NILG GOVERNANCE & RECHT 14

On Lawmaking and Public Trust

Editors • Suzanne Comtois • Kars de Graaf

eleven
international publishing

On Lawmaking and Public Trust

On Lawmaking and Public Trust

Editors

Professor Suzanne Comtois
Professor Kars de Graaf

eleven
international publishing

Published, sold and distributed by Eleven International Publishing
P.O. Box 85576
2508 CG The Hague
The Netherlands
Tel.: +31 70 33 070 33
Fax: +31 70 33 070 30
e-mail: sales@elevenpub.nl
www.elevenpub.com

Sold and distributed in USA and Canada
International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786, USA
Tel.: 1-800-944-6190 (toll-free)
Fax: +1-503-280-8832
orders@isbs.com
www.isbs.com

Eleven International Publishing is an imprint of Boom uitgevers Den Haag.

ISBN 978-94-6236-684-8
ISBN 978-94-6274-570-4 (E-book)

Printed in The Netherlands

Preface

This issue of the *Netherlands Institute for Law and Governance Series* is the result of an Administrative Law Research Seminar held on June 11th 2014, in Groningen, under the theme: "*On lawmaking and public trust*".

We are grateful to the speakers and participants who have generously accepted to take part in this seminar and make their essays available to a wider audience by contributing to this publication.

In addition to the debt we owe our contributors, we wish to express our gratitude to the *Department for Constitutional Law, Administrative Law and Public Administration* of the University of Groningen Law Faculty, the *Research Program Public Trust and Public Law* and the *Groningen Centre for Law and Governance* for financing this project. Finally, we would like to thank Mrs Renée Pruneau and the Publisher, *Eleven International Publishing*, for their competent and efficient work as well as the members of the peer review committee for their meticulous work, which has resulted in numerous constructive comments for the authors.

May 2016,
Suzanne Comtois
Kars de Graaf

Table of Contents

List of Contributors **9**

INTRODUCTION

Contemporary Lawmaking and Public Trust: Challenges, Threats and Opportunities **15**
Suzanne Comtois

Chapter 1 **"Front-Door" versus "Back-Door" Lawmaking. A Case Study Concerning German Responses to the Challenges of the Aarhus Convention** **21**
Jan H. Jans and *Annalies Outhuijse*

Chapter 2 **Who Decides What Is Significant? The Case of Nitrogen Deposition on Dutch and German Natura 2000 Sites** **31**
Peter Mendelts

Chapter 3 **Goal Regulation, Democracy and Organised Distrust** **43**
Pauline Westerman

Chapter 4 **Principles-Based Regulation and Public Trust in the Post-Crisis World: The Dutch Case of Financial Services** **55**
Herman E. Bröring and *Olha O. Cherednychenko*

Chapter 5 **Public Trust and the Preparation of Regulation: The Case of ex ante Studies in the Netherlands** **73**
Heinrich B. Winter and *Carolien M. Klein Haarhuis*

Chapter 6 **Policy Change and Public Trust The Case of the *Atomausstieg* in Germany: Who Has to Pay?** **85**
Dick A. Lubach

Chapter 7 **On Administrative Adjudication, Administrative Justice and Public Trust. Analyzing Developments on Access to Justice in Dutch Administrative Law and Its Application in Practice** **103**
Kars J. de Graaf and *Albert T. Marseille*

Chapter 8 **Participation Societies or Repressive Welfare States?** **121**
Rob Schwitters and *Gijsbert Vonk*

Chapter 9 **Public Trust in the Regulatory Welfare State** **135**
Albertjan Tollenaar

Chapter 10 **Crowding Out Administrative Justice** **153**
Jacobus de Ridder

Chapter 11 **Mediation and the Psychology of Trust within Organizations** **167**
Annie Beaudin

Chapter 12 **Tacit Authorization: A Legal Solution for Administrative Silence** **187**
Nicole G. Hoogstra

Chapter 13 **The *European Citizens' Initiative*'s Role in Having the Grass Roots Associations Connect to the European Public Sphere** **201**
Nicolle Zeegers

Chapter 14 **The Influence of Economic Agents in the Lawmaking Process of Environmental Laws: The Case of Waste Electrical and Electronic Equipment (WEEE) Legislation in Europe** **223**
Heyd Más

CLOSING CHAPTER
Rethinking Lawmaking and Public Trust: Five Lessons from the Low Countries **243**
Marc Hertogh

List of Contributors

Beaudin, Annie
Admitted to the Quebec Bar Association in 1991. Since 2011, she is an administrative judge for the Commission des lésions professionnelles, now the Tribunal administratif du travail. She holds a postgraduate degree in private law from the Université de Paris I (Panthéon-Sorbonne) and a master's degree (LL.M.) in dispute prevention and resolution from the Université de Sherbrooke. She is a member of the Conférence des juges administratifs du Québec and of the Association des juges administratifs du Tribunal administratif du travail (Occupational Health and Safety Division).

