Conclusions

In the Book of Daniel there is the story of an extravagant feast in Babylon being suddenly rudely interrupted by an mysterious hand that wrote on the wall the famous words: "mene, mene, tekel, upharsin".233

With refugee case-law the situation is somehow similar. Any comparative look that spans a period of over 20 years will be subject to different interpretations, some of which will be more plausible than others. What refugee case-law shares with the words from the Daniel narrative is that its meaning is, politely speaking, difficult to discern at times.

First of all, let us remember that the cases that end up in the courts are the ones that were rejected by the administration in the first place. They came, they presented their claim, but were refused by the authorities. This important fact cannot be overlooked, as we talk of case-law on refugee status. While other groups were admitted straight away, these individuals had to reargue their cases. Before the 1980 Refugee Act in the United States, as Loescher and Scanlan presented in their book, to the U.S. administration certain groups were prima facie refugees and thus received preferential treatment from the immigration authorities. With the passage of the Refugee Act things were supposed to change. Yet, it should be remembered that still the same principle applied. Some cases made it the first time, while the others had to go through the process of adjudicating by the IJ, BIA, circuit courts etc. The absence of certain groups in the higher instances can be as much demonstrative of the concept of the refugee, as the presence of others. Thus, it is instructive, that for the whole period of 1980s, there were few cases from Eastern Europe before American courts – most were accepted in the first stage and did not need to appeal to the courts for legal recourse. At the same time, most cases before the bench, were filed by applicants from Central America and other continents. The same was true in the 1990s with the absence of any Yugoslavian cases in the 1990s in the Netherlands. Most of these applicants were accepted either as refugees or under the humanitarian status category.

Let us look closely at the refugee claims that were so dominant in the American case-law in the past quarter of the century. Which ones were popular and dealt with readily by the courts? Which ones failed in the beginning, or were moved to other categories where the courts were most comfortable with them?

Looking at the American asylum case-law it seems that there was a particular group of rights that were clearly protected by the courts: the freedom of speech, and the freedom to refuse to participate in acts contrary to conscience, or to put it more broadly, the freedom from government interference. The freedoms connected with reproductive choice, though officially endorsed by the Congress (within certain numerical limits), were advanced with less conviction, as if to avoid politicizing them. However, since 1990, there was a steady stream of jurisprudence affirming them more and more strongly. Interestingly enough, for those who would expect the rise of the religious right parallel the rise of religious orientated asylum case-law, this has not been the case. The courts seem to be uneasy with religious cases and if possible, prefer to classify them or merge them with other persecution grounds where they feel more comfortable. The only field where there has been more jurisprudence, were the conversion cases, where the courts insisted that it was improper for governments to inquire into the sincerity of the...
Reconstructing the refugee definition

convictions of the asylum claimants.

Dutch case-law offers a slightly different picture. In 1980 the Council of State stated that, in principle, homosexuals constituted a particular social group in the meaning of the Refugee Convention. Though in that particular case, it dismissed the appeal by the applicant. It was indeed revolutionary in 1980 to say boldly that homosexuals might fall under the protection of the Geneva Convention. What is interesting is that the Court did not divulge any more on the subject but just mentioned it en passant in one sentence and then proceeded to dismiss that particular claim. The value of such a statement was considerably decreased by the fact that until the mid 1990s, few homosexual cases succeeded before the Court, yet nonetheless, in 1980 a signal was sent: homosexuals qualify for refugee status in The Netherlands. The second group that found protection was that of Eritrean refugees fleeing from the war in Ethiopia. So, Dutch courts were ready to accept group persecution of an ethnic minority in a country. Finally, in the 1990s the Dutch Courts reversed their previous case-law and allowed conscientious objectors claims to succeed.

