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In this talk, I will discuss the legal and political fight for basic rights, regardless of migratory status, that we have been fighting in the Netherlands. I will first briefly sketch the circumstances of our fight, after which I will focus on the interplay between legal and political action that has become the hallmark of this project.

First of all I want to make clear that when I talk about basic rights, I talk about socio-economic rights. That is: access to food, a place to sleep, access to hygienic sanitary facilities. These facilities should not only be available regardless of migratory status, but also be adequate for the situation of an individual. Being excluded from these basic rights, as many migrants are, is quite frightful: without access to these basic rights, without food and a place to sleep and go the bathroom, you will simply die in the end. Without the ability to legally work, without the ability to return to a war-torn country of origin, without the ability to seek refuge in another country, there is a group of people that is left destitute.

At a glance, the human rights aspect of this project is not very difficult. After all, article 11 of the ICESCR reads:

“The States Parties (...) recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing (...).”

The wording of this article doesn't leave room for any squabbling: basic provisions are *everyone's* right. Also that of irregular migrants.

But apparently, it is not that simple. The policy of excluding irregular migrants from social provisions has been Dutch Government policy since 1998, in a bid of the Social Democratic party to “safeguard” the welfare state. The Linkage Act targeted the so-called “white illegals”, mostly guest workers who had overstayed their working permits but continued to lead a more or less regular life. The situation of irregular migrants has thus since the mid-nineteen nineties been painted in an unwelcoming narrative. In the political debate, excluding irregular migrants was thus an instrument to force them to leave the territory of the State, and even more importantly (but inexplicitly), to prevent more ‘economic migrants’ from coming to the Netherlands.

Our campaign: legal and political

There is one important realization that was constituent to our approach to this subject. Namely, that the repeat player always wins in the end. In the field of social provisions, it is the State who normally is the repeat player, and thus always wins. So we reverted our approach. Instead of filing cases against the central State's agencies and authorities, we reframed the issue and filed cases directly with the municipalities. I toured the country, reaching many of the 450 municipalities of the Netherlands, in order to scout clients, and build cases against a large number of different municipalities before different district courts. This way, I became an expert repeat player. Using elements of decisions of different district courts to build my arguments, I increased my chances of winning.

First step: Children

My first step was to focus on children. The vulnerability of children is universally recognized and uncontroversial. Furthermore, children can hardly be blamed for their migratory situation. The first success I had with this approach was the Dutch High Court's ruling of 8 August 2005. It said that children from parents who were in the Netherlands without residence permit, but still in a procedure, had a right to shelter. Together with the ngo *Defence for Children International*, I filed a collective complaint with the ECSR. In *DCI v. the Netherlands* (No. 48/2008), the ECSR ultimately decided that a child is a child, because it is a child, and is to be treated as such. A child should not be excluded on the basis of a lack of residence permit of the parents. Only after seven years of procedures, the Dutch High Court ruled on 9 September 2012 that the Dutch State has to follow this principle, and stop excluding children from basic provisions.

Second step: Extremely vulnerable people

The second step was establishing protection and shelter for extremely vulnerable people. Our argument was based on the need for protection of private life (article 8 ECHR). A positive obligation for the State arises if the lack of basic provisions leads to irreparable harm or death. The tactics of these cases were the same: finding clients in multiple municipalities, and taking the cases to the municipality instead of the central State. This led to jurisprudence concluding that exclusion of demonstrably vulnerable people was not reasonable, and did not fall in the wide margin of appreciation. Although this was a valuable step for a group of clients, the threshold remained very high: only a fully documented medical history, and demonstrable difficulties to leave the territory of the State would lead to a positive duty for the State.

Third step: Unconditional shelter for every individual

So after these two important, most vulnerable groups, the attention started to shift to the broader goal: unconditional shelter for every individual within the territory of the Netherlands. Multiple dynamics started to intertwine: a legal campaign, a campaign by multiple NGOs, and a campaign started by the irregular migrants themselves.

Although the ground work for the campaign was already formed, the action of a group of irregular migrants, mostly asylum seekers who were turned down and kicked on the streets, formed a tent camp at the main asylum reception center in the Netherlands in Ter Apel, a small rural town in the far north of the Netherlands. They demanded a resolution for their limbo, and protested against the treatment they faced. The majority of migrants originated from Somalia, and were not deported by the State, nor were they granted a stated. After the local mayor intervened, the tent camp was evicted. Many of the migrants left and went to Amsterdam, where a new tent camp was established. The group turned political, and started to call themselves “We Are Here”. They squatted buildings, and organized media attention and demonstrations. This generated a lot of attention. The problems of irregular migrants and the policy exclusion from society as whole became visible.

Although their plea was first and foremost for a resolution of the migratory status, the constant threat of evictions and the debilitating state of the main squatted parking garage lead the group to shift their attention to shelter as an intermediate resolution. Here my legal strategies and the political actions of the migrants themselves started to align with each other.

Around the same time, the increased visibility of the problem lead to more intense cooperation with civil society organizations. A lot of NGOs were helping the group of migrants. In this case, the Protestant Church was a very important partner. The did not just help the group of migrants in their day to day struggle to survive, but also recognized the lack of shelter as a political problem with which they wanted to engage. Involvement of the Church also granted an important moral status to the campaign. The close cooperation with the Church lead to a new complaint filed at the ECSR, closely connected to another complaint filed by us at the ECSR, at the discretion of the homelessness NGO, FEANTSA.

At the ECSR, the movement for universal accessible shelter was successful. The Committee concluded that although the arrangements do not need to be the same as for citizens, basic rights need to be covered for anyone within the

territory of the State. In paragraph 117 of the merits of CEC v. the Netherlands (ECSR No. 90/2013), the Committee concludes:

“117. The Committee observes in this connection that the scope of the Charter is broader and requires that necessary emergency social assistance be granted also to those who do not, or no longer, fulfil the criteria of entitlement to assistance specified in the above instruments, that is, also to migrants staying in the territory of the States Parties in an irregular manner, for instance pursuant to their expulsion. The Charter requires that emergency social assistance be granted without any conditions to nationals of those States Parties to the Charter who are not Member States of the Union. The Committee equally considers that the provision of emergency assistance cannot be made conditional upon the willingness of the persons concerned to cooperate in the organisation of their own expulsion.”

This was, however, not the end of the legal and political debate in the Netherlands, but much more the start of it. The current Government of Social Democrats and Conservative Liberals works in a field of rising xenophobia, with both coalition partners trying to raise a completely different image concerning the treatment of refugees.

In an effort to be effective politically, we tried to make the problem as small as possible. The current narrative in Dutch politics centers around the idea that enabling “illegals” and “failed asylum seekers” to keep themselves alive is excessive pampering, creating an ‘*aanzuigende werking*’. This untranslatable concept, which literally means *suction effect*(!) illustrates the high contentiousness of the aim of our campaign. The need was first and foremost to paint the problem as a *small* problem. The plea was only for the basics, keeping people from the streets and enabling them to think clearly and work on a better future. This resulted in a three word alliteration: *bed, bad, brood*, or bed, bath and bread.

The government reacted in two different ways: the municipalities, many forces by their city councils, were eager to set up ‘bbb’-facilities from their own funds. In total, as much as 60 new arrangements were made. The response of central government was however much more difficult. The need to respond to the decision of the ECSR led to a week-long political crisis, with the coalition government on the brink of collapse. The result was a political compromise, which was upheld by the Dutch High Administrative Court on 26 November 2015: that aliens without residence permit have a right to shelter, however only on the condition that they *demonstrably and sincerely* cooperate with their expulsion.