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# COHABITING WITH THE ACCUSED: THE FORMAL LIMITS OF SPOUSAL PRIVILEGE AFFIRMED IN *VAN DER HEIJDEN v.* *NETHERLANDS*

SHAE FITZPATRICK\*

**Abstract:** In the wake of Europe’s evolving social landscape of family life, the European Court of Human Rights’ (ECtHR) decision in *Van der Heijden v. Netherlands* sheds light on the scope of spousal privilege. The ECtHR found that the Netherlands’ interference in Van der Heijden’s nontraditional family life did not violate her Article 8 right guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms . In its decision, the ECtHR upheld the formal limits of Dutch spousal privilege even though it did not protect Van der Heijden in her *de facto* relationship with the accused. Despite the contentious split on the court, the ECtHR reached the correct result and properly embraced family form over function in this clash between criminal procedural law and informal Dutch family lifestyle. The ECtHR adopted a formalistic approach that departs from prior Article 8 case law, although, in this case it was justified because a criminal prosecution was at stake. This Comment asserts that the court’s reasoning was appropriate in light of the margin of appreciation doctrine, the criminal context, and the letter and spirit of Article 8.

## INTRODUCTION

Ms. Gina Gerdina van der Heijden faced a profound moral dilemma when her companion of eighteen years and the father of her two children became a suspect in a fatal shooting: would she be obligated to testify against him?<sup>1</sup> Stakes are high in criminal cases, yet, virtually every legal system, recognizing family as a protected social institution, exempts spouses from the duty to provide evidence and confront

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<sup>1</sup> *Van der Heijden v. Netherlands*, App. No. 42857/05, ¶ 13 (Eur. Ct. H.R. Apr. 3, 2012); *id.* ¶ 3 (Casadevall, J., dissenting), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110188> (decision not selected for publication in *European Court of Human Rights, Reports of Judgments and Decisions*).

this dilemma.<sup>2</sup> It was not that simple for Van der Heijden because her family relationship lacked one critical element required by the Netherlands courts and legislature—formal legal recognition.<sup>3</sup>

On April 3, 2012, the European Court of Human Rights' (ECtHR) Grand Chamber addressed a conflict between criminal procedural law and the protection of family life in the case of *Van der Heijden v. Netherlands*.<sup>4</sup> The ECtHR held that the Netherlands did not violate Van der Heijden's Article 8 "right to respect for [her] private and family life" guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights or ECHR).<sup>5</sup> Although Dutch courts sent Van der Heijden to jail for her refusal to testify against her companion, the ECtHR found that state interference in her private family life was justified in the truth-seeking pursuit of justice.<sup>6</sup> This case highlights the significance of Article 8 as one of the most dynamic fields of ECtHR case law based on the evolving concept of family life across Europe.<sup>7</sup> In light of the changing social landscape, this recent judgment calls into question the decision of the Strasbourg court in regard to Article 8 and spousal privilege.<sup>8</sup>

Part I of this Comment provides background on the facts of *Van der Heijden* and the circumstances of Van der Heijden's family life with the alleged suspect, as well as the foundation of her legal proceedings in the Netherlands and ECtHR. Part II presents a discussion of the majority and joint dissent opinions from the ECtHR's contested 10–7 judgment. This section examines prior Article 8 case law and margin of appreciation doctrine development, in addition to the treatment of testimonial privilege across other Council of Europe Member States. Part III argues that the ECtHR properly applied a formalistic reasoning

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<sup>2</sup> *Id.* ¶ 32; *id.* ¶ 14 (Tulkens, J., dissenting) (describing spousal privilege as the protection of family life as a social value and human right).

<sup>3</sup> *See id.* ¶¶ 62, 65 (majority opinion).

<sup>4</sup> *See id.* ¶¶ 62, 65, 84.

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, 14, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]; *see Van der Heijden*, App. No. 42857/05, ¶¶ 3, 78.

<sup>6</sup> *See Van der Heijden*, App. No. 42857/05, ¶ 54.

<sup>7</sup> *See* JUDY WALSH & FERGUS RYAN, IRISH HUMAN RIGHTS COMM'N, THE RIGHTS OF *DE FACTO* COUPLES 47–48 (2006); W.M. Schrama, *The Dutch Approach to Informal Lifestyles: Family Function over Family Form?*, 22 INT'L J.L. POL'Y & FAM. 311, 312–14 (2008) (discussing the growth of Dutch cohabitation as one example of the evolving concept of family life across Europe); *see also* cases cited *infra* note 74.

<sup>8</sup> *Van der Heijden*, App. No. 42857/05, ¶ 14 (Tulkens, J., dissenting); *see id.* ¶¶ 5–6 (Casadevall, J., dissenting); *see also* Schrama, *supra* note 7, at 311; WALSH & RYAN, *supra* note 7, at 43.

to reach its decision in light of the margin of appreciation, the criminal justice at stake, and the letter and spirit of Article 8. As a result, the ECtHR's decision signals a reluctance to trump the Dutch legislative judgment and require the state to qualify Dutch criminal procedural law on the basis of an alternative family lifestyle.

