte.

³ HRC, *S.W.M. Broeks v. the Netherlands*, Communication 172/1984, 9 April 1987, UN Doc. CCPR/C/29/D/172/1984.

an individual complaints procedure.⁴ Ms Yilmaz-Dogan, pregnant at the time, had been dismissed by her employer because ‘when a Dutch girl marries and has a baby, she stops working. Our women workers of foreign descent,⁵ on the other hand, take the child to the neighbours or family and at the slightest setback disappear on sick leave.’ The Cantonal Court accepted the argument and approved the dismissal. The Advocate-General at the Supreme Court rejected Yilmaz-Dogan’s request to seek annulment of the Cantonal Court’s decision, and the Prosecutor of the District Court refused to prosecute Yilmaz-Dogan’s former employer under the Dutch Penal Code. This led the CERD Committee to the conclusion that the Netherlands had failed to redress her dismissal. Such experiences do not tend to encourage the ratification of new human rights treaties.

The government⁶ felt that full compliance with the CEDAW required that the Algemene wet gelijke behandeling,⁷ the Equal Treatment Act that was being drafted at the time and that included sex as a protected ground, should have entered into force. The length of the drafting process of this Act was not caused by any major conflicts regarding the prohibition of sex discrimination, although there were some, of course. The most-heated debates involved sexual orientation as a protected ground. Fortunately, the government eventually changed its mind and decided that ratification did not have to be postponed until the full implementation of the CEDAW had been accomplished. The responsible Ministers declared in Parliament that ‘the meaning of treaty obligations is not determined, let alone fixated by the views of the national legislature at the time of ratification’.⁸ Thereafter, the Parliamentary approbation process accelerated and the Convention

⁴ CERD Committee, *Yilmaz-Dogan v. the Netherlands*, Communication 1/1984, 10 August 1988, CERD/C/36/D/1/1984.

⁵ Yilmaz-Dogan was of Turkish descent.

⁶ During the whole national ratification process – that is, from 1977 to 1994 – the Dutch government was led by the Christian Democratic Party (CDA) in varying coalitions with the Liberal Party (VVD) or the Labour Party (PvdA) and/or the Democrats (D66). These were the Cabinets Van Agt I, II and III, and Lubbers I, II and III.

⁷ General Act on Equal Treatment of 2 March 1994, prohibiting discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, hetero- or homosexual orientation or civil status. Most recent version *Staatsblad*, 2007, 321. All Dutch legislation enacted since 1 May 2002 is available at: www.overheid.nl. An English translation of the Dutch Equal Treatment Act is available at the website of the International Labour Organization: www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_country=NLD&p_classification=05.01&p_origin=SUBJECT (last accessed 25 February 2013).

⁸ ‘De betekenis van verdragsverplichtingen wordt immers niet bepaald, laat staan gefixeerd door de opvattingen van de nationale wetgever ten tijde van een verdragsgoedkeuring.’ [The meaning of treaty obligations is after all not determined let alone

was ratified on 23 July 1991.⁹ Had ratification still been dependent on the entry into force of the Equal Treatment Act, ratification would have been delayed for another three years. Rumour has it that the government's change of mind was to a large extent thanks to the unremitting efforts of one or two civil servants who strongly supported ratification.

The occasion of the ratification of the CEDAW was reason for the Dutch government to withdraw from the Convention on the Nationality of Married Women 1957.¹⁰ According to the government, Article 3 of this Convention was not in accordance with the CEDAW's Article 9, because the former is based on a presumption of *unequal* legal positions of men and women, whereas the CEDAW is based on the equality principle.¹¹

Ratification of the Complaints Protocol¹² was a far quicker process, although it still took a good two and a half years before the Protocol was ratified on 22 May 2002. The Netherlands played a prominent role in the drafting of the text. A Dutch proposal, drawn up by national and international experts at the initiative of the University of Maastricht, served as the basis for the international negotiations, in which Dutch representatives were equally active.¹³

The Netherlands ratified the amendment to Article 20, paragraph 1 of the Convention on 10 December 1997.¹⁴ The amendment is meant to

fixed by the views of the national legislator at the time of ratification.] *Tweede Kamer* 1988–1989, 18950 (R 1281), nr. 9 at 4. See also: *Tweede Kamer* 1984–1985, 18950, no. 3 at 7; *Tweede Kamer* 1986–1987, no. 6 at 14; and 1988–1989, no. 9 at 3. More extensively: J. H. J. de Wildt, 'Het Internationaal Verdrag inzake de Uitbanning van Alle Vormen van Discriminatie van Vrouwen' [The International Convention on the Elimination of All Forms of Discrimination against Women], *Ars Aequi* 41:5 (1992) 259–66.

⁹ Rijkswet van 3 juli 1991 inzake goedkeuring van het Verdrag inzake de uitbanning van alle vormen van discriminatie van vrouwen [CEDAW Approbation Act 1991], *Staatblad* 1991, 355.

¹⁰ 4468 UNTS 66, entered into force 11 August 1958.

¹¹ See: *Tweede Kamer* 1988–1989, 18950 (R 1281), no. 9 at 15; see also CEDAW Committee, *Initial State Party Report: the Netherlands*, 17 April 1993, UN Doc. CEDAW/C/NET/1 at 171–2.

¹² Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 2131 UNTS 83, entered into force 22 December 2000.

¹³ *Staten-Generaal* 2001–2002, 28253 (R 1714), nos. 252 and 1, Facultatief Protocol bij het Verdrag inzake de uitbanning van alle vormen van discriminatie van vrouwen, 6 October 1999 [Letter of Minister regarding tacit approval of the Protocol, with an explanatory note].

¹⁴ So far, the ratification has not helped much: on 20 January 2011 only 60 states had ratified the amendment. To enter into force, ratification by two-thirds of all States Parties, at the time of writing 124 ratifications, is required.

lift the restriction on the number of annual meetings for the CEDAW Committee.

2.1 *Reservations and declarations*

The Netherlands did consider a number of reservations, among these a reservation to Article 11(1)(e) of the CEDAW on social security.¹⁵ However, it was decided that such a reservation would be useless, since the Dutch courts had already shown their willingness – in the aftermath of Ms Broeks' victory as mentioned above – to fully apply the ICCPR non-discrimination clause contained in Article 26 to social security issues. Other suggested reservations, such as with regard to compulsory military service, were likewise rejected. In the end, no reservations were made. The government did, however, make a declaration on two paragraphs in the Preamble: paragraph 10 on apartheid and (neo)colonialism and paragraph 11 on disarmament, territorial integrity and state sovereignty. The government felt that 'it was not desirable to introduce political considerations such as those contained in paragraphs 10 and 11 of the preamble in a legal instrument of this nature. Moreover, the considerations are not directly related to the achievement of total equality between men and women.'¹⁶

The Netherlands has retained a consistent policy regarding reservations by other states that, according to the Dutch government, are incompatible with the object and purpose of the Convention. It has, however, never precluded the entry into force of the Convention between itself and the states making these reservations (see UN treaty collection). This commendable alertness seems to be characteristic of the active interest taken by the Ministry of Foreign Affairs in the position of women and women's human rights, albeit mostly abroad. Generally speaking, the CEDAW seems to play a much bigger role in Dutch foreign policy than it does at home.¹⁷

¹⁵ De Wildt, 'Het Internationaal Verdrag inzake de Uitbanning van Alle Vormen van Discriminatie van Vrouwen' at 265.

¹⁶ C.N.161.1991.TREATIES-5 (*Depositary Notification*), available at: <http://treaties.un.org/doc/publication/mtdsg/volume%20i/chapter%20iv/iv-8.en.pdf> (last accessed 18 February 2013).

¹⁷ See Hellum on Norway in this volume.