Bröring, Herman E.
Professor of integrative law studies at the University of Groningen, Department of Constitutional, Administrative Law and Public Administration. He is participating in the research program Public Trust and Public Law and in the Groningen Centre for European Financial Services Law. His research interests are soft law, law enforcement, participation in public decision-making, and public law of the Caribbean territories of the Kingdom of the Netherlands.

Cherednychenko, Olha O.
Associate Professor at the University of Groningen, where she holds the Chair in European Private Law and Comparative Law and is the Director of the Groningen Centre for European Financial Services Law. Her research focuses on the interaction between European private law, in particular European contract law and financial services law, European public law and national legal orders.

Comtois, Suzanne
Professeur titulaire (Full Professor) at the Faculty of Law, Université de Sherbrooke, Québec, Canada and visiting Professor at University of Groningen Law School, the Netherlands (2010-2014). She is an Associate member of the International Academy of Comparative Law and a member of the Quebec Bar Association. Her current research focuses on innovative approaches to citizen participation in public decision-making and on the interaction between courts and administrative decision-makers in the context of judicial review.

de Graaf, Kars J.
Associate Professor, holds a Chair in Public Law and Sustainability at the University of Groningen, the Netherlands. He is a member of the board of the Dutch Association for Administrative Law and the Dutch Association for Environmental Law, the managing editor of the *Review of European Administrative Law* (REALaw) and a honorary judge at the district court in the North of the Netherlands.

de Ridder, Jacobus
Honorary professor of comparative public management at the Law Faculty of the University of Groningen. He is professor emeritus in public administration at the same faculty. Also, from 2003 to 2008, he held the VIDE chair for Regulation and Oversight at the same university. His main research interest is the transition area between public law and administrative behaviour. He has published widely about specific topics such as regulatory oversight, enforcement practices in environmental law, planning law and planning behaviour, and the administration of social justice. He has served on a number of government investigation committees. Amongst these were the Committee for the Comprehensive Review of Legal Functions in Dutch Government Ministries and the Committee for the Investigation of Integrity at the Ministry of Defence. His present research interest is the structuring and management of intergovernmental relations.

Hertogh, Marc
Professor of Socio-Legal Studies at the University of Groningen, the Netherlands, and Associate Research Fellow at the Centre for Socio-Legal Studies (University of Oxford). His research focuses on public opinion about law, with a special interest in legal consciousness, legal pluralism, and administrative justice.

Hoogstra, Nicole G.
Lecturer and researcher (PhD candidate) at the Department of Constitutional Law, Administrative Law and Public Administration of the University of Groningen. Her research focuses on legal instruments to stimulate timely decision-making by administrative authorities (the "Silence is Consent" rule). She is a member of the Advisory Committee for Objections of the municipalities of Eemsmond and Oldambt and she annotates Dutch administrative case law for the journal *Jurisprudentie Milieurecht* on a regular basis.

Jans, Jan H.
Professor of Public Law and Vice-Dean (research) at the Faculty of Law, University of Groningen. He is a member of the Dutch Commission on Environmental Impact Assessment and a member of the editorial boards of the *Journal of Environmental Law*, the *Journal for European Environmental & Planning Law* (JEEPL), the *Review of European Administrative Law* (REALaw) and the *Columbia Journal of European Law*. He is a member of the Commission on Environmental Law of the IUCN.

Klein Haarhuis, Carolien M.
Researcher at the Research Centre of the Department of Security and Justice (WODC). Her research and evaluation work regards the field of justice administration and legislation. Her doctoral thesis (2005) includes an evaluation of anti-corruption programs in seven African countries.