## I. BACKGROUND

### A. *Van der Heijden's Family Life*

At the time of the suspect's arrest, Van der Heijden had been cohabitating with him in a stable relationship for eighteen years.<sup>9</sup> The couple had two children, and Van der Heijden's male companion had legally recognized both of their children.<sup>10</sup> When Van der Heijden was detained, their youngest child was only two years old.<sup>11</sup> Though Van der Heijden and her life partner had elected not to marry or enter into a registered partnership, they had maintained a long-term, *de facto* family relationship.<sup>12</sup> The nature of their relationship was not uncommon; although statistics vary, Dutch society has experienced a steady increase and acceptance of cohabitation as an alternative family lifestyle.<sup>13</sup> Additionally, cohabitation and marriage receive equal legal treatment in other areas of Netherlands law, such as taxation, alimony, tenancy, and social security.<sup>14</sup>

### B. *Netherlands and the European Court on Human Rights*

On May 25, 2004, Van der Heijden was summoned before a judge in a criminal investigation involving her longtime life partner.<sup>15</sup> She appeared before the judge and refused to testify contending that the testimonial privilege afforded to spouses and registered partners under Article 217 § 3 of *Wetboek van Strafvordering*, the Netherlands Code of

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<sup>9</sup> *Van der Heijden*, App. No. 42857/05, ¶ 13 (majority opinion).

<sup>10</sup> *Id.* ¶ 46.

<sup>11</sup> *See id.* ¶ 12 (Tulkens, J., dissenting).

<sup>12</sup> *Id.* ¶¶ 13, 50–51 (majority opinion).

<sup>13</sup> *See* Schrama, *supra* note 7, at 312–14 (discussing growth in cohabitation rates in Dutch society); Wendy M. Schrama, *Registered Partnership in the Netherlands*, 13 INT'L J.L. POL'Y & FAM. 315, 324 (1999) (discussing the Dutch Registered Partnership Act enacted in 1998 as an example of legislative action that created an alternative to married life, and its impact on the evolving social developments in Dutch society).

<sup>14</sup> *Van der Heijden*, App. No. 42857/05, ¶ 48.

<sup>15</sup> *Id.* ¶ 13.

Criminal Procedure (CCP), should apply to her.<sup>16</sup> Although her argument did not prevail, the judge declined to issue an order for her detention recognizing that her liberty interests outweighed the prosecution's interests.<sup>17</sup> The 's-Hertogenbosch Regional Court (Regional Court), however, rejected the judge's decision and sent Van der Heijden to prison for failure to comply with a judicial order.<sup>18</sup> Following her thirteen-day imprisonment, Van der Heijden still refused to provide evidence against the father of her children.<sup>19</sup> She appealed the judgment, but the Court of Appeal dismissed her petition and upheld the Regional Court ruling that she was not entitled to testimonial immunity under Netherlands law.<sup>20</sup>

Van der Heijden appealed again, and in May 2005, the *Hoge Raad*, the Netherlands Supreme Court (Supreme Court), upheld the decision of the Regional Court, finding that the Article 217 privilege did not apply to Van der Heijden.<sup>21</sup> Subsequently, the Supreme Court rejected Van der Heijden's claim that by denying her this privilege, the Netherlands had violated her rights under Articles 8 and 14 of the ECHR.<sup>22</sup> As noted by the ECtHR, the Supreme Court recognized that Article 217 was intended to protect family relationships and that the principle of legal certainty supported this clearly defined statutory exemption.<sup>23</sup>

In November 2005, Van der Heijden began proceedings with the ECtHR, asserting that the Netherlands had interfered with her right to respect for her family life (Article 8) and, furthermore, that the state had subjected her to discriminatory treatment on the basis of her familial lifestyle (Article 14).<sup>24</sup> The ECtHR reasoned that the Netherlands

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* ¶ 13.

<sup>18</sup> *Id.* ¶ 14.

<sup>19</sup> *Id.* ¶¶ 17, 77.

<sup>20</sup> See *Wetboek van Strafvordering* (Code of Criminal Procedure) [Sv] Art. 217 (Neth.) available at [http://wetten.overheid.nl/zoeken\\_op/BWBR0001903/TweedeBoek/TitelIII/Vierdeafdeling/Artikel217/geldigheidsdatum\\_26-10-2012](http://wetten.overheid.nl/zoeken_op/BWBR0001903/TweedeBoek/TitelIII/Vierdeafdeling/Artikel217/geldigheidsdatum_26-10-2012) (select "laws"; type "Article 217" in "SKU" search field and select "article"; scroll down to Code of Criminal Procedure; check box next to "Article 217" and select "show item"); *Van der Heijden*, App. No. 42857/05, ¶¶ 17–19.

<sup>21</sup> *Van der Heijden*, App. No. 42857/05, ¶ 20.

<sup>22</sup> *Id.* ¶ 21.

<sup>23</sup> See *id.*

<sup>24</sup> *Id.* ¶¶ 1, 3; see ECHR, *supra* note 5, arts. 8, 14. The ECHR, formulated in the wake of World War II, discerns the critical need for individual safeguards against state action across Europe. Gillian Douglas, *The Family and the State Under the European Convention on Human Rights*, 2 INT'L J.L. & FAM. 76, 79 (1988). Following ECHR ratification, the Netherlands entitled all of its citizens to the protection of the rights provided in the treaty. See Nancy Johnson, *The Breadth of Family Law Review Under the European Convention on Human Rights*, 36

interference in Van der Heijden’s relationship was justified under Netherlands law and in pursuit of a legitimate aim.<sup>25</sup> Consequently, this case turned on the question of whether the interference was “[n]ecessary in a democratic society.”<sup>26</sup> The ECtHR found Van der Heijden’s Article 8 right had not been violated and, as a result, declined to consider her Article 14 claim.<sup>27</sup>

## II. DISCUSSION

### A. Majority Analysis

*Van der Heijden v. Netherlands* represented a clash between criminal procedural law and informal Dutch family lifestyle.<sup>28</sup> The ECtHR framed its analysis with respect to Article 8 such that the Netherlands had a negative obligation to refrain from arbitrary interference with Van der Heijden’s protected family life.<sup>29</sup> Based on established ECtHR case law, the court found that Article 8 protections extended to *de facto* familial relationships, such as Van der Heijden’s non-marital cohabitation.<sup>30</sup> Yet this protection—the right to respect for family life—was not

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HARV. INT’L L.J. 513, 514 (1995). The ECHR established the ECtHR, a supranational court, to adjudicate the human rights claims from the treaty’s Contracting States. *Id.* at 514–16. After exhausting the Dutch legal system, Van der Heijden filed an application with the ECtHR alleging that the Netherlands, as a Contracting State, breached its obligations under Articles 8 and 14 of the ECHR. *Id.*

<sup>25</sup> See *Wetboek van Strafvordering* Art. 221 (stating that a witness shall be detained for failure to comply with a judicial order); *Van der Heijden*, App. No. 42857/05, ¶¶ 53–54.