3 Parliamentary approbation of ratification: national reports

In the Netherlands the Parliamentary approbation of proposals to ratify international treaties may occur either tacitly or explicitly. In the case of the CEDAW, the approbation was given explicitly, and subject to a remarkable condition that has not been repeated since.¹⁸ Article 3 of the Approbation Act 1991 requires the Minister of Social Affairs and Employment to report to Parliament every four years on the implementation of the Convention in the Netherlands. This exceptional clause was included after a proposal thereto by three Members of Parliament, who were not fully confident that the periodic reports to the CEDAW Committee would provide a sufficiently reliable picture of the situation in the Netherlands.¹⁹ This amendment lies at the heart of a number of detailed, comprehensive and critical reports dealing with the implementation of the CEDAW in the Netherlands. These national reports are commonly known as 'NIRV' (Nationale implementatie rapportage vrouwenverdrag) or as '*Kalsbeek-rapportage*', after Member of Parliament Ella Kalsbeek, the primary sponsor of the amendment.

In 1996 a preliminary report was published outlining the major issues involved in the implementation of the CEDAW in the Netherlands.²⁰ This was followed by an exploration into the character of the obligations imposed by the Convention. The Groenman Commission – named after its chairperson, former Parliamentarian Louise Groenman – concluded on the basis of its analysis that the Convention requires implementation at three levels: direct discrimination and legal inequalities must be eliminated, the position of women must be improved and dominant gender ideology must be combated.²¹ This distinction was taken up by the Dutch government in its second report to the CEDAW Committee, by discussing the progress made regarding the implementation of all topics covered by the Convention at these three levels. This is a really helpful approach because it

¹⁸ CEDAW Approbation Act 1991.

¹⁹ *Tweede Kamer* 1989–1990, 18950 (R 1281), no. 11, Goedkeuring van het verdrag inzake de uitbanning van alle vormen van discriminatie van vrouwen [Ratification process of CEDAW] (New York, 18 December 1979).

²⁰ J. C. Hes and C. E. van Vleuten, *Het Vrouwenverdrag in de Nederlandse Rechtsorde* [The Women's Convention in the Dutch Legal Order] (The Hague: Vuga/SZW, 1996).

²¹ L. S. Groenman *et al.*, *Het Vrouwenverdrag in Nederland Anno 1997* [The Women's Convention in the Netherlands in 1997] (The Hague: Vuga/SZW, 1997) at 19. See also Holtmaat on the CEDAW's holistic approach in this volume.

makes immediately clear that implementation in some fields has seen far more progress and success than in other fields. The Committee accepted the structure of the report, and later endorsed this approach in its General Comment No. 25 on temporary special measures.²² Unfortunately, the Dutch government discontinued this three-level analysis after its third report to the CEDAW Committee. The Groenman Report concluded with sixty-five recommendations for concrete actions to enhance implementation. As a result, a major national women's conference was held in 1997 in Nijmegen where public policy makers, NGO representatives and academics discussed ways to ensure the observance of the Convention.

After these first general reports, the government has commissioned both 'regular' national reports,²³ as well as several detailed studies on specific topics, all drafted by independent experts. Specific topics that have been dealt with include health, parenting and labour market participation, violence against women, and structural gender discrimination (Article 5(a)).²⁴ Moreover, many 'working documents', that is research reports that for one reason or another have not been officially published, have been produced. In 2003 the government decided to stop the production of general national reports altogether and focus instead on one theme at the time, thus radically changing the character of the national reports.²⁵

²² The Committee states the object and purpose of the Convention is (1) to ensure full equality of women before the law and protection against discrimination in the public as well as the private sphere, (2) to improve the de facto position of women, and (3) to address prevailing gender relations and the persistence of gender-based stereotypes. See GA, 59th Session, *Report of the CEDAW Committee on its 30th and 31st Session*, 2004, UN Doc. A/59/38, Annex I.

²³ For example, M. H. Marchand, *Emancipatie op een Zijspoor? Tweede Nationale Rapportage Inzake de Implementatie van het VN Vrouwenverdrag* [Emancipation Being Side-Tracked? Second National Report on the Implementation of the UN Women's Convention] (Amsterdam: UvA, 2003).

²⁴ N. Holtrust, A. C. Hendriks and D. M. J. Bauduin, *De Betekenis van Artikel 12 Vrouwenverdrag voor Nederland: gezondheid als recht* [The Significance of Article 12 of the Women's Convention for the Netherlands: Health as a Right] (The Hague: Vuga/SZW, 1996); W. C. Monster, E. Cremers and L. Willems, *Vrouwenverdrag, Moederschap, Ouderschap en Arbeid* [Women's Convention, Motherhood, Parenthood and Employment] (The Hague: Vuga/SZW, 1998); I. Boerefijn, M. M. van der Liet-Senders and T. Loenen, *Het Voorkomen en Bestrijden van Geweld tegen Vrouwen* [The Prevention and Combating of Violence against Women] (The Hague: Vuga/SZW, 2000); R. Holtmaat, *Naar Ander Recht en Beleid* [Towards Different Law and Public Policy] (The Hague: Vuga/SZW, 2004).

²⁵ Written replies to the list of issues regarding the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) raised in connection with the fifth periodic report of the Netherlands (CEDAW/C/NLD/5), Annex 2: *Letter to the House of Representatives of the States General* (10 December 2008). The latest report published

The importance and value of the knowledge and awareness generated by the special clause in the Approbation Act can hardly be underestimated. However, it is uncertain how long the government will keep up the good work. Aversion to what is perceived as ‘international meddling in domestic business’ is increasing. This aversion is primarily directed at the ECtHR, which is considered to be too activist, systematically overstepping its authority. Although the international treaty bodies are not yet ‘targeted’ by these critics because they are perceived as less of a nuisance than the binding decisions of the ECtHR, that may be just a matter of time.²⁶

4 Reporting to the CEDAW Committee

By the end of 2010 the Netherlands had submitted five reports to the CEDAW Committee. Unfortunately, not all reports were submitted on time, and the Committee has made critical remarks about this. The Dutch

in this series is: M. Keizer and S. Keuzenkamp, *Moeilijk Werken. Gezondheid en de Arbeidsdeelname van Migrantenvrouwen* [Difficult Employment. Health and Labour Market Participation of Migrant Women] (The Hague: SCP, 2011).

²⁶ The government under Prime Minister Mark Rutte (a minority Cabinet composed of the Liberal VVD and Christian Democrat CDA, ‘supported’ by the right-wing populist PVV) stated in its policy document on human rights in foreign policy that the antiquated European treaties (that is of the Council of Europe, not the EU) are an obstacle for necessary reforms, in particular in the area of migration policy, and that the ECtHR ‘should not undermine its authority by pronouncing on issues that are only marginally related to human rights’. *Tweede Kamer* 2010/11, 31735, no. 1, *Verantwoordelijk voor Vrijheid. Mensenrechten in het Buitenlands Beleid* [Responsible for Freedom. Human Rights in Foreign Policy]. This triggered a heated debate between supporters of this stance, who regard human rights as a leftist hobby, and defenders of human rights and their mechanisms. In the meantime, the government backed down a little (after the First Chamber of Parliament adopted a motion urging the government to continue doing its best to realise human rights in conformity with its international obligations: *Eerste Kamer*, 2010/2011, 32502B, 19 April 2011, Motie van het Lid Bemelmans-Vidéc c.s.). See ‘Mensenrechten in Discussie: Linkse Hobby, rechts Liberaal Gedachtengoed, of van Ons Allemaal?’ [Human rights in debate: left-wing hobby, right-wing liberal legacy, or belonging to all of us?], editorial, *NJCM-Bulletin* 36:4 (2011) 429–32; ‘Het Kabinet-Rutte en de Europese Mensenrechten: Een Kwestie van Contrasten’ [The Rutte-Administration and European human rights: an issue of contrasts], editorial, *NJCM-Bulletin* 36: 6–7 (2011) 617–21; J. Gerards, ‘De Waarde van een Europees Mensenrechtenhof’ [The significance of a European Court of Human Rights], *Recht der Werkelijkheid* [Law in Reality] 32:2 (2011) 65–73; Thierry Baudet, ‘Dik of Dun’ [Fat or thin], *Recht der Werkelijkheid* [Law in Reality] 32:2 (2011) 74–9. For an analysis and many more references: T. Spijkerboer, ‘Het Debat over het Europese Hof voor de Rechten van de Mens’ [The debate on the European Court of Human Rights], *Nederland Juristenblad* 87:4 (2012) 254–62.