Lubach, Dick A.
Professor of Construction Law at the University of Groningen. His research interests focus on comparative law, particularly the legal problems on the border of private and public law. He is counsel with Damsté advocaten, notarissen en fiscalisten in Enschede, member of the Committee deciding on damage compensation claims regarding Schiphol Airport and chairman of the Advisory Committee on damage compensation claims of the municipality of Groningen. He studied at the Vrije Universiteit Amsterdam and got his PhD at the Rijksuniversiteit Groningen.

Marseille, Albert T.
Professor of Public Administration, in particular the Empirical Study of Administrative Law at the University of Groningen. His research focuses on the functioning of dispute settlement procedures in administrative law. He is a member of the editorial board of the Dutch Journal for Administrative Law, the chairman of the Dutch Association of Public Administration in the North of the Netherlands and a member of the Advisory Committee for Objections of the municipality of Delfzijl.

Más, Heyd F.
Scholarship PhD Candidate of BABEL project (European Commission Action 2 Programme) at the Department of Constitutional Law, Administrative Law and Public Administration at the University of Groningen. She holds a BA in International Relations from the Pontifical Catholic University of São Paulo, Brazil, and a BA in Law as well as a Master of Science Degree in Political Economics and Law from Mackenzie Presbyterian University, Brazil. Her previous academic research focuses on both international relations and law, with emphasis on public international law. Her PhD research focuses on laws and policies for regulating the proper collection, treatment, recycling or reuse of waste electrical and electronic equipment by observing the European experience and proposing legal transplant possibilities to the Brazilian legal framework.

Mendelts, Peter
Legal consultant specialized in administrative law, especially nature protection law and spatial planning law. He is also a part-time lecturer at University of Groningen and the editor in chief of the *Journaal Flora en Fauna*, a Dutch journal on nature protection law. His work experience ranges from government agencies at both the national and the provincial levels, the universities of Utrecht, Rotterdam and Groningen, consultancy agencies and the judiciary. He holds an LL.M. in Dutch law and an LL.M. in international law from the University of Groningen and a PhD from Utrecht University. He publishes mainly on nature protection law.

Outhuijse, Annalies
PhD fellow at the Department of Administrative Law at the University of Groningen. Her PhD research focuses on the functioning of dispute settlement procedures and the public enforcement of competition law in the Netherlands. She is a research and teaching assistant at the same department since April 2012. The topics of her research included the relationship between the decisions taken by the Netherlands competition authority and the recommendations of its advisory committee, the appraisal of these decisions by the court of first instance and the differences between judgements of the administrative and civil courts in competition law cases. In 2015 she completed an LL.M. in Dutch Law with a specialisation in Constitutional and Administrative law (*summa cum laude*) and the LL.M. Research Master (*cum laude*).

Schwitters, Rob
Associate professor (sociology of law) and connected to the Paul Scholten Centre (University of Amsterdam). He has published on tort law, responsibility and liability, the welfare state, compliance and methodological issues. He is especially interested in transformations of the rationalities underpinning law. In the years 2009-2013, he was chairman of the Dutch/Belgium association of socio-legal theory (VSR). Currently, he is a member of the editorial board of *Recht der Werkelijkheid,* a journal of socio-legal theory.

Tollenaar, Albertjan
Assistant Professor at the Department of Constitutional Law, Administrative Law and Public Administration at the University of Groningen. He started his career as a PhD student at the Faculty of Law of the University of Groningen. His PhD dissertation was on *Gemeentelijk beleid en beleidsregels* (Municipality policy and policy rules). After his graduation, he worked as a post-doctoral researcher in the project "Safeguarding public interest in the private social security". For this project, he worked as a fellow at the Max Planck Institut für Sozialrecht und Sozial Politik in Munich.

Vonk, Gijsbert
Professor of social security law at the University of Groningen. He studied international law in Amsterdam and London before receiving a PhD for his research in the field of European social law at the University of Tilburg (1990). He was head of the department for legal affairs at the Social Insurance Bank in Amstelveen from 1993 to 2006. He held a part-time chair for Social Security Law at the Faculty of Law of the Vrije Universiteit Amsterdam between 2000 and 2012. His fields of interest are (international) social security law, public law, European law and human rights law. His current research is on poverty, migration and the repressive welfare state.

Westerman, Pauline
Professor in Philosophy of Law at the University of Groningen and a member of staff of the Academy of Legislation in the Hague. She is editor of the *Journal for the Theory and Practice of Legislation* (Taylor & Francis) as well as the Dutch journal *R.M. Themis* (Paris). She is a member of the Executive Committee of the International Association for Legal and Social Philosophy (IVR). In 2010 she was appointed member of the Royal Dutch Academy of Science. Her current interests include alternative forms of legislation and the way they relate to the requirements of the Rule of Law.