<sup>26</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 3, 55–57.

<sup>27</sup> See *id.* ¶¶ 3, 55–57, 78, 84.

<sup>28</sup> See Schrama, *supra* note 7, at 323–24 (citing the Supreme Court ruling in Van der Heijden’s Netherlands case).

<sup>29</sup> See *Van der Heijden v. Netherlands*, App. No. 42857/05, ¶¶ 52–55 (outlining the relevant aspects of its Article 8 analysis); A.M. Connelly, *Problems of Interpretation of Article 8 of the European Convention on Human Rights*, 35 INT’L & COMP. L.Q. 567, 570 (1986) (explaining the “negative obligation” approach that ECtHR often applies to Article 8 analysis); Johnson, *supra* note 24, at 518.

<sup>30</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 40, 50. The Government did not challenge the existence of Van der Heijden’s “family life” because it falls within well-established ECtHR case law. *Id.* ¶ 40. In addition, the nature of her relationship—length of time, and two children both legally recognized by their father—constitutes “family life” for the purposes of Article 8 protections. See *id.* ¶ 50. In *Keegan v. Ireland*, the ECtHR stated that the notion of “family” applies to non-marital relationships where the parties have cohabited together for a length of time. 18 Eur. H.R. Rep. 342, 360 (1994); see also *Kroon and Others v. Netherlands*, 19 Eur. H.R. Rep. 263, 283 (1995) (discussing that the notion of “family life” was not confined only to marriage-based relationships and might encompass other “family ties”).

absolute.<sup>31</sup> The text of Article 8(2) provided an exception for public authorities, including states, to interfere with that right in limited circumstances.<sup>32</sup> Accordingly, the ECtHR found the prosecution's efforts to compel Van der Heijden to testify constituted an interference with her family life.<sup>33</sup> This State intrusion, nevertheless, was executed "in accordance with the law" following the procedure set forth in the CCP Article 221.<sup>34</sup> In addition to the statutory basis, the interference was justified in pursuit of the legitimate aim to prevent crime under Article 8(2) and was necessary to achieve that public aim through state criminal prosecutions.<sup>35</sup>

The majority opinion focused its analysis on whether this interference—Van der Heijden's imprisonment—was necessary in a democratic society.<sup>36</sup> In *Van der Heijden*, the ECtHR affirmed its role in Strasbourg as subsidiary to that of "national authorities" in the evaluation and protection of their citizens' human rights.<sup>37</sup> This component of the analysis aims to balance competing interests: protection of the private sphere of family life versus the public interest in prosecuting serious crimes.<sup>38</sup> In an effort to strike the proper balance, the Netherlands government limited the Dutch spousal privilege to relationships defined by formal marriage or registered partnership.<sup>39</sup>

The "central question" that *Van der Heijden* presented was whether the bounds of this Dutch exemption violated Van der Heijden's right to respect for family life guaranteed by Article 8.<sup>40</sup> Aiming to protect familial harmony, the Dutch legislature, as noted by the ECtHR, enacted

<sup>31</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 56–57.

<sup>32</sup> ECHR, *supra* note 5, art. 8(2). Article 8(2) provides that:

There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

*Id.*

<sup>33</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 52, 53.

<sup>34</sup> *Id.*

<sup>35</sup> See ECHR, *supra* note 5, art. 8(2); *Van der Heijden*, App. No. 42857/05, ¶¶ 55, 57, 62.

<sup>36</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 55–78.

<sup>37</sup> *Id.* ¶ 55; see WALSH & RYAN, *supra* note 7, at 42 ("Some deference is considered appropriate because the ECtHR is not always as well placed as national actors in striking an appropriate balance between competing interests in complex areas of law and policy.")

<sup>38</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 56, 62.

<sup>39</sup> *Id.* ¶ 62.

<sup>40</sup> *Id.* ¶ 65.

Article 217 with objective formal limits to exempt “close relatives, spouses, former spouses, registered partners, and former registered partners of suspects” from their civil duty to provide evidence.<sup>41</sup> The ECtHR did not question the authority of Netherlands legislature to define the limits of their spousal privilege, but Van der Heijden contested its scope.<sup>42</sup> She asserted that her relationship with the suspect was functionally equivalent to a formalized union.<sup>43</sup> Therefore, the Netherlands courts in forcing her to testify implicated the same unfairness that the privilege was intended to prevent.<sup>44</sup>

Rejecting Van der Heijden’s argument, the ECtHR found the formal legal recognition of the family unit determinative in her case.<sup>45</sup> The ECtHR focused this decision on the legal rights and obligations that accompany marriage or registered partnership to distinguish these formal relationships from Van der Heijden’s unrecognized cohabitation.<sup>46</sup> It was evident that the court did not want to engage in a case-by-case basis assessment of family relationships because of the practical implications on judicial efficiency, time, and resources.<sup>47</sup> Finally, the court returned to the fact that this was a choice made by Van der Heijden and her counterpart not to avail themselves of a legal union.<sup>48</sup> Thus, Van der Heijden must face the legal ramifications of this voluntary decision.<sup>49</sup>

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<sup>41</sup> *Id.* ¶ 68; *see id.* ¶¶ 65, 69.