reports have met with varying enthusiasm. The first report, for instance, was fairly well received. One of the CEDAW Committee members even commented on ‘the wonderful way they are dealing with women in the Netherlands’.²⁷ The second and third reports, in which the government applied the three-level analysis as developed in the Groenman Report (see section 3 above) to analyse its own progress in implementing the CEDAW, also met with approval, despite the fact that the second report had been handed in two years late. This positive reception may have been due to the fact that, by its analysis, the government showed that it had listened to the Committee’s critique that the first report was too descriptive and lacked analysis. This is not to say, however, that there was no critique. The (married) husband’s ‘right to veto’ regarding the children’s family name was critically questioned. Another major point of criticism concerned a Dutch political party.²⁸ This national Calvinist party, the SGP, refused full membership to women, in particular withholding them from administrative and public offices. Thus, although the SGP allowed women (if only since 24 June 2006) to become members, they were excluded from representational positions, for instance in Parliament, but presumably in greater numbers at the local level.²⁹ The Dutch government has quite firmly dismissed both concerns, at the national level when reporting back to Parliament, and at the international level at the occasion of the presentation of the fourth Dutch report to the CEDAW Committee. On the issue of the SGP, the government told the CEDAW Committee that ‘[t]he State had appealed the [lower court’s] judgment on the ground that caution should be exercised in intervening in the constitution of political parties, because a variety of fundamental rights and freedoms were at stake. The right to stand for election and the prohibition of discrimination must be balanced against the freedom of assembly of a political party.’³⁰ The Committee’s

²⁷ M. van den Brink and M. Jacobs, “‘The wonderful way they are dealing with women in the Netherlands’”. *Nederland en het Vrouwenverdrag* [‘The wonderful way they are dealing with women in the Netherlands’. *The Netherlands and the Women’s Convention*], *NJCM-Bulletin* 19:6 (1994) 742–50.

²⁸ CEDAW Committee, *Concluding Observations: the Netherlands*, A/56/38(SUP), 20 July 2001, paras. 185–231. See also M. van den Brink, ‘VN-Vrouwenverdrag: De Eerste Tandjes Komen Door. Kroniek 1999–2001’ [UN Women’s Convention: its first teeth appear], *NJCM-Bulletin* 26:8 (2001) 1069–78.

²⁹ T. Loenen, ‘De SGP-Discussie Revisited’ [The SGP debate revisited], *Nederlands Juristenblad* 85:36 (2010) 2269–74 at 2273.

³⁰ CEDAW Committee, summary record 767th meeting, 24 January 2007, CEDAW/C/SR.767 (B), 5 March 2007, Consideration of reports submitted by States Parties under Article 18 of the Convention (*continued*), *Fourth Periodic Report of the Netherlands*, at 3. See also CEDAW Committee, Consideration of reports submitted by States Parties under

criticism of the Dutch law on surnames was dismissed with reference to a decision of the ECtHR,³¹ in which the Court concluded that states enjoy a wide margin of appreciation in this area, because national law tends to be ‘strongly determined by national traditions’, thus brushing aside the specific expertise of the CEDAW Committee, as well as the fact that it is oftentimes precisely those traditions that stand in the way of women’s emancipation.³² The candid way in which the government dismissed these comments is surprising and does raise questions regarding the willingness of the Dutch government to really engage in a constructive dialogue. The Committee raised both issues – family names and the issue of the SGP, in particular – again on the occasion of the presentation of the fourth and fifth reports, but so far to no avail. A third point of concern of the CEDAW Committee that the Dutch government seems unwilling to accept is in regard to the direct effect of the Convention provisions in the Dutch legal system. I will return to some of these issues in section 6 where the role of the CEDAW in the national courts and legal practice is discussed.

4.1 *The role of NGOs in the reporting procedure*

On the occasion of the presentation of the first report to the CEDAW Committee, the Committee expressed its surprise that Dutch women’s NGOs were not involved in the drafting of the report. The Dutch government explained that this is standard practice in all human rights reporting procedures, and is meant to prevent confusion as well as the entangling of responsibilities and interests. If Dutch NGOs were to participate in the drafting of Dutch State Party reports, they would become an accomplice to the act, so to speak, and it would be much more difficult for them to fulfil the critical role expected of NGOs. Instead, the government offers NGOs financial support to draw up their own shadow reports.³³ That is very welcome, of course, given the considerable effort, expertise and time required for the drafting of shadow reports, as well as for their presentation to the CEDAW Committee. So far, every governmental report has been followed by a shadow report endorsed by a great number of Dutch human and

Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, *Fifth Periodic Reports of States Parties: the Netherlands*, CEDAW/C/NLD/5, 24 November 2008, at 66–7.

³¹ *Bijleveld v. the Netherlands*, appl. no. 42973/98, ECtHR 27 April 2000.

³² CEDAW/C/NLD/5, 24 November 2008 at 77–8.

³³ See CEDAW Committee, *Consideration of the Initial Report on the Netherlands*, A/4938(supp), 4 February 1994, paras. 245–317 at 54, para. 253.

women's rights organisations. Occasionally, other shadow reports have been presented on specific topics if these were not addressed in the general report. An example is the report by the former Dutch Emancipation Council on the issue of family law and lesbian women, an issue on which the Dutch women's movement at the time was either divided or lacked expertise. That such things may sometimes change very quickly is shown by the fifth Dutch shadow report that was co-sponsored by the Federation of Dutch Associations for the Integration of Homosexuality (COC), as well as by the Dutch Transgender Network.³⁴

Both the government and NGOs are happy with this practice of 'independent' NGO participation, because it allows for a more critical involvement in reporting back to the CEDAW Committee. In the Dutch CEDAW Network (Netwerk VN-Vrouwenverdrag), a number of women's and human rights NGOs cooperate in collecting information to be included in the shadow reports to the CEDAW Committee, in the drafting and lobbying of the reports, and in reporting back to civil society in the Netherlands on the outcome of the constructive dialogue. The subsidies offered by the government are primarily used to pay one or two independent experts to draft the reports and present them to the CEDAW Committee. Also of importance is the participation of 'mainstream' (that is, not specifically women's) human rights organisations in the network. These organisations do not only contribute to the quality and expertise of the shadow reports, their participation is also a means to bring knowledge about women's and gender issues to mainstream human rights NGOs.

5 The legal status of the CEDAW

The Dutch legal system can be characterised as moderately monist. Transformation into national law is not necessary for a treaty to become effective in the national legal order. Article 93 of the Dutch Constitution provides that 'provisions of treaties and of resolutions by international institutions, which may be binding on all persons by virtue of their contents shall become binding after they have been published'. Article 94 of the Constitution states that national provisions that conflict with treaty provisions that are binding on all persons, shall not be applicable.

³⁴ Dutch CEDAW Network, *Women's Rights – Some Progress, Many Gaps. Shadow Report by Dutch NGOs; An Examination of the Fifth Report by the Government of The Netherlands on Implementation of the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 2005–2008* (Utrecht: Aim for Human Rights, 2009).

It is up to the courts to decide whether a treaty provision has direct effect, that is whether it has a general purpose and is sufficiently concrete to be applied without any administrative interference. If it is, the provision may be invoked in the courts. No equivalent national provision is needed. Generally speaking, civil and political human rights, such as religious freedom or the right to vote, tend to be regarded as sufficiently concrete to be binding on all. On the other hand, social, economic and cultural rights, such as the right to work or to a decent standard of living, are mostly considered in need of elaboration before they can be applied by the courts.