Winter, Heinrich B.
Professor of Public Administration at the department of Constitutional Law, Administrative Law and Public Administration of the Law Faculty of the University of Groningen. He graduated in 1996. His PhD thesis was on the evaluation of legislation. His work is committed to enforcement, evaluation of policy and legislation, and (procedural) administrative law. In addition to his academic activities, he works as a consultant for Pro Facto, a research and consultancy firm for the public sector.

Zeegers, Nicolle
Assistant Professor in Political Science at the Faculty of Law, University of Groningen, the Netherlands. The democratic deficit in the EU is one of her main research subjects. Her recent publications are "Convergence in European Nations' Legal Rules Concerning the Use of Human Embryos in Research?" in *European Journal of Health Law* 21, 5, 2014, p. 454-472 and Zeegers, N. & Althoff, M., "Regulating Human Trafficking by Prostitution Policy?: An Assessment of the Dutch and Swedish Prostitution Legislation and its Effects on Women's Self-determination" in *European Journal of Comparative Law and Governance* 2, 2015, p. 351-378.

Contemporary Lawmaking and Public Trust: Challenges, Threats and Opportunities

Suzanne Comtois[*]

This book, as well as the research seminar that preceded it, explores ways in which lawmaking is changing under various pressures and examines the impact of such changes on the law itself, on the lawmaking processes, and on the role of decision-makers (judges, public administrators and stakeholders). It also questions the legitimacy and impact, on the public's trust and confidence, of the new governance tools that have emerged from this transformation.

1. The transformation of lawmaking

Over the last decades, the evolution of public law has been marked by a trend towards the diversification of the sources and forms of law, processes and governance tools. In our ever more globalized world, various factors (such as the increasing importance of European law, international law and fundamental rights, as well as the greater prevalence of social and economic concerns) have tended to justify the need to harmonize legal norms and practices and, thus, to open the borders of legal normativity. The increased interaction between legal systems and other sources of normativity has led to the coexistence of a diversity of normative authorities (ranging from civil society and the industry itself, to European and international organizations). It has also resulted in the emergence, within domestic law, of a broad range of norms grounded in different sources of legitimacy and with varying degrees of normative force, not merely constrained to the narrow formal definition of "legal norm".

Within the judicial branch, the creation of judges' international networks, together with their common interests and the development of a European or international judicial culture, has led to the increasing use of foreign legal material (binding as well as non-binding) by the highest courts when interpreting vague statutes or dealing with difficult cases.[1] Canadian courts, for example, have used foreign

---

[*] Professeur titulaire (Full Professor) at the Faculté de droit, Université de Sherbrooke and visiting Professor at the University of Groningen Law School, Netherlands (2010-2014). The author wishes to thank Chantal Racette, currently completing her master's degree in notarial law at the Faculté de droit, Université de Sherbrooke, for her collaboration.

[1] On this question, *see* namely: Elaine MAK, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts*, Oxford, Hart Publishing, 2013; Sam MULLER and Sydney RICHARDS (eds), *Highest Courts and Globalisation*, The Hague, Hague Academic Press, 2010; Antoine HOL et al. "Special Issue on Highest Courts and Transnational Interaction", (2012) 8-2 *Utrecht*

legal material in cases dealing with a wide range of topics, including environmental protection,[2] international trade obligations, constitutional issues related to war crimes and crimes against humanity, extradition to countries where the death penalty may be imposed, and deportation of refugees to areas where they risk torture.[3] The growing influence of these external sources (international, European or other foreign legal material) is a subject of debate among scholars and among judges themselves. At the center of this debate is the tension between diverging views on the role and limits of the national courts with respect to upholding the rule of law and promoting core democratic values. More specifically, as pointed out by the authors LeBel and Chao, there is a "tension between the democratic principle underlying the internal legal order and the search for conformity or consistency with a developing and uncertain external legal order".[4]

Likewise, at the administrative level, especially in states with liberal market-oriented economies, the quest for superior performance and the development of a new culture has transformed the legal landscape.[5] Laws and direct regulations are