<sup>42</sup> *Id.* ¶ 69 (noting that states are entitled to set boundaries to the scope of testimonial privilege and to draw the line at marriage and registered partnerships); *see id.* ¶ 47; *see also* Thomas A. O’Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 *HUM. RTS. Q.* 474, 478 (1982) (discussing that states are entitled to make the initial determinations to conform their laws and practice with the ECHR that is subject to review by the ECtHR).

<sup>43</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 65, 69.

<sup>44</sup> *See id.* ¶¶ 46–47, 65, 69 (discussing that spousal privilege shields certain witnesses from dilemma of providing truthful evidence that might harm family relationship or providing unreliable evidence at risk of perjury); *id.* ¶ 8 (Tulkens, J., dissenting) (declaring that Van der Heijden faced the same moral dilemma as a married spouse or registered partner).

<sup>45</sup> *See id.* ¶ 69 (majority opinion).

<sup>46</sup> *See id.* (highlighting the legal rights rather than the characteristics of the relationship such as the length of time or the supportive nature).

<sup>47</sup> *See id.*

<sup>48</sup> *See id.*

<sup>49</sup> *Van der Heijden*, App. No. 42857/05, ¶ 76.

### B. *Joint Dissent Analyses*

The ECtHR's decision was not unanimous; the court handed down a 10–7 judgment, including four separate opinions: majority, concurrence, and two separate joint dissents.<sup>50</sup> This section explores the majority and dissents' divergence in their treatment of Van der Heijden's claim. In one of the dissenting opinions, Judge Tulkens, joined by four of his colleagues, challenged the overall framework of the majority's Article 8 analysis.<sup>51</sup> The majority framed Van der Heijden's claim as a conflict between two interests, the protection of family life from state interference and the prosecution of crime, but Judge Tulkens in his dissent argued this ran counter to the "spirit and letter of Article 8."<sup>52</sup> The ECHR and Article 8 guarantee rights, not merely interests.<sup>53</sup> Therefore, according to Judge Tulkens, the ECtHR should broadly construe Van der Heijden's right to respect for family life.<sup>54</sup> Conversely, Article 8(2) sets forth an exception to that right—public interest in crime prevention—that the court should narrowly interpret.<sup>55</sup>

Judge Tulkens' dissent challenged the majority's reliance on the principle of legal certainty to substantiate its rejection of a more nuanced analysis of Van der Heijden's relationship.<sup>56</sup> The majority reasoned that judicial efficiency and practical concerns weighed in favor of a bright line rule on family relationships.<sup>57</sup> Yet the dissent explicated that in reality the applicant, rather than the court, would bear the burden of proving the existence of a stable relationship.<sup>58</sup> Analogizing to marriage or registered partnership, the dissent declared that much of the information pertinent to this inquiry was available in public or municipal records.<sup>59</sup> This dissent contested the majority's swift dismissal of the equal legal treatment of unmarried persons in other areas of Dutch

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<sup>50</sup> See generally *id.* ¶ 84 (noting joint dissent opinions of Judge Tulkens, Vajić, Spielmann, Zupančič and Laffranque as well as Judges Casadevall and López Guerra).

<sup>51</sup> *Id.* ¶ 6 (Tulkens, J., dissenting); *id.* ¶ 84 (majority opinion).

<sup>52</sup> *Id.* ¶¶ 5–6 (Tulkens, J., dissenting).

<sup>53</sup> *Id.* ¶ 6; see ECHR, *supra* note 5, art. 8.

<sup>54</sup> *Id.* ¶ 6 (Tulkens, J., dissenting).

<sup>55</sup> *Van der Heijden*, App. No. 42857/05, ¶ 6.

<sup>56</sup> See *id.* ¶ 10 (Tulkens, J., dissenting).

<sup>57</sup> See *id.* ¶ 69 (majority opinion).

<sup>58</sup> See *id.* ¶ 10 (Tulkens, J., dissenting).

<sup>59</sup> See *id.*

law and argued that the same principle should apply *a fortiori* even during the course of criminal proceedings.<sup>60</sup>

In a separate dissent, Judge Casadevall and Judge Guerra found the limits of the Dutch testimonial privilege incompatible with the ECtHR's concept of family life.<sup>61</sup> The Netherlands devised a broad privilege extending to "relatives in the ascending or descending line, whether connected by blood or by marriage . . . ."<sup>62</sup> Nevertheless, Van der Heijden's commensurate family life was denied statutory protection despite the fact that Van der Heijden faced the same unfair moral dilemma this evidentiary privilege was designed to prevent.<sup>63</sup> Both dissents contended that the majority's formalistic reasoning conflicted with the Strasbourg court's approach to family life questions as one of both fact and social reality.<sup>64</sup> As such, the dissents advanced that protecting familial relationships trumps strictly adhering to the legal formalities delineating spousal privilege in the Netherlands.<sup>65</sup>

### C. Article 8 Jurisprudence and Margin of Appreciation Doctrine

As the traditional concept of family life evolves across Europe, the fact that ECHR was intended to function as a dynamic living instrument has made the margin of appreciation doctrine particularly relevant to Article 8 case law.<sup>66</sup> To achieve this aim, the ECHR must be con-

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<sup>60</sup> *Id.* ¶ 10 (Tulkens, J., dissenting); *see id.* ¶ 74 (majority opinion) (finding that the equal legal treatment afforded to marriage-like relationships for purposes of taxation and social security was not relevant to this case).