In the wake of the fourth Dutch government report to the CEDAW Committee, a heated debate on the legal status of the CEDAW and on the direct effect of its provisions flared up. The debate was incited by NGOs, who were appalled that the government in its fourth report had brushed aside recommendations on issues such as the all-male SGP Party and had merely repeated that sex equality was not the only fundamental concern at issue. Criticism of the law on surnames was confronted equally briefly by merely repeating what the government had already stated before (see section 4 above). This made the NGOs suspicious about the status accorded to the CEDAW by the Dutch government. To make things worse, the government representative told the Committee that it was not possible to say anything in general about the direct effect of the Convention. She stated that:

‘[D]irect effect’ means that a stipulation is legally enforceable by an individual. Article 93 of the Dutch Constitution stipulates that stipulations in Conventions have binding force if they can bind all individuals through their content. The more generally stipulations are formulated and the more active action on the part of the state they require, the less the question of direct effect. The question whether a stipulation binds everyone and therefore has direct effect is, in the final instance, determined by the Dutch courts in individual cases.³⁵

Moreover, Dutch civil servants present suggested that, although the Convention was an important document, it was not a legal document, thus referring implementation entirely to the sphere of public policy. The Dutch CEDAW Network (see section 4 above) made sure questions were asked in Parliament about these negotiations of the CEDAW’s legal status. The Minister responsible replied that a distinction must be made between the legally binding nature of the document for the state and any direct

³⁵ See CEDAW/C/NLD/5, 24 November 2008 at 10–11.

effect of the Convention, that is whether it can be invoked by individuals in court.³⁶ The Netherlands has felt bound to the Convention since its ratification. Still, the Minister continued, the question whether a specific provision has direct effect can only be answered by courts in concrete cases. The Minister promised to explain everything to the CEDAW Committee in the fifth report. However, the fifth report is disappointing in that the Minister's words are merely repeated.³⁷ And although this statement is correct in itself, it does not convey the impression that the government is intent on taking away the concerns of the CEDAW Committee, Parliament and NGOs on the legal status accorded to the Convention. Rather curious also was the terminology used by the Minister when referring to the constructive dialogue with the Committee: he promised Parliament to keep them posted 'on the *defense* of the fifth implementation report'.³⁸

It is hard to say where all this leaves the CEDAW. On the one hand, the Convention's position does not differ from that of other human rights treaties ratified by the Netherlands. On the other hand, there seems to be some reason to fear that the government's attitude is a consequence of a 'two-spheres' conception of the nature of women's human rights, that is a conception of women's human rights as belonging to the policy sphere of international cooperation instead of as an integral part of the legal human rights framework. It would be very unfortunate if this phenomenon – that is finally disappearing at the UN level, albeit slowly – now took root in the Netherlands.

6 The CEDAW in the Dutch courts

The International Law Association concluded in 2004 that '[w]hile provisions of UN human rights treaties are often referred to [by the Dutch courts], reference to the products of the supervisory bodies is haphazard and extremely limited in comparison to the products of the European

³⁶ Letter of 5 November 2007 of the Minister of OCW (Onderwijs, Cultuur en Wetenschap/ Education, Culture and Science) on the legal scope of the CEDAW, DE/RV/07/42724.

³⁷ See *4th and 5th Dutch Periodic Reports to the CEDAW Committee*, UN Doc. CEDAW/C/NLD/4, 10 February 2005, and UN Doc. CEDAW/C/NLD/5, 24 November 2008. CEDAW Committee, *Concluding Observations: the Netherlands*, UN Doc. CEDAW/C/NLD/CO/5, 1 March 2010, para. 13.

³⁸ *Tweede Kamer* 2009–2010, 30420, no. 141, 'Emancipatiebeleid, Brief van de Minister van Onderwijs, Cultuur en Wetenschap' [Emancipation policy, letter of the Minister of Education, Culture and Science].

Court of Human Rights'.³⁹ This impression was confirmed by an exploratory small-scale survey in 2009. Janse and Tigchelaar did a quick scan of the digital databases containing the major Dutch legal journals. Although their findings are probably not fully accurate, the emerging picture leaves little room for doubt regarding the situation in general. The research showed that in the ten years since 1999, the CEDAW was referred to only ten times in Dutch case law.⁴⁰ The Appellate Court in The Hague even dismissed a claim regarding the exclusion of women of 75 years and older from the nationwide preventive breast cancer screening, without discussing the relevance of the CEDAW, or any other human rights provision for that matter, on which the plaintiffs and the women's test-case fund (Stichting Proefprocessenfonds Clara Wichmann) had based their claim that this was a violation of women's right to self-determination.⁴¹ References to the Committee – and thus its interpretations and recommendations – were even more scarce: four references were found. The same effect – more references to Conventions than to their monitoring bodies – was found for both the ICCPR and the Convention on the Rights of the Child (CRC): the ICCPR was referred to 454 times, the Human Rights Committee only 65 times; the CRC was referred to 266 times as opposed to only 10 references to its supervising Committee.

The absence of the CEDAW in legal practice is striking, in particular when compared to the more recent CRC, which, even prior to its ratification, was invoked in the courts in the so-called *Valkenhorst* cases. These cases evolved around the claims of a number of children who had been born in an institution for unmarried pregnant girls who were promised eternal secrecy. These children, when they became adults, sued the institution because it refused to provide them with information concerning their biological fathers. The Dutch Supreme Court relied on the CRC to construct a right to information regarding biological descent.⁴² However, the ICCPR and the CRC also become insignificant documents in the Dutch courts when compared to the

³⁹ International Law Association, 'Final report on the impact of findings of the United Nations human rights treaty bodies', *Report of the Seventy-First Conference* (London: ILA, 2004) at 682.

⁴⁰ R. Janse and J. Tigchelaar, 'Het Vrouwenrechtencomité: Niet Bekend en Niet Geacht?' [The Women's Rights Committee: not known and not considered?] in N. Doornbos, N. Huls and W. van Rossum (eds.), *Rechtspraak van Buiten* [The Administration of Justice from the Outside] (Deventer: Kluwer, 2010) 309–16.

⁴¹ Hof Den Haag, 9 February 2010, *LJN*: BL3061.

⁴² Hoge Raad, 15 April 1994, *NJ* 1994, 608.

European Convention on Human Rights (ECHR) and the work of the Human Rights Court in Strasbourg. Janse and Tigchelaar found 7,678 references to the Convention and 1,120 references to the case law of the Strasbourg Court. The existence of the ECHR, not to speak of the EC sex equality Directives, explains at least some of the absence of the CEDAW in the Dutch courts, but hardly all of it.

6.1 *The male-dominated political party*

Of the very few cases involving the CEDAW, four concerned the issue of the male-dominated political party, the SGP. And the good news is that the news coverage was such that it was difficult not to know about it. Not only is the issue highly controversial – as is any question regarding orthodox religious faiths in the early years of the twenty-first century – it also led to a remarkable difference of opinion among the courts. In 2005 the Court in The Hague found that the SGP refusal to accept women as (full) members was in violation of Article 7 of the CEDAW.⁴³ It therefore ordered the state to stop state subsidies to the Party. Thus, at the end of the year, when the SGP applied for the yearly financial support for political parties, the request was rejected. The SGP then went to the Administrative Court and asked for a revision of that decision.⁴⁴ This Court rejected the claim, and the SGP appealed.⁴⁵ The Raad van State, the highest administrative court in the Netherlands, was asked by the SGP to order the Dutch state to revise its decision to terminate financial support – paid to all political parties represented in Parliament in the Netherlands – to the SGP. The state had terminated financial support earlier, to comply with the prior court decision that the SGP's refusal to admit women as members was a violation of Article 7 of the CEDAW. In appeal, the Raad van State took the desirability of a diverse society as its starting point. Subsidies granted to political parties must be regarded as being in the interest of society generally. Article 7 of the CEDAW is, according to the Court, a balanced provision, offering space for minority views such as those of the SGP and – apparently of some importance – there are sufficient numbers of other political parties that do allow female membership. In addition women have the possibility to found their own political parties. Excluding the SGP from government funding in these circumstances would undermine the legitimacy of the

⁴³ Rechtbank Den Haag, 7 September 2005, *LJN*: AU2091.