---

Law Review 1; Basil MARKESINIS and Jörg FEDTKE, *Judicial Recourse to Foreign Law: A New Source of Inspiration?*, New York, Routledge-Cavendish, 2006; Michel BASTARACHE, "The Globalisation of the Law and the Work of the Supreme Court of Canada" in Sam MULLER and Sydney RICHARDS (eds), *Highest Courts and Globalisation*, The Hague, Hague Academic Press, 2010, p. 41-54. Among the other authors cited on the subject in Elaine Mak's book, *see* namely: Vicki JACKSON, *Constitutional Engagement in a Tran/snational Era*, Oxford, Oxford University Press, 2009; Aida TORRES PÉREZ, *Conflicts of Rights in the European Union: A theory of Supranational Adjudication*, Oxford, Oxford University Press, 2009; Mitchel DE S.-O.-L'E. LASSER, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford, Oxford University Press, 2004; and Michal BOBEK, *Comparative Reasoning in European Supreme Courts: A Study in Foreign Persuasive Authority*, Doctoral thesis, European University Institute, 2011.

2 *See* namely: *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Ville),* 2001 SCC 40, in which the Supreme Court of Canada discusses the interpretative role of the international law precautionary principle.

3 Louis LeBel and Gloria CHAO, "The Rise of International Law in Canadian Constitutional Litigation: Fugue or Fusion? Recent Developments and Challenges in Internalizing International Law", (2002) 16 *Supreme Court Law Review* (2d) 23.

4 L. LeBel and G. CHAO, cited in note 3, p. 24. On this question, *see* also: S. MULLER and S. RICHARDS, cited in note 1; E. MAK, cited in note 1.

5 On this theme *see* namely: (69) P. Issalys, *Répartir les normes. Le choix entre les formes d'action étatique*, Québec, Société de l'assurance automobile du Québec 2002, à la p. 90 (La réglementation par objectifs); Ch.-A. Morand, *Le droit néo-moderne des politiques publiques*, Paris, LGDJ, 1999, à la p.77 (nature des objectifs); L. M. Salamon (dir.), *The Tools of Government : A guide to the New Governance*, Oxford University Press, 2002; P. F. Eliadis, M. M. Hill et M. P. Howlett (dir.) *Designing Government : from instruments to Governance*, Montréal, McGill / Queen's University Press, 2005; W.A. Bogart, « *The Tools of the Administrative State and the Regulatory Mix »* dans C. M. Flood et L. Sossin (dir.), Administrative Law in Context, 1re éd., Toronto, Emond Montgomery Publications, 2008, 25; P. Lascoumes et P. Le Galès (dir.), *Gouverner par les instruments*, Paris, Presses de Sciences Po. 2005; Ch. Halpern, P. Lascoumes,

still important but now form only part of the picture. To improve efficiency and adapt state action and practices to ever-changing contexts, public administrations have sought alternatives to traditional command-and-control regulation. New forms and methods of regulation and practices that promote greater flexibility, responsibility and technical expertise, rather than control, have emerged. These include smart regulation, principles-based regulation, self-regulation, negotiated norms, soft law, procedural safeguards and various other forms of participative democracy. Last but not least, the transformation of lawmaking cannot be properly assessed without a clear account of the soft law phenomenon, that is the production, by the public administration itself, of an abundance of administrative norms, (often called "soft law") not binding *per se*, but often interpreted as such for the sake of coherence.

In contrast to the binding character of traditional regulation, these new public governance tools put greater emphasis on social dialogue and objectives such as flexibility, fairness, transparency, participation, accountability, justification, consensus, collaboration, effectiveness, consistency, legitimacy and social acceptability. For instance, in many sectors, such as public transportation, financial markets, agriculture and some industrial branches, various forms of co- or self-regulation and soft law have replaced or supplanted general state rules. In other sectors, such as energy, natural resources and watershed management, participatory decision-making processes have been introduced to give stakeholders (First Nations, citizens, industry actors, public interest groups, etc.) a stronger voice at the various stages of the lawmaking process, from the elaboration of the norms to their application in individual cases. In other settings, like pollution control, a combination of policy tools including market incentives (pollution permits, carbon exchange and voluntary measures[6]), complement regulatory frameworks.