Perhaps, when speaking about Dutch asylum case-law, it would be more instructive to say which groups did not succeed in the courts, as, it has been shown, the theories developed by the jurisprudence tended to be more exclusive, than inclusive. Thus, from the end of the 1970s till the 1980s groups who were not awarded refugee status were Christians from Turkey, fleeing violence and serious economic deprivation. The courts, without addressing the issue of persecution grounds in greater detail, found that economic disadvantage did not constitute persecution. In the mid 1980s, group persecution was not allowed and most of the Tamil cases from that period were dismissed based on the principle of singling out. The applicants had not been singled out for special discriminatory treatment, thus they were not persecuted. The singling out criteria had been maintained more or less consistently later in the Somali cases, where again the court ruled that their fate was not exceptional enough to constitute persecution. The 1990s also saw the development of the theory of agents of persecution which successfully excluded Tamils, Somalis, and Algerians. At the same time, the court again reversed its line of decisions, now allowing in some instance group persecution (Nuba from Sudan) as well as that, in some circumstances, economic deprivation may constitute persecution (Assyrians from Turkey).

When reading both case-law and literature on the question of asylum in the United States and the Netherlands, two things strike the reader. First of all, legal theory behind asylum in the United States is constructed affirmatively, while in the Netherlands negatively, and this has bearing on the second feature: its domestication. Let us have a closer look.

When the American courts were constructing the theory of (for example) neutrality as a political opinion, they did so in clear and understandable language. The issue of well-founded fear was analyzed, as was that of political opinion and whether neutrality constituted such,. Also the question of the nexus between the political opinion and persecution was looked at. It is interesting to note that some court decisions were clearly divided into sections and subsections with titles where a particular issue is discussed. The language, and arguments, as well as premises how to qualify or not, were clearly stated, so that they could have been invoked in future case-law. Quite often, courts referred to other similar decisions by sister circuits, before making their own pronouncement in the cases before them. Thus, the neutrality theory was
slowly being developed, transformed and changed into the imputed political opinion theory, as well as that of hazardous neutrality. The same applied for the notion of the nexus requirement or a particular social group. When case-law conflicted, even within one circuit, this was stated, and at times the court would intervene to clarify things by sitting *en banc*. The courts had no difficulty in articulating new doctrine, and they quite often employed the norms of domestic, constitutional, criminal or civil law. Thus by inserting these provisions to the matter of before them in asylum cases, the American courts seemed to feel more at ease with refugee law.

Legal theory was shaped, and very often invented, by the courts themselves and legal doctrine in most cases was secondary to the courts. That is, it had more of a descriptive role. Only in some circumstances, did the legal authors (Anker, Blum, von Sternberg etc.) warn the courts of possible problems with their line of interpretation, and possible inconsistencies with previous case-law.

Dutch asylum case-law was somewhat the opposite. First of all, it avoided, as much as possible, stating a clear legal doctrine. It preferred to state who does not qualify, rather than who does. It is interesting that in the draft evasion cases, it took several years before the courts articulated detailed and clear premises on whether draft qualified or not for refugee status. Most of the cases were styled in the manner "in the case before us, the applicant has not sufficiently proven that he has a well founded fear of being persecuted." The Dutch Council of State was much happier to say: "this interpretation is too extreme" or "harsh" than to state what the proper interpretation would be. Thus, the case of draft evaders returned to it all through the 1970s and a clearer interpretation of admissibility of draft evaders was not made until the 1980 decision in the case of a Columbian, but its precedent value in terms of future cases would be limited. Even after that, the courts would rather grant humanitarian status, and thereby avoid ruling on the merits, than to define the refugee status.

So, do the Dutch courts offer legal doctrine from time to time? Yes and no. The example of the homosexuals and agents of persecution are pertinent. The Council of State ruled in 1981 that gays qualify for refugee status "as a reasonable interpretation" but without giving any more indication on why exactly they thought so. For the next 15 years after that decision, nearly all asylum cases based on sexual orientation that came before it were denied, based on "insufficient evidence in that particular case". It wasn’t, in fact, until the late 1990s and the times of district courts, when the Dutch courts did grant asylum to a group of homosexuals from Iran and Armenia. There is also an example when the Dutch courts refused to issue a clear pronouncement: that of the agents of persecution. At first the courts found that the state must be "willing and knowing" in the persecution (in another case, they even used the word "guilty"). The Dutch legal commentators were very unimpressed with that decision, and following a critical note in one of the legal periodicals, the courts from then on avoided elaborating on the issue, and simply applied it at will. This avoidance led to a chaotic line of decisions in the late 1990s especially in the Somali case, and in one of the notes Spijkerboer compared the coherence of the decisions to lotto. The issue was finally resolved by a long and detailed decision by the district courts, which left no place for ambiguity.