⁴⁴ Rechtbank Den Haag, 19 February 2007, *LJN*: AZ5393.

⁴⁵ Raad van State (AVRvS), 5 December 2007, *LJN*: BB9493.

outcome of Parliamentary debates. Thus, the Raad van State ordered the state to revise its rejection of the SGP's demand for subsidies.

Meanwhile, both the SGP and the state had appealed the initial court's decision in 2005 to the Court of Appeal in The Hague.⁴⁶ The manoeuvring space for the Court of Appeal was limited by the very speedy decision of the Raad van State, published only fifteen days before the Court of Appeal issued its decision. The Raad van State clearly was not willing to wait for the Appellate Court's decision. The Court of Appeal could not do much else than confirm the Raad van State's decision regarding the revision of the rejection of the demand for subsidies. However, contrary to the Raad's finding that the SGP was allowed to exclude women from its membership, the Court of Appeal concluded that such discrimination against women, even if following from sincere religious beliefs, is not protected by the constitutional right to religious freedom. Peters and Bleeker, commenting on these cases, conclude that the legal situation is chaotic:

The legislature must do something about the SGP; subsidies must continue to be paid to the SGP; the SGP does not have to be prohibited; the SGP is no longer allowed to withhold the right to be eligible to women in principle, however it is in practice.⁴⁷

On 9 April 2010 the Supreme Court finally cut the knot, after having first postponed its decision that was originally foreseen at the end of February 2010.⁴⁸ The Court established that, in so far as enjoyment of the right to stand for election, as provided for by Article 7(a) of the CEDAW, is conditional on participating in a political party, the direct effect of Article 7(a) of the CEDAW entails the direct effect of Article 7(c) of the CEDAW, that provides for the right to participate in NGOs and associations that are active in the field of the country's public life. The Court further established that Article 7(a) of the CEDAW requires the state to effectively ensure women's right to stand for election and it further stated that the Convention leaves no room for a margin of appreciation regarding active and passive voting rights for women. The Court found that, in this particular case, the prohibition of discrimination must be given precedence over the SGP's fundamental rights. The Court argued:

⁴⁶ Hof Den Haag, 20 December 2007, *LJN*: BC0619.

⁴⁷ J. Peters and K. Bleeker, 'Staat Moet SGP Aanpakken Maar Ook Subsiidiëren. Over Botsende Competenties en Grondrechten' [State should tackle SGP but also subsidise the party. On conflicting competences and constitutional rights], *Nederlands Juristenblad* (2008) 556–63.

⁴⁸ Hoge Raad, 9 April 2010, *LJN*: BK4549.

Article 4 of the Constitution, Articles 25 and 2 of the ICCPR and, for women, Article 7 of the CEDAW, guarantee everyone regardless of sex the right to elect members for representational bodies as well as the right to be elected into those bodies. These provisions all mention active and passive voting rights in one breath, thus expressing that these rights are each other's essential counterpart in a democracy, because voters must have the right to determine who among them will be elected. Because thus the exercise of the passive right to vote affects the core of the democratic functioning of the state, it is unacceptable that a political group violates a fundamental right that guarantees the voting rights of all citizens, when drafting their list of candidates, even when the violation finds its basis in a principle grounded in a religious conviction or other belief.⁴⁹

The Court concluded:

The Court of Appeal ... has concluded rightly that the state must take measures that will ensure that the SGP will grant women passive voting rights and that the state must apply a measure that is effective but that at the same time infringes the fundamental rights of the (members of the) SGP as little as possible.

This, however, does not mean that the court is qualified or able to order the state to take specific measures to end the discrimination by the SGP with regard to the passive voting rights of her female members ... [T]he choice of measures to be made by the state requires a balancing of interests that coincide to a large extent with deliberations of a political nature that such a decision can't be demanded of the court. This is also true for the [lower court's] order that the state stops granting subsidies to the SGP.⁵⁰

Thus, the Dutch state must take effective measures to ensure women's right to stand for election. The state should be careful, however, to select measures that respect the SGP's fundamental rights as much as possible. Because the Supreme Court cannot order the state to make law, nor order the state to take other measures to comply with Article 7 of the CEDAW, it was left up to the state to come up with a solution.

On 6 October 2010, however, the SGP lodged a complaint with the ECtHR that the Dutch Supreme Court had deprived the SGP and its members of their right to freedom of assembly and association, their right to freedom of expression and their right to freedom of religion (Articles 11, 10 and 9 of the ECHR respectively).⁵¹ The government

⁴⁹ *Ibid.*, paras. 4.5.4–4.5.5.

⁵⁰ *Ibid.*, paras. 4.6.1–4.6.2.

⁵¹ Application no. 58369/10 by Staatkundig Gereformeerde Partij against the Netherlands, 6 October 2010, para. 59.

then decided to await the ECtHR's decision before deciding on further action.⁵²

It is ironic that a government that was so clearly reluctant to redress the SGP situation had to defend the Supreme Court's decision in Strasbourg. The decision to postpone left two possibilities, one of which would be that the ECtHR agreed with the SGP that their rights have been violated. In that case, the Dutch state is no longer obliged to take measures, although of course the CEDAW Committee might still see things differently. However, equally possible was that the Court would judge the SGP's discriminatory policy regarding its female members to be unacceptable. In that case, the Dutch state would have to take steps after all. However, the responsible Minister (Home Office), notified Parliament that he was going to 'consider the necessity and desirability of further action after the European Court has reached a decision'.⁵³

That time came on 10 July 2012, when the ECtHR found the SGP's application manifestly ill-founded.⁵⁴ The Court does not address the question of whether the SGP really is a 'victim' of the alleged violations in the absence of any government action, because 'the application is in any event inadmissible on other grounds'.⁵⁵ The Court recalls that political parties may pursue their political aims on condition that the means used are legal and democratic, and that the changes proposed by that party are compatible with fundamental democratic principles.⁵⁶ It further emphasises that the advancement of sex equality prevents states from 'lending its support to views of the man's role as primordial and women's as secondary', referring to its previous judgments in *Ünal Tekeli* and in *Konstantin Markin*.⁵⁷ The fact that no women have expressed the wish to stand for election is not decisive, nor is the fact that the bye-laws of the SGP do not contain any formal impediment to the possibility of women being elected,⁵⁸ a fact that – remarkably enough – had been considered relevant by the Minister of the Home Office.⁵⁹ The Court then concludes:

⁵² Brief van de Minister van Binnenlandse Zaken en Koninkrijksrelaties aan de Voorzitter van de Tweede Kamer der Staten-Generaal inzake HR-uitspraak SGP [Letter of the Minister of the Home Office on the Supreme Court's decision on the SGP], 8 April 2011.

⁵³ *Ibid.* See also C. Flinterman and I. Lintel, 'Vrouwen verkiesbaar bij de SGP: een kwestie van tijd en politiek?' [Women eligible in the SGP: a matter of time and politics?], *Nederlands Juristenblad* 86:30 (2011), 2029–30.

⁵⁴ ECtHR *Staatkundig Gereformeerde Partij* against the Netherlands, Application no. 58369/10, 10 July 2012.

⁵⁵ *Ibid.*, para. 67. ⁵⁶ *Ibid.*, para. 71.

⁵⁷ *Ibid.*, para. 73. ⁵⁸ *Ibid.*, para. 76.

⁵⁹ *Ibid.*, paras. 56–8.