At first glance, this evolution may appear beneficial for the field of administrative law, in that it reflects a spirit of adaptation and a greater concern for efficiency and values such as cooperation and communication in the development of new policy instruments. However, the increasing use of new types of norms flowing from various normative systems or attached to other sources of legitimacy raises serious questions as to their place with respect to national legal systems. Their growing influence not only blurs the boundary between law and non-law, but also

P. Le Galès (dir.), *L'Instrumentation de l'action publique*, Paris, Presses de Sciences Po. 2014; S. Breyer, *Regulation and its Reform*, Cambridge (Mass), Harvard University Press, 1982; S. Breyer, "*Analyzing Regulatory Failure : Mismatches, Less Restrictive Alternatives, and Reform*", (1979) 92 Harvard Law Review, 547; D. Mockle, « *Gouverner sans le droit? Mutation des normes et nouveaux modes de régulation* », (2002) 43 Cahiers de Droit 143 : D. Mockle, « *L'évincement du droit par l'invention de son double : les mécanismes néo-réglementaires en droit public* », (2003 44 Cahiers de Droit 297.

6 Such as the industry monitoring initiative suggested by the Governor of the Bank of England at the 2015 United Nations Climate Change Conference in Paris.

creates new challenges when it comes to their integration into domestic law and the means of ensuring their legitimacy through proper democratic checks and balances. Soft law, for instance, is usually considered as being outside of the recognized categories of positive law, unlike traditional laws and regulations that are binding and enforceable against third parties. Yet, the use of soft law is broadly acknowledged[7] and, under certain conditions, even legitimized and encouraged by courts[8] as a flexible means of controlling the use of discretionary powers and curtailing arbitrariness in administrative decision-making. As a result, despite its lack of binding force or legal status, soft law often has important impacts on the individuals, the businesses or even the member states (EU) to which it applies.

2. The transformation of lawmaking and public trust

The evolution of lawmaking and of the conception of law referred to above also raises questions about the impact of such a transformation on public trust and confidence in the law itself and in its processes, institutions and stakeholders.

It is well established that trust matters in lawmaking. For instance, the "decisions of legal authorities mean little if the members of the public do not follow them".[9] Research has shown that compliance with laws and regulations rises when the level of trust and confidence is high.[10] In less democratic societies, it may not be impossible to govern without trust or legitimacy[11] but, in the absence of voluntary compliance, governments must resort to coercion and "expend enormous resources to create a credible system of surveillance through which to monitor public behavior, reward desired behavior, and punish rule violators".[12] On the other hand, voluntary compliance, obtained through trust or legitimacy, not only reflects our core democratic values, it "makes governing easier and more effective," less costly,[13] and it frees up state resources.[14] In other words, voluntary

---

7 For an exhaustive study of the soft law phenomenon's terms of acceptance, *see*: CONSEIL D'ÉTAT, FRANCE, *Étude annuelle 2013 du Conseil d'État. Le droit souple*, coll. « Études et documents, Conseil d'État », La Documentation française, 2013.

8 *See* namely, *Friends of the Oldman River Society* v. *Canada (Ministre des Transports)*, [1992] 1 SCR 3.

9 Tom R. TYLER, "Trust and law abidingness: A proactive model of social regulation", (2001) 81 *Boston University Law Review* 361, 363.

10 Margaret LEVI, Audrey SACKS and Tom TYLER, "Conceptualizing Legitimacy, Measuring Legitimating Beliefs", (2009) 53 *American Behavioral Scientist* 354, 356-357; Myung JIN, "Citizen Participation, Trust, and Literacy on Government Legitimacy: The Case of Environmental Governance", (2013) 5 *Journal of Social Change* 11, 14-15; T. R. TYLER, "Trust and law abidingness: A proactive model of social regulation", cited in note 9, 366.

11 M. LEVI, A. SACKS and T. TYLER, cited in note 9, 354-355.

12 *Id.*; M. JIN, cited in note 10, 14.

13 M. LEVI, A. SACKS and T. TYLER, cited in note 9, 354-355.

14 T. R. TYLER, "Trust and law abidingness: A proactive model of social regulation", cited in note 9, 386.

compliance with laws and regulations is crucial to both democracy and the efficient functioning of the legal system.[15] In addition, research studies have shown that increased mutual understanding and trust foster cooperation.[16] As such, trust and confidence facilitate social interaction, whether in the private sphere or in dealings with the state (through government agencies or other public authorities). On the contrary, a decrease in trust and confidence tends to negatively impact such relations.