It is interesting to observe that the Dutch courts seem to view the Aliens law as, indeed, an alien law in terms of interpretation, and hardly insert any other legal theory into it. I have
Reconstructing the refugee definition

found no case where the Dutch courts would cite domestic constitutional, criminal or civil law to elucidate on the asylum case before them.

It is because of this that legal theory in The Netherlands has a different role to play that in the United States. Here it is based on what I would call a "negative" case-law. It tries to reconstruct a theory of the asylum seeker who does qualify, based on decisions, where the courts say who does not qualify. This is not only frustrating at times but also difficult, and the Dutch authors are much bolder at times in criticizing the Council of State and the courts in their manner of dealing with the case-law before them.

In one of the cases, the Dutch Council of State remarked that "asylum is not a poor man’s alternative for immigration.” Perhaps not, but the same court was very cautious about saying what is was. The reluctance to state exactly that, the caution in which it formulates legal theory and finally, the preference for a selection through the negative is a feature of the case-law. Apart from some brief decisions that state the principles ("gays are in", or "draft evaders are in, in extreme circumstances"), there is a visible avoidance of more explicit legal theory. I would venture the thought that the Dutch courts prefer to leave the issue open. By phrasing their decisions in such terms, the courts leave the administration a large margin of appreciation in dealing with refugee cases. By doing that Dutch courts reserve for themselves more flexibility to change their case-law if the deem it necessary. Thus, the prophet Daniel is given great leeway in interpreting the sign on the wall: it can be good news, it can be bad news, and sometimes it’s neither.

The American refugee law is, on the other hand, much more "parochial". Immigration has always been a feature of the United States history, and so were the refugees. The question is are they seeking the same values that the Americans are? To discern that, the courts heavily and willingly borrow from other fields of American law. Why not? Asylum law is a part of the American law system. While the deference towards the administration is shown, it has its limits – the case-law of the courts and constitutional principles: for example the freedom from governmental inquiry into the motivation behind a political opinion or the conversion to a particular religion.

The American dream, ethos of freedom to hold an opinion, is clearly visible in the Bolanos-Hernandez case, where the court stated that one has the right to hold an opinion, not a particular opinion (pro or con) but any opinion desired. In Re Kasinga, the BIA said that judging other cultures was not an issue: if the individual thinks of something that is being done to her is abhorrent, she should be free from it. Kasinga, if living in the United States would not be forced to undergo FGM, and thus she should not be forced to undergo it wherever she comes from. The amendments that gave special consideration to evangelical Christians and people fleeing from birth control were another example of American legal thought influencing the refugee convention. Everybody has the right to hold a religion, to have as many children as they please and should be free from governmental interference in those matters. The quote from the Declaration of Independence: "We hold these truths to be self-evident..." is true: the American justice system (as it understands it) does consider them to evident and thus effecting all – "we hold these truths to be universal". Even if they are not applied universally, they will be applied here in this forum. It is not the United States forcing their values on others. It is, in fact, quite the opposite. If we are not allowed to judge the refugee cases through the
prism of our own values, we will be importing foreign notions to our legal system and thus compromising it in its coherency.

If I were to distil the concept of the refugee as it emerges from American case-law I would risk to say that it seems to be understood as: a valid case made by an individual in which he seeks to call his persecutor an oppressor and a tyrant. And if he makes his case, he should be allowed to stay, in a land that once rebelled against its own oppressor. By making his case persuasively he becomes one of us. The prophecy is a piece of cake and Daniel knows it.