The Supreme Court ... concluded from Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women and from Articles 2 and 25 of the International Covenant on Civil and Political Rights taken together that the SGP's position is unacceptable regardless of the deeply held religious conviction on which it is based ... For its part, and having regard to the Preamble to the Convention and the case-law cited ... the Court takes the view that in terms of the Convention the same conclusion flows naturally from Article 3 of Protocol No. 1 taken together with Article 14.⁶⁰

The ball had been kicked back to the Dutch government.⁶¹

6.2 *Income insurance for the pregnant self-employed*

The second issue in which the CEDAW played a role, though less prominent than in the SGP cases, concerned loss of income during pregnancy and maternity for the self-employed. In 2001 legislation regarding this issue was revised. The financial safety net that had granted self-employed women a benefit at minimum level was revoked and women were referred to private insurance. Most private insurances only insured against the risk of this specific loss of income on condition that the self-employed would take the general loss of income insurance as well. Moreover, in most cases women were only eligible for payment if they had been insured for a minimum of two years. Quite a number of law suits followed. Some women asked the *Commissie gelijke behandeling*, the Dutch equality body, to give its opinion while others went to court. The CEDAW was not invoked before the *Commissie gelijke behandeling*, because this body is only competent to interpret equal treatment legislation. However, Article 11(2)(b) of the CEDAW was invoked before the lower court in The Hague in a collective action instigated by a number of self-employed women, a trade union and a women's test-case fund. The Court found that Article 11(2)(b) 'contains no direct, clear-cut prescriptions on how to realise its purported aim, thus leaving scope for national policy making'. Therefore, the provision was to be regarded as an instruction norm, that is an instruction to the state to achieve a certain purpose as opposed to a concrete obligation to take a specific measure, and thus lacked direct effect.⁶² It concluded that other

⁶⁰ *Ibid.*, para. 77.

⁶¹ In March 2013 the SGP decided to insert in its regulations that the 'sex of a candidate cannot be an objection'. This became effective on 1 April 2013. The Minister of Internal Affairs informed Parliament by letter on 26 March 2013 that the case had ended (Brief inzake tenuitvoerlegging arrest Hoge Raad in SGP Zaak, 2013-0000171386).

⁶² *Rechtbank Den Haag*, 25 July 2007, *LJN*: BB0334.

national or international provisions did not also oblige the government to take action.⁶³

In conclusion, one can say that the CEDAW plays a very small role in the Dutch courts. Given the existing strong provisions in both the European Human Rights Convention and EU sex equality Directives, this is not really surprising. However, in a few cases at least, the CEDAW's specific gender focus has been relied upon, albeit not always with success. Maybe the CEDAW can be employed more fruitfully in the future if more use is made of the CEDAW's unique provision on the elimination of gender ideology as contained in Article 5(a).⁶⁴ However, in order to get the Dutch courts to acknowledge the direct applicability of this provision, lawyers in the Netherlands will have to do some serious thinking.

7 Complaints under the Optional Protocol

By October 2009 three complaints against the Netherlands had been lodged under the Optional Protocol. In two cases the Committee has given its opinion. The first complaint concerned the complex situation of a woman working part-time and being simultaneously a co-working spouse, resulting, according to the plaintiff, in a discriminatory loss of income during pregnancy and maternity.⁶⁵ The Committee found, however, that the situation was not due to direct or indirect sex discrimination, because the loss of income was due to her special employment situation, and not because the relevant legislation had been applied in any discriminatory manner. The second plaintiff, a victim of trafficking invoking Article 6 of the CEDAW, did not fare much better.⁶⁶ The Committee ruled that the complaint was inadmissible, because she had failed to exhaust the available domestic remedies. A third complaint has been discontinued.

⁶³ This, as well as related issues, have been dealt with by different courts, but all cases have finally failed, if not in the lower courts, then in the Supreme Court, including the cases that were argued on the basis of EU Directives, such as Directive 86/613 on the self-employed or the pregnancy Directive 2004/113/EC. See Hoge Raad, 11 July 2008, *LJN*: BD1850 and Hoge Raad, 11 April 2011, *LJN*: BP3044.

⁶⁴ Holtmaat, *Naar Ander Recht en Beleid*; R. Holtmaat and C. Tobler, 'CEDAW and the European Union's policy in the field of combating gender discrimination', *Maastricht Journal of European and Comparative Law* 12:4 (2005) 399–424; see also Holtmaat in this volume.

⁶⁵ CEDAW Committee, *Ms. Dung Thi Thuy Nguyen v. the Netherlands*, Communication 3/2004, 14 August 2006, UN Doc. CEDAW/C/36/D/3/2004.

⁶⁶ CEDAW Committee, *Ms. Zhen Zhen Zheng v. the Netherlands*, Communication 15/2007, 27 October 2008, UN Doc. CEDAW/C/42/D/15/2007.

Three complaints is not an impressive number. Nevertheless, the Minister responsible for the implementation of the CEDAW may have been right when he remarked:

The Netherlands so far has only received three complaints under the Optional Protocol. In absolute figures that is a small number, however nevertheless significant when compared to the very few individual complaints that have been lodged with the Committee thus far. I feel this says something about the visibility of the CEDAW in the Netherlands.⁶⁷

And it just might indicate that Dutch lawyers have more faith in the CEDAW Committee than the small number of references in the national courts would make us believe.

8 The impact of the CEDAW on legislation

A quick search on ‘women’s convention’ in the Dutch database *Opmaat*, containing all official government documents published since 1995, including the notes of Parliamentary debates, explanatory memoranda accompanying bills and the like, resulted in a mere 207 hits. A very disappointing result and, I assume, an indicator of the lack of significance attached to the CEDAW.⁶⁸ In a few instances questions were asked in Parliament, following recommendations of the CEDAW Committee. Issues referred to included the law regarding family names, already briefly discussed above, and sexual and domestic violence as grounds for residence permits in asylum procedures. Following up on a recommendation of the CEDAW Committee after the second government report, two Members of Parliament asked the government to oblige each Ministry to subject at least one new legislative proposal a year to a Gender Impact Assessment.⁶⁹ The proposal was not successful. The majority of references were less closely linked to the work of the Committee.

Ministerial proposals for the annual women’s emancipation plans usually include rather general references to the CEDAW. A positive exception is the Ministry of Foreign Affairs, which tends to conduct a very active human rights policy. Gender is a specific point of attention in the

⁶⁷ Letter of 5 November 2008 on the legal scope of CEDAW at 2.

⁶⁸ The lack of references stands in stark contrast with EU Directives. See for instance J. H. Gerards, ‘Implementation of the Article 13 Directives in Dutch equal treatment legislation’, *Maastricht Journal of European and Comparative Law* 13:3 (2006) 291–309.

⁶⁹ *Tweede Kamer* 2003–2004, 27061, no. 24, Meerjarennota emancipatiebeleid, Motie van de leden Stuurman en Tonkens [Several year note on emancipation policy, Motion of Members of Parliament Stuurman and Tonkens]. On the Gender Impact Assessment see M.

work of the Department for International Development Cooperation. Although this is obviously to be applauded, the gender expertise available for the international arena seems to make Dutch NGOs more sharply aware of the perceived lack of expertise on women's human rights issues regarding the position of Dutch women. Civil servants responsible for the implementation of the CEDAW in the Netherlands apparently are mostly unaware of the legal character of the document. According to the NGO representatives who presented the fourth Dutch shadow report to the CEDAW Committee, the civil servants in the Dutch delegation valued the Committee's recommendations and comments as something of an expert opinion, not as legal interpretations of the competent body.⁷⁰ The CEDAW Committee's Concluding Observations on the fifth Dutch report show that the Committee's recommendations in this regard so far have had no effect. The Committee regrets that:

the Netherlands has argued in court the non-direct applicability of substantive provisions of the Convention ... and ... reiterates its concern that as a consequence of the position of the State Party, the judiciary is left with the responsibility of determining whether a particular provision is directly applicable. CEDAW urges the Netherlands to reconsider its position and to ensure that substantive provisions of the Convention are fully applicable in the domestic legal order ... and to provide for domestic remedies for alleged violations of any rights guaranteed to individuals by the Convention.⁷¹

A specific issue where the CEDAW popped up concerned the lack of a financial safety net for loss of income due to pregnancy and childbirth for the self-employed, which has already been mentioned. Thanks to a strong lobby, supported by women's NGOs, politicians, trade unions, as well as decisions and an advisory report of the national equality body, the issue did not disappear after the disappointing court decision. In 2008 the government presented a bill to Parliament proposing the reinstatement of a minimum financial safety net for the self-employed. The proposal was adopted and entered into force in June 2008.⁷² However, self-employed

Verloo and C. Roggeband *Emancipatie-Effectrapportage: Theoretisch Kader, Methodiek en Voorbeeldrapportages* [Gender Impact Assessment: Theoretical Framework, Method and Examples] (The Hague: Vuga/SZW 1994).