<sup>61</sup> *Van der Heijden*, App. No. 42857/05, ¶ 4 (Casadevall, J., dissenting).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* ¶ 8 (Tulkens, J., dissenting); *id.* ¶ 5 (Casadevall, J., dissenting).

<sup>64</sup> *See id.* ¶ 2 (Casadevall, J., dissenting); *id.* ¶¶ 7, 8 (Tulkens, J., dissenting).

<sup>65</sup> *See id.* ¶ 2 (Casadevall, J., dissenting); *id.* ¶¶ 7, 8 (Tulkens, J., dissenting).

<sup>66</sup> *See* D.J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 363 (2d ed. 2009); *see also* Douglas, *supra* note 24, at 79.; Johnson, *supra* note 24, at 518–19. After the ECtHR obtains jurisdiction over a case, then its judgment is binding on the parties involved. Johnson, *supra* note 24, at 515. As a result of this authority, the role of the ECtHR clashes with the international concept of sovereignty. *Id.* at 516. To remedy this fundamental tension, the ECtHR developed a judicial doctrine called the margin of appreciation to afford a degree of deference to Member States' governments. *Id.* The margin of appreciation has played a key role in Article 8 case law and, particularly, when the court affords states discretion in "sensitive areas" the ECtHR is hesitant to interfere with judgment of national authorities. HARRIS, *supra* note 66, at 363; *see* WALSH & RYAN, *supra* note 7, at 43; Douglas, *supra* note 24, at 78–79; Johnson, *supra* note 24, at 518–19. Since ECtHR precedents do not bind the Court, the effects of the ECHR can develop over time. WALSH & RYAN, *supra* note 7, at 43. Consequently, the ECtHR considers the changing legal landscape of the Council of Europe Contracting States and the presence or absence of common approaches on an issue. *See id.*

strued in light of “present-day conditions” including social and political developments across Council of Europe Member States.<sup>67</sup> In Strasbourg, the ECtHR functions as one tenet of the apparatus designed to uphold the individual rights and freedoms, including Article 8, guaranteed by the ECHR.<sup>68</sup> Since that role is impacted by the federalist system in which it operates, the ECtHR developed the margin of appreciation to aid in the determination of whether a state law or practice violates the ECHR.<sup>69</sup> Broadly, this doctrine refers to the latitude awarded to states in complying with the ECHR.<sup>70</sup>

In establishing the amount of latitude, or deference, to afford national authorities, the ECtHR examines the legal treatment across Member States to ascertain whether there is common ground on the issue.<sup>71</sup> If no consensus exists, then the ECtHR affords the Member State a wider margin of appreciation in its laws or practices to protect the rights of the ECHR.<sup>72</sup> Accordingly, this inquiry across Member States aids the ECtHR in performance of its function to maintain standards of human rights protections across Europe.<sup>73</sup>

In Article 8 jurisprudence, the ECtHR has interpreted the “right to respect for family life” broadly and utilized the margin of appreciation to extend Article 8 protections to nontraditional families.<sup>74</sup> *Van der Heijden* presented an opportunity for the ECtHR to address the scope of spousal privilege in regard to informal family forms.<sup>75</sup> Yet contrary to prior Article 8 case law, the Strasbourg court focused on the lack of formal legal recognition for a family relationship.<sup>76</sup> The court’s application of broad, functional reasoning to Article 8 cases originated in

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<sup>67</sup> *Tyrer v. United Kingdom*, 2 Eur. H.R. Rep. 1, 10 (1978); see Douglas, *supra* note 24, at 78 (noting that the ECHR must be dynamic in the sense that it is interpreted in light of developments in social and political attitudes).

<sup>68</sup> See O’Donnell, *supra* note 42, at 474–75.

<sup>69</sup> See *id.* at 475; see also Johnson, *supra* note 24, at 514.

<sup>70</sup> See O’Donnell, *supra* note 42, at 475.

<sup>71</sup> See *id.* at 475, 479–80 (discussing the consensus in law among Member States).

<sup>72</sup> See *id.*

<sup>73</sup> See ECHR, *supra* note 5, pmb.; O’Donnell, *supra* note 42, at 474, 479–80.

<sup>74</sup> See, e.g., *Kroon*, 19 Eur. H.R. Rep. at 283 (finding a child born of an extramarital relationship and his father amounts to family life for Article 8 purposes); *Keegan* 18 Eur. H.R. Rep. at 360–61 (finding a father and daughter relationship sufficient, though no longer married or living with child’s mother, for Article 8 purposes); *Marckx v. Belgium*, 2 Eur. H.R. Rep. 330, 341–42 (1979) (finding Article 8 applies to a mother and her illegitimate child); HARRIS, *supra* note 66, at 361 (noting that the court has taken a flexible approach to the definition of individual interests protected by Article 8); Johnson, *supra* note 29, at 518–20.

<sup>75</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 65, 69.

<sup>76</sup> See *id.*; see also cases cited *supra* note 74.

*Marckx v. Belgium*, where the court held that Member States had a positive obligation to protect family life and, therefore, could not afford different rights of succession to legitimate and illegitimate children.<sup>77</sup> This 1979 decision set the tone for an expansive view of human rights with respect to Article 8 and illustrated the latitude of the State's duty to respect family life under the ECHR.<sup>78</sup>

The ECtHR in *Keegan v. Ireland* affirmed that for purposes of an Article 8 right, *de facto* relationships may constitute family life even when the parents cohabit outside of marriage.<sup>79</sup> While the court in *Keegan* extended the notion of an Article 8 family to a couple that was no longer cohabitating or in a relationship, the ECtHR broadened that view in *Kroon and Others v. Netherlands* to a family dynamic that consisted solely of a parent-child relationship.<sup>80</sup> The ECtHR in *Kroon* found a Dutch law that denied a father paternity rights violated his Article 8 right.<sup>81</sup> In that case, there was a nontraditional family relationship because the father's son was born to his mother while she was still legally married yet legally separated from her prior husband.<sup>82</sup>

Similar to these prior Article 8 decisions, the ECtHR in *Van der Heijden* found that the complex moral nature of the family life claim necessitated the use of the margin of appreciation.<sup>83</sup> By relying on this doctrine, the ECtHR noted that the Article 8(2) standard of necessary in a democratic society might vary across states.<sup>84</sup> Therefore, the court utilized the presence or absence of consensus on the scope of spousal privilege across Member States to determine the proper deference af-

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<sup>77</sup> See *Marckx*, 2 Eur. H.R. Rep. at 342; HARRIS, *supra* note 66, at 392; Johnson, *supra* note 24, at 518–19.