Insofar as public trust and lawmaking are interconnected, ensuring public trust in lawmaking seems even more important today. In our globalized world, characterized by rapidly evolving technologies, highly complex scientific and technological developments, intricate financial systems, and so on, it is often an enormous challenge for even the most sophisticated experts to fully understand the stakes and make rational decisions. To the general population, most of it is simply incomprehensible. In some instances, it is difficult even for government authorities, judges and administrative decision-makers to fully grasp the underlying issues. In that context, individuals and decision-makers often have no other choice but to trust the experts to act in the public's interest and not in their own self-interest. However, the magnitude of the scandals that have occurred over the last decades - be it in the industrial sector (such as the recent Volkswagen "diesel dupe" scandal) or in the financial sector (for example, the Lehman Brothers scandal of 2008, the unethical ABACUS deal of the Golden Sachs investment bank and the syphoning off of large corporations' profits into off-shores bank accounts), as well as the numerous allegations of corruption, political traffic of influence, conflicts of interest, fraud and bribery voiced across the world - have weakened the public's trust in both governments and experts, and called into question the motives behind their actions. Nonetheless, as governance is unlikely to become any simpler, it is essential to restore or enhance public trust and confidence in lawmaking, as well as in the processes and institutions by which laws, regulations and norms are applied. This observation, in turn, has implications for modern lawmaking, which needs to repair trust. Is it the case? Is public trust enhanced or undermined by contemporary lawmaking? Are the new governance tools trust-generating? For instance, does the increased reliance on self-regulation, negotiated norms, soft law, non-jurisdictional modes of conflict resolution and various procedural safeguards bolster public trust and confidence in the legal system, its processes and its institutions? Or else, is public trust and confidence being further undermined by such a diversification of sources and forms of lawmaking? If so, in what ways?

Some nineteen authors have shared their thoughts on these issues and discussed the threats and challenges that perhaps call for adjustments in the contemporary lawmaking processes. Their essays analyze changes in lawmaking and their

---

15 M. JIN, cited in note 10, 14.

16 *See*, for instance: Tom R. TYLER, *Why People Cooperate: The Role of Social Motivations*, Princeton, Princeton University Press, 2011, p. 42-43.

impacts on public trust and confidence from various perspectives (such as ethics, rights, legitimacy, democratic responsiveness, checks and balances, legitimate expectations, public interest, capture, technical competence, legal certainty, costs and efficiency) and within a variety of issues and contexts, including: the Europeanization and internationalisation of administrative law (*Jans & Outhuijse*; *Mendelts)*; the emergence of alternative modes of regulation and their trust-generating qualities (*Westerman*; *Bröring & Cherednychenko*; *Winter & Haarhuis)*; policy change and public trust *(Lubach);* the developing trends in access to justice in Dutch administrative law and practice, in the light of Jerry Mashaw's theory of administrative justice (*De Graaf & Marseille*); the erosion of the welfare state, through a shift from rights to conditional entitlements (*Schwitters & Vonk*) and, from the point of view of the combination of statutory and private initiatives in domains such as social security (*Tollenaar*). The book also analyses the tension between juridification and socialization in social control (*De Ridder*); the psychology of trust within public organizations and the use of mediation as a way of repairing trust (*Beaudin*); legal uncertainties and mistrust in the tacit authorization system under GALA (*Hoogstra*); the effectiveness of citizen "participatory initiatives" under ECI (*Zeegers)* and other types of statutory consultations such as the ones conducted under the Waste electrical and electronic equipment Act, WEEE (*Más*). Finally, to conclude this book, a synthesis chapter will shed light on and draw attention to the key points developed in these essays (*Hertogh*).

We thank all the contributors for this opportunity to reflect on lawmaking and public trust and we are confident that the present book has much to offer to those interested in these issues.

"Front-Door" versus "Back-Door" Lawmaking.

A Case Study Concerning German Responses to the Challenges of the Aarhus Convention

Jan H. Jans[*] and *Annalies Outhuijse*[**]

1. Introduction[1]

In most countries, the relationship between international and national law was never simple nor straightforward. In order to comply with international obligations, two main instruments have been applied at the national level. First of all, there is the royal road via the "front door". If national law is not in sync with international obligations, the legislature assumes its responsibilities and takes action. National law will then be amended accordingly to comply with international law. However, there is also another way of dealing with national incompatibilities. We could call this the "back-door" way of lawmaking.[2] With this method, the main actor is not the *legislator* but the *court*. The court performs lawmaking by interpreting national law in such a way that it is consistent with international obligations. In some countries, for instance the Netherlands, Germany and the United Kingdom, the courts have a duty to interpret in such a manner as a matter of national constitutional law.[3] Furthermore, the Court of Justice of the EU requires, as a matter of EU law, that national courts interpret

* Professor of Public Law and Vice-Dean (research) at the Faculty of Law, University of Groningen.