⁷⁰ See the diary of Marjan Wijers and Margreet de Boer at www.vrouwenverdrag.nl (last accessed 18 February 2013).

⁷¹ CEDAW Committee, *Concluding Observations: the Netherlands*, CEDAW/C/NLD/CO/5, 5 February 2010, paras. 12–13.

⁷² Wet van 29 mei 2008 tot wijziging van de Wet arbeid en zorg in verband met een uitkering aan zelfstandigen bij zwangerschap en bevalling en een verruiming van de periode

women who suffered loss of income due to pregnancy between 2001 and 2008 were left without any compensation. It is important and telling that even though the CEDAW was mentioned, the government explicitly stated that it did not feel there was any international obligation for the enactment of this legislation.

The absence of the CEDAW in political and legislative debates may be explained in part by the existence of substantial domestic sex equality legislation, resulting from the implementation of EU Directives. However, this cannot explain why the CEDAW does not play a more prominent role in debates on issues regarding women's human rights outside the equality framework. In three recent debates, all dealing with topics that may have significant consequences in terms of women's human rights, the CEDAW was not mentioned once. These issues included legislative changes in the Act on the termination of pregnancies,⁷³ a bill on the possibility to evict perpetrators of domestic violence temporarily from their own homes⁷⁴ and the introduction of the obligation to agree on a 'parental plan' as a condition to obtain a divorce.⁷⁵ In the discussions regarding the parental plan the CRC was mentioned; however, the CEDAW was not. Rather remarkable, moreover, is that the explanatory memorandum to the bill on the restraining order in case of domestic violence was formulated entirely in neutral terms, not once referring to either men or women.

From these findings it may be concluded that, even though it is not to be ruled out that the CEDAW in a very general sense informs political debates on important gender-biased issues, its role or influence is certainly not very prominent or influential. Ways will have to be found to encourage politicians to make more use of the concrete recommendations and suggestions regarding implementation of women's human rights, and to insist that the government takes the CEDAW Committee's comments seriously.

voor deelname aan een vrijwillige verzekering in enkele socialezekerheidswetten [Act on Employment and Care with Regard to a Pregnancy Benefit for the Self-Employed], *Staatsblad* 2008, 192.

⁷³ Besluit van 18 mei 2009, houdende wijziging van het Besluit afbreking zwangerschap [Decision Changing the Decision on the Termination of Pregnancy], *Staatsblad* 2009, 230.

⁷⁴ Wet van 9 oktober 2008, houdende regels strekkende tot het opleggen van een tijdelijk huisverbod aan personen van wie een ernstige dreiging van huiselijk geweld uitgaat [Act on a Temporary Eviction from Home of Perpetrators of Domestic Violence], *Staatsblad* 2008, 421.

⁷⁵ Wet van 27 november 2008 tot wijziging van Boek I van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering in verband met het bevorderen van voortgezet

9 Research, education, training and awareness-raising

Both in the period prior to and following the Dutch ratification of the CEDAW, there was ample attention for the Convention. This was the heyday of Dutch feminist scholarship, and an impressive number of feminist expertise centres and women's organisations were subsidised by the government. In anticipation of the Dutch ratification, two volumes were published on 'International Law and Women', highlighting among others the expected added value of the CEDAW.⁷⁶ *Nemesis*, an academic journal on women and law, published a special issue on the CEDAW on the occasion of the Dutch ratification in 1991, and many contributions on the CEDAW in the following years until the journal was discontinued in 2003. In 1994 a volume was published containing a detailed analysis of all provisions in the Convention.⁷⁷ A human rights NGO published a low-cost practical guide explaining the treaty on an article-by-article basis, illustrated with many concrete examples.⁷⁸ Studies were commissioned on such issues as the significance of the CEDAW for Dutch aliens law, and on the multicultural society.⁷⁹ Shortly after the Optional Protocol was ratified, the Clara Wichmann Institute, an independent (though subsidised) expert institute on women and law, published a guidebook on how to use the complaints

ouderschap na scheiding en het afschaffen van de mogelijkheid tot het omzetten van een huwelijk in een geregistreerd partnerschap [Act on the Advancement of Continued Parenting after Divorce ...] *Staatsblad* 2008, 500.

⁷⁶ H. van Maarseveen, D. Pessers and M. Gunning (eds.), *Internationaal Recht en Vrouwen. De Betekenis van het Internationale Recht voor Vrouwen in Nederland. Part I: Commentaren & Part II: Teksten van Verdragen, Resoluties, Statuten en Andere Internationale Documenten*, [International Law and Women. The Significance of International Law for Women in the Netherlands. Part I: Comments & Part II: Texts of Treaties, Resolutions, Charters and Other International Documents] (Zwolle: W. E. J. Tjeenk Willink, 1987).

⁷⁷ A. W. Heringa, J. Hes and L. Lijnzaad (eds.), *Het Vrouwenverdrag: Een Beeld van een Verdrag ...* [The Women's Convention: Picture of a Convention ...] (Antwerp/Apeldoorn: Maklu Uitgevers, 1994).

⁷⁸ W. Evenhuis and E. van Dijk, *Met Recht een Vrouw. Het VN-Vrouwenverdrag Toegelijk* [A Woman by Rights. An Explanation of the UN Women's Convention] (Amsterdam: Greber Uitgever & Distributeur, 2001).

⁷⁹ S. van Walsum, *Het VN-Vrouwenverdrag en het Nederlands Vreemdelingenrecht* [The UN-Women's Convention and Dutch Aliens Law] (Amsterdam: Clara Wichmann Instituut, 1995); R. Holtmaat (ed.), *Een Verdrag voor Alle Vrouwen. Verkenningen van de Betekenis van het VN-Vrouwenverdrag voor de Multiculturele Samenleving* [A Treaty for All Women. Explorations of the Significance of the UN-Women's Convention for the Multicultural Society] (The Hague: E-Quality, 2002).

procedure.⁸⁰ In fact, so much was being written that the Institute had to publish a revised edition of its bibliography on the CEDAW.⁸¹ In 2004 the Clara Wichmann Institute had to close its doors, due to lack of income.⁸² Fortunately, the archive function of the Institute has been taken over by the Dutch Institute for Emancipation and Women's History, Atria (formerly known as the IIAV, thereafter as Aletta). Many publications have been made accessible on the Internet.⁸³ It is possible to study other publications at the Institute or order hard copies.

Now that the heyday of the second feminist wave seems to be over, the number of publications on the CEDAW is decreasing. A special site dedicated to the CEDAW was opened by an ardent supporter of the Convention, Jeroen de Wildt, a civil servant who had previously been involved in the ratification process.⁸⁴ However, because no funding whatsoever has been made available to support the work involved in keeping this very informative site up to date, of late the site seems to have slowed down, which, although understandable, is nevertheless a great pity.

In Dutch primary and secondary schools courses are taught on 'citizenship', religion and on what is called 'philosophy of life' (*levensbeschouwing*). Depending on the orientation of schools and teachers, in such courses attention may be paid to human rights or at least human rights issues. It is highly unlikely, though, that specific attention will be paid to the CEDAW.

At the university level, in particular in the law schools, the picture is a little different. In the last decades of the twentieth century, almost every Dutch law school had a specific 'women and law' department, however small. These were mostly established in the wake of the second feminist wave. The existence of such departments is a good guarantee that courses will be offered that focus on women's rights issues, although not necessarily on human rights. Most of these departments, unfortunately, have

⁸⁰ F. van Leeuwen, *Het Facultatief Protocol bij het VN-Vrouwenverdrag; Klagen over Vrouwendiscriminatie* [The Optional Protocol to the UN Women's Convention; Complaining about Women's Discrimination] (Amsterdam: Clara Wichmann Instituut, 2004).