<sup>78</sup> See *Marckx*, 2 Eur. H.R. Rep. at 330, 346 (stating that Article 8 must be interpreted in light of present-day conditions) (quoting *Tyner*, 2 Eur. H.R. Rep. at 10); WALSH & RYAN, *supra* note 7, at 48; Johnson, *supra* note 24, at 519.

<sup>79</sup> *Keegan*, 18 Eur. H.R. Rep. at 360; see WALSH & RYAN, *supra* note 7, at 49.

<sup>80</sup> See *Kroon*, 19 Eur. H.R. Rep. at 283; *Keegan*, 18 Eur. H.R. Rep. at 360; Johnson, *supra* note 24, at 520.

<sup>81</sup> See *Kroon*, 19 Eur. H.R. Rep. at 265–66, 285.

<sup>82</sup> See *id.* at 265–66, 285; Johnson, *supra* note 24, at 520–21.

<sup>83</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 58, 60; cases cited *supra* note 74.

<sup>84</sup> See Johnson, *supra* note 24, at 516 (“[T]he Convention organs may most accurately be viewed not as a supranational court of appeal, but in their more limited supervisory role, slowly legitimizing European human rights consensus among the States Parties.”) (quoting Howard Charles Yourow, *Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, in 28 INTERNATIONAL STUDIES IN HUMAN RIGHTS 1, 6 (1996)); see also *Van der Heijden*, App. No. 42857/05, ¶ 57.

forded to the Netherlands.<sup>85</sup> The majority in *Van der Heijden*, relied on the lack of uniform treatment among Member States on spousal privilege to substantiate its decision.<sup>86</sup> The majority found that Member States employed a wide array of practices in compelling witnesses to testify.<sup>87</sup> Furthermore, this absence of a common approach in conjunction with the sensitive moral nature of spousal privilege supported a wide margin of appreciation for the Netherlands.<sup>88</sup>

In contrast, the joint dissents offered a different assessment of the comparative survey.<sup>89</sup> Judge Tulkens noted that although no true consensus exists a majority of states would likely have *de facto* exempted Van der Heijden from testifying.<sup>90</sup> As Judge Casadevall explained, thirty-eight Member States granted a right of testimonial privilege and twenty-two of those states would provide that right to Van der Heijden on the basis of her stable, marriage-like relationship.<sup>91</sup> The divergent interpretations of the comparative treatment of spousal privilege prompted the dissenting judges to question the court's reliance on the margin of appreciation doctrine and whether certain cases should be excluded from its reach.<sup>92</sup>

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<sup>85</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 60–61. After all, the ECHR was designed to achieve “approximation of national laws but not their uniformity . . . .” See *Kroon*, 19 Eur. H.R. Rep. at 289 (Morenilla, J., dissenting); Johnson, *supra* note 24, at 522.

<sup>86</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 31–36, 60–61, 65, 69.

<sup>87</sup> See *id.* ¶ 61.

<sup>88</sup> See *id.* ¶ 60–61 (“Although the lack of common ground is not in itself decisive, it militates in favour of a wide margin of appreciation in this matter.”).

<sup>89</sup> See *id.* ¶ 5 (Tulkens, J., dissenting); *id.* ¶ 7 (Casadevall, J., dissenting).

<sup>90</sup> *Id.* ¶ 5 (Tulkens, J., dissenting). The ECtHR considered a survey of the other Council of Europe Member States on the spousal privilege issue. *Id.* ¶¶ 31–36 (majority opinion). Non-marital cohabitants (like Van der Heijden and her companion) are fully exempt from the duty to testify in four States: Albania, Andorra, Lithuania, and Moldova. *Van der Heijden*, App. No. 42857/05, ¶ 36. Beyond that, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, “the Former Yugoslav Republic of Macedonia,” Hungary, Iceland, Italy, Liechtenstein, Montenegro, Norway, Portugal, Serbia, Slovakia, Spain, Sweden, and Switzerland require evidence of a marriage-like relationship, such as children born, financial arrangements, or length of cohabitation. *Id.* Van der Heijden would likely satisfy that burden after eighteen years living together and two children with her partner. See *id.* ¶¶ 13, 36.

<sup>91</sup> *Id.* ¶ 7 (Casadevall, J., dissenting).

<sup>92</sup> *Id.* ¶ 5 (Tulkens, J., dissenting).