⁸¹ M. Kruizinga, *VN-Vrouwenverdrag. Een Geannoteerde Bibliografie* [UN Women's Convention. An Annotated Bibliography], 2nd revised edition (Amsterdam: Clara Wichmann Instituut, 2002).

⁸² In October 2009 a volume commemorating the fifth anniversary of the closure of the Clara Wichmann Institute was published: M. de Boer and M. Wijers, *Vrouw & Recht. De beweging, de mensen, de issues* [Women & Law. The Movement, the People, the Issues] (Amsterdam University Press/Pallas Publications, 2009).

⁸³ www.atria-kennisinstituut.nl/aletta/atria (last accessed 18 February 2013).

⁸⁴ www.vrouwenverdrag.nl (last accessed 18 February 2013).

disappeared again. Moreover, severe budget cuts at the universities, in combination with revised curricula in many law schools, have led to a strong reduction in the number of optional courses offered. The result is that many courses on women or gender and (human rights) law have disappeared. However, specific courses on gender and human rights have survived in a few law schools. Attention is also paid to the CEDAW in some more general human rights courses, but there is no guarantee that this will continue to be the case. It is interesting to note that foreign students in particular are interested in such courses, provided they are taught in English.

A special education institute exists for the judiciary and other legal professionals (SSR).⁸⁵ The brochure for judges and prosecutors for the year 2010 mentions no courses on human rights, let alone on the CEDAW, although there are possibilities for internships in Strasbourg or Luxembourg. Future judges, the judiciary in training, follow a compulsory programme. In a few courses in this curriculum specific attention is paid to human rights, according to the course summaries. Among these, courses on immigration law seem to be overrepresented. In the commercial market, many other training institutes and universities offer post-academic programmes. Presumably in some of the human rights courses offered, attention will be paid to the CEDAW.

A number of women's and feminist organisations and institutions were discontinued or had to merge with other organisations in these last years, partly because of new rules regarding government subsidies whereby many subsidies were made contingent on specific projects, thus undermining any long-term perspective. Nevertheless, others survived, such as the previously mentioned Aletta, and some took a new form, such as E-Quality, initially a 'proper' women's institute, nowadays a 'knowledge centre for emancipation, family and diversity'. In 2012 a new reduction in the number of women's organisations took place, when Aletta and E-Quality merged into a 'knowledge centre for emancipation and women's history' (Atria).

What has helped to keep the CEDAW alive is that between 2003 and 2010 one of the CEDAW Committee members was Dutch. Cees Flinterman – Member of the Human Rights Commission (HRC) since 1 January 2011 – was always ready to discuss what happened during the latest session and the improvements that had been made. Debriefing lunches

⁸⁵ www.ssr.nl (last accessed 18 February 2013).

were organised on a regular basis at his university (Utrecht), both in the human rights department and for a more general public. Flinterman also regularly met with the Dutch section of the Committee on Feminism and International Law, one of the standing committees of the International Law Association. In May 2009 a topical colloquium on 'Women's Human Rights *versus* Religion/Culture/Tradition'⁸⁶ was organised in the Peace Palace in The Hague, with the help of Flinterman. Several CEDAW Committee members attended. It is quite likely that it would have been impossible to organise a prestigious event such as this, if there had not been an esteemed CEDAW Committee member to back it up.

The picture, as it arises from this overview, seems to indicate that the general public is hardly likely to be aware of the CEDAW. However, in all probability, people know very little about law and human rights generally, except maybe for some very vague ideas. Arguably, we should not expect a thorough knowledge of human rights. It might be a more realistic goal to make sure that women know where to go when they feel treated badly and that they have access to expert legal counselling.

From this perspective, it is more troubling that even legal professionals seem to receive little information on the CEDAW. If they have to deal with issues of sex equality and women's rights, they tend to stick to provisions that have already proven to be successful, such as Article 26 of the ICCPR and Article 8 of the ECHR. As long as they are successful, that is not a real problem. However, it would seem that the most gender-specific provisions of the CEDAW, including its obligation to combat gendered stereotypes and ideologies, do remain underused in this way.

10 In conclusion

Drawing conclusions on the embeddedness of the CEDAW in Dutch society as well as in the legal clay is not easy. The picture emerging is ambivalent. On the one hand, there is the unique and extremely helpful Article 3 of the Dutch Approbation Act, instructing the government to report periodically to Parliament about the 'real state of affairs'. This provision has

⁸⁶ As was to be expected, the use of the word 'versus' raised many critical comments, as well as lively debate. For the results of the conference see: R. Holtmaat and I. Boerefijn (eds.), *Women's Human Rights and Culture/Religion/Tradition: International Standards as Guidelines for Discussion? Proceedings of the Colloquium Peace Palace, The Hague 12 May 2009* (Utrecht: Sim Specials, 2010). See also R. Holtmaat and J. Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Antwerp: Intersentia 2011).

been the source of some beautifully detailed and thorough analyses of the way the CEDAW should and could be implemented in the Netherlands. On the other hand, there are signs that civil servants involved in the implementation process know less and less about the treaty obligations. This is at least partly due to the fact that the staff are expected to be internally (or externally) mobile, which means that they change jobs every so many years. However, it may also be that it is not the most experienced and knowledgeable employees who are assigned to the CEDAW file.

The impact of the CEDAW in legal practice is lagging behind that of other conventions, the ICCPR and the ECHR in particular, not to speak of EU law. Still, the one case to which the CEDAW is core, the SGP case, caused unprecedented controversy between the national courts and could count on a high media profile. So, I would recommend that we continue to rely on successful provisions such as Article 26 of the ICCPR and Articles 8 and 14 of the ECHR, and try to focus, in our work on the CEDAW, on the most gender-specific elements of that document. It is here that the CEDAW will arguably have the most added value, both in the courts as well as in developing new policies and legislation.⁸⁷ An impressive amount of information on the CEDAW has been published, and expert knowledge on the Convention is available both in mainstream human rights organisations and among women's organisations. However, in order to make it work, we have to make sure that Dutch politicians and policy makers understand the legal character of the CEDAW and turn back to their conception of the CEDAW as a dynamic instrument: implementation is a progressive process and the constructive dialogue with the CEDAW Committee is an instrument to help that process along. That means that reporting to the CEDAW Committee on the situation in the Netherlands should be regarded as an opportunity to improve that situation, not as an opportunity to 'defend' it, as the responsible Minister apparently thinks.⁸⁸ Whether the CEDAW Committee can do anything to stimulate such a change in perception is a difficult question to answer. Possibly it could be by offering more concrete and feasible advice

⁸⁷ For suggestions on how to use the CEDAW to enhance gender sensitivity in the interpretation of other important legal regimes, see Holtmaat and Tobler, 'CEDAW and the European Union's policy in the field of combating gender discrimination'. Compare also Fredman on the CEDAW in the UK in this volume.

⁸⁸ In a similar vein, J. Morijn, 'Reforming United Nations human rights treaty monitoring reform', *Netherlands International Law Review* (2011) 295–333 at 312.

that may be implemented right away. That, however, is a very complex task for an international body. Moreover, past experiences, such as the SGP issue, are not encouraging. Arguably, the strategy that the CEDAW Committee is currently trying out – that is teaming up with other treaty bodies in dealing with provisions and topics that the Convention shares with other human rights treaties – may prove to be more fruitful, even if only because it may ease the increasingly burdensome task of reporting to and complying with a steadily expanding human rights monitoring system.⁸⁹

⁸⁹ For an example, see the CEDAW Committee's project in cooperation with the Children's Rights Committee to draft a joint General Recommendation on harmful practices, 2011, available at: www2.ohchr.org/english/bodies/cedaw/JointCEDAW-CRC-GeneralRecommendation.htm (last accessed 18 February 2013).