## III. ANALYSIS

The *Van der Heijden v. Netherlands* decision, at its essence, addresses the statutorily defined limits of the Dutch testimonial privilege.<sup>93</sup> The ECtHR determined that competing policy interests in this case weigh more heavily in favor of the public interest in the prosecution of crime, rather than the protection of Van der Heijden's family life from state interference.<sup>94</sup> Despite the contentious split on the court, the ECtHR made the legally correct judgment in this clash between an emerging family dynamic and a criminal prosecution.<sup>95</sup> In an attempt to balance individual and community interests, the ECtHR opted for a formalistic negative obligation approach that is appropriate in light of the margin of appreciation doctrine, the criminal context, and the letter and spirit of Article 8 in the ECHR.<sup>96</sup> Moreover, the result in this decision suggests that the ECtHR is hesitant to require the Netherlands to qualify Dutch criminal law and extend an evidentiary privilege based on an evolving social landscape.<sup>97</sup>

Although Judge Tulkens' joint dissent questioned the application of the margin of appreciation doctrine to *Van der Heijden*, the majority properly affords discretion to the national legislature based on the emergence of alternative family lifestyles across Europe, including the growth of Dutch unmarried cohabitation.<sup>98</sup> This societal shift invited the Netherlands to take legislative action and provide nontraditional

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<sup>93</sup> See *Van der Heijden v. Netherlands*, App. No. 42857/05, ¶¶ 65, 69 (majority opinion).

<sup>94</sup> See *Van der Heijden*, App. No. 42857/05, ¶ 62.

<sup>95</sup> See *id.* ¶¶ 5–7 (Tulkens, J., dissenting); *Keegan v. Ireland*, 18 Eur. H.R. Rep. 342, 362 (discussing the aim of Article 8 to ensure that a state achieves a fair balance between individual and community interest); *Marckx v. Belgium*, 2 Eur. H.R. Rep. 330, 346; Schrama, *supra* note 7, at 323–24 (citing the Supreme Court ruling in *Van der Heijden's* Netherlands case).

<sup>96</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 65–69; see also Johnson, *supra* note 29, at 517–18; Schrama, *supra* note 7, at 323–34. *But see Van der Heijden*, App. No. 42857/05, ¶ 7 (Tulkens, J., dissenting) (challenging the formalistic approach of the majority and its disregard for the substantive right of Article 8); Alexandra Timmer, *Testimonial Privilege for Life Partners? The Formalism of van der Heijden v. Netherlands*, STRASBOURG OBSERVERS (Apr. 11, 2012), <http://strasbourgoobservers.com/2012/04/11/testimonial-privilege-for-life-partners-the-formalism-of-van-der-heijden-v-netherlands/> (arguing that the ECtHR's departure from its flexible approach in favor of a more formalistic approach produced the wrong decision in *Van der Heijden*).

<sup>97</sup> See *Van der Heijden*, App. No. 42857/05, ¶ 76; see also Schrama, *supra* note 7, at 312–14, 324.

<sup>98</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 65, 69 (majority opinion); *id.* ¶ 5 (Tulkens, J., dissenting); Schrama, *supra* note 7, at 312–14; Schrama, *supra* note 13, at 315.

families with the same legal protections.<sup>99</sup> The court, however, invokes the margin of appreciation consistent with prior Article 8 jurisprudence and upheld the Dutch decision not to extend spousal privilege to *de facto* relationships.<sup>100</sup> Even though the scope of the Netherlands' privilege emanates from an approach that the ECtHR had previously rejected—formal requirements to recognize family life.<sup>101</sup>

In prior ECtHR decisions, the court disregarded formal legal categories and recognized Article 8 rights based on the realities of family life.<sup>102</sup> In *Van der Heijden*, however, the court properly relied on Article 217 of the Netherlands CCP to find Van der Heijden's lack of a formalized union with the suspect determinative in its decision.<sup>103</sup> While the court found Van der Heijden's family life sufficient for Article 8 protections, it was unwilling to challenge the objective statutory limits that govern spousal privilege.<sup>104</sup> The Netherlands' pursuit of justice in an ongoing criminal investigation reinforces the court's adherence to the clear categories set forth in Article 217 and supports the departure from the court's more flexible, functionalist approach to protect family relationships.<sup>105</sup>

The ECtHR champions the need for legal certainty and adopts a bright line rule because the prosecution of a serious crime is at risk.<sup>106</sup> In order to reconcile this formalistic reasoning with prior Article 8 case law, it is crucial to take a more expansive view of what is at stake in this case—the broad administration of justice.<sup>107</sup> Van der Heijden's com-

<sup>99</sup> See *Van der Heijden*, App. No. 42857/05, ¶ 36 (citing examples of Council of Europe Member States that have taken legislative action); Schrama, *supra* note 7, at 312–14; Schrama, *supra* note 13, at 316–17 (discussing recent social changes across Europe have prompted states to take legislative action similar to the Netherlands' action to enact the Dutch Registered Partnership Act in 1998).

<sup>100</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 61–62, 67–69; see cases cited *supra* note 74.

<sup>101</sup> *Van der Heijden*, App. No. 42857/05, ¶¶ 62, 65; see *Keegan*, 18 Eur. H.R. Rep. at 362; *Marckx*, 2 Eur. H.R. Rep. at 346; HARRIS, *supra* note 66, at 423; Schrama, *supra* note 7, at 324.

<sup>102</sup> See cases cited *supra* note 74; see also Timmer, *supra* note 96.

<sup>103</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 68, 69, 76–78 (majority opinion); Schrama, *supra* note 7, at 324; see also *Van der Heijden*, App. No. 42857/05, ¶ 2 (Casadevall, J., dissenting) (“The Court’s constant case-law has never required any formalities without which it would not be recognized.”).

<sup>104</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 56, 69, 76 (stating that the state is permitted to adopt legislation that it sees fit to balance competing policy interests).

<sup>105</sup> See *id.* ¶¶ 62, 68, 77 (noting the judicial interest in public prosecutions of crime); see also cases cited *supra* note 74.

<sup>106</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 62, 65, 69–71.

<sup>107</sup> See *id.* ¶¶ 41, 62 (noting the Government’s argument that the civic duty to provide evidence was essential to judicial aims in Dutch society and explaining that the formal

panion was not simply involved in a minor criminal investigation, but rather he was a prime suspect in a deadly shooting.<sup>108</sup> If the ECtHR extends the Dutch spousal privilege to Van der Heijden, then the state's timely prosecutorial efforts in a criminal investigation might be jeopardized.<sup>109</sup> The joint dissents imply that the majority's preference for legal certainty is motivated by convenience and pragmatism, but that view fails to account for what is at stake, both evidentially and judicially, in criminal proceedings.<sup>110</sup>

The ECtHR is not merely concerned with the practical effects of the burden to assess the nature of unregistered, unmarried relationships on a case-by-case basis.<sup>111</sup> In addition to the considerations of judicial efficiency, time, and resources, it is the broader judicial aims of procuring truthful evidence from reliable witnesses in order to prosecute crime that supports the court's decision in *Van der Heijden*.<sup>112</sup> If the court had adopted a functional approach to assess individual relationships, then ECtHR might erect additional administrative hurdles to state prosecutions and impede justice.<sup>113</sup>

Furthermore, the *Van der Heijden* decision is proper by virtue of the letter and spirit of Article 8 of the ECHR.<sup>114</sup> The text of Article 8(1) bolsters the court's deference to the Netherlands because it guarantees

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limits of the privilege support state efforts in criminal prosecution); cases cited *supra* note 74.

<sup>108</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 11, 77 (stating that the relevant criminal investigation in this case involved a criminal case involving murder).

<sup>109</sup> See *id.* ¶¶ 41, 62, 65, 69 (discussing the Netherlands' argument regarding the broader aims of criminal justice that the court ultimately adopted and noting that securing evidence is crucial to the public interest in the prevention of crime).

<sup>110</sup> See *id.* ¶¶ 62, 69 (majority opinion) (discussing public interest in prosecution of crime); *id.* ¶¶ 9–10 (Tulkens, J., dissenting).

<sup>111</sup> See *id.* ¶¶ 41, 62, 69 (majority opinion); *id.* ¶ 9 (Tulkens, J., dissenting); Julia L. Cardozo, Note, *Let My Love Open the Door: The Case for Extending Martial Privileges to Unmarried Cohabitants*, 10 U. MD. L.J. RACE RELIGION GENDER & CLASS 375, 405 (2010).

<sup>112</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 62–65 (implying that the court has recognized an exception to the civic obligation to testify only when it absolutely necessary—like privilege against self-incrimination); Schrama, *supra* note 7, at 324 (noting that the value of discovering the truth may trump other interests); Cardozo, *supra* note 111, at 405 (discussing the considerations of judicial resources, time, and efficiency that affect a case-by-case evaluation of relationships).

<sup>113</sup> See *Van der Heijden*, App. No. 42857/05, ¶¶ 65, 69 (noting timeliness, unreliable evidence, and perjury as concerns that might arise if Van der Heijden were relieved of her duty to testify); Cardozo, *supra* note 111, at 405.

<sup>114</sup> See ECHR, *supra* note 5, pmbl., art. 8(2); Connelly, *supra* note 29, at 568; see also *Van der Heijden*, App. No. 42857/05, ¶ 76.

the right to respect for one's private and family life.<sup>115</sup> In addition, Article 8(2) substantiates the court's decision not to impose a positive obligation on the Netherlands to extend its spousal privilege to *de facto* family life.<sup>116</sup> The explicit state interference exception for crime prevention in Article 8 denotes the weight of criminal prosecutions in striking the proper balance of interests.<sup>117</sup> More broadly, the Netherlands is best suited to delineate what interference is necessary in Dutch society and realize the spirit of Article 8 to protect Van der Heijden from arbitrary interference.<sup>118</sup> Notwithstanding the court's willingness to intervene in other areas of law to protect the family unit, the ECtHR in *Van der Heijden* is not prepared to require the expansion of the *Wetboek van Straffoordering* to protect a *de facto* relationship.<sup>119</sup>

#### CONCLUSION

The *Van der Heijden v. Netherlands* decision augments the dynamic ECtHR Article 8 jurisprudence and sheds light on the scope of spousal privilege in the wake of Europe's transformative shifts in family life. The ECtHR's approach in *Van der Heijden's* case demonstrates that the court will embrace legal form over family function in an Article 8 claim that impacts the pursuit of justice. In light of the evolving social landscape of Europe, this nuanced legal and policy conflict between criminal procedural law and informal Dutch family life highlights the complexity of the Article 8 cases before the European Court of Human Rights.

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<sup>115</sup> See ECHR, *supra* note 5, art. 8(1); *Van der Heijden*, App. No. 42857/05, ¶¶ 56–58, 71; HARRIS ET AL., *supra* note 66, at 422 (noting the language of Article inherently affords more latitude to state judgments).

<sup>116</sup> See Connelly, *supra* note 29, at 572 (discussing the potential positive obligations on states under ECHR); see also *Van der Heijden*, App. No. 42857/05, ¶ 69.

<sup>117</sup> ECHR, *supra* note 5, art. 8(2); see *Van der Heijden*, App. No. 42857/05, ¶¶ 54, 62.

<sup>118</sup> See *Van der Heijden*, App. No. 42857/05, ¶ 56 (finding that it is the primary responsibility of the Netherlands to determine the scope of this privilege); *Kroon and Others v. Netherlands*, 19 Eur. H.R. Rep. 263, 283 (stating that margin of appreciation is relevant for a state to achieve the broad aims of Article 8); Connelly, *supra* note 29, at 570; Johnson, *supra* note 24, at 517, 521.

<sup>119</sup> See *Van der Heijden*, App. No. 42857/05, ¶ 56; cases cited *supra* note 74.