** PhD researcher on the functioning of dispute-resolution procedures of the Dutch competition authority at the University of Groningen. LL.M. in Dutch Law specialisation Constitutional and Administrative law (*summa cum laude*) and the LL.M. Research Master (*cum laude*).

1 This text builds upon previous publications of the first author, in particular the publications mentioned in footnotes 2, 3 and 5. The text of this contribution was finished on 1 October 2015.

2 Cf. on the concept of "back-door' lawmaking: J.H. Jans, "Harmonisation of National Procedural Law Via the Back Door? Preliminary Comments on the ECJ's Judgment in Janecek in a Comparative Context, in: Bulterman, Hancher, McDonnell and Sevenster (eds), *Views of European Law from the Mountain*, (Liber Amicorum P.J. Slot), p. 267-275.

3 Cf. J.H. Jans, S. Prechal, R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015), chapter 3.

national law "as far as possible" in the light of EU law; the doctrine of consistent interpretation.[4]

This contribution will discuss both methods of lawmaking by presenting a concise case study concerning German responses, from both the legislator and the courts, towards German obligations under Article 9(2) and (3) of the Aarhus Convention.

2. The front-door method

The front-door method of lawmaking is lawmaking by the legislator and normal legislative procedures. The case of access to justice of environmental organisations in German administrative procedural law and the implementation of Article 9(2) of the Aarhus Convention in the German legal order can serve as an example of this front-door method.

The Aarhus Convention is a so-called "mixed agreement" which means that both the European Union and the Member States are party to the Treaty.[5] The official name of the Aarhus Convention is the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[6] The official name reflects the three pillars of the Convention, namely (1) access to information, (2) public participation and (3) access to justice. In this chapter, we will focus on access to justice, the third pillar of the Convention, which is laid down in Article 9 of the Convention. The aim of the Convention is to provide wide access to justice, and this pillar provides effective enforcement of the two other pillars. Paragraphs 1 to 3 of Article 9 Aarhus Convention provide different possibilities for access to justice. The first paragraph only relates to disputes concerning the right to environmental information. The second paragraph stipulates access to justice with respect to the public participation pillar of Article 6 Aarhus Convention. The third paragraph provides an additional right with regard to the first and second paragraph, which will be discussed below in the context of the back-door method. The second paragraph is of particular importance for the description of the front-door method.

4 I.a. Case C-106/89 *Marleasing* ECLI:EU:C:1990:395; Joined Cases C-397/01 to C-403/01 *Pfeiffer* ECLI:EU:C:2004:584. Cf. also the literature referred to in footnote 3, with further references in that chapter.

5 Cf. J.H. Jans, "Who is the referee? Access to Justice in a Globalised Legal Order". *Review of European Administrative Law*, 4(1), 2011, p. 87-99.

6 There is abundant literature on this treaty. *See*, i.a., M. Pallemaerts (ed.), *The Aarhus Convention at Ten; Interactions and Tensions between Conventional International Law and EU Environmental Law* (Groningen: Europa Law Publishing 2011).

Article 9(2) of the Aarhus Convention provides:

> 2. Each Party shall, within the framework of its national legislation, ensure that members of the public concerned:
> (a) having a sufficient interest or, alternatively,
> (b) maintaining impairment of a right, where the administrative procedural law of a Party requires this as a precondition, have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to the provisions of Article 6 and, where so provided for under national law and without prejudice to paragraph 3 below, of other relevant provisions of this Convention.
>
> What constitutes a sufficient interest and impairment of a right shall be determined in accordance with the requirements of national law and consistently with the objective of giving the public concerned wide access to justice within the scope of this Convention. To this end, the interest of any non-governmental organisation meeting the requirements referred to in Article 2(5) shall be deemed sufficient for the purpose of subparagraph (a) above. Such organisations shall also be deemed to have rights capable of being impaired for the purpose of subparagraph (b) above.
>
> The provisions of this paragraph 2 shall not exclude the possibility of a preliminary review procedure before an administrative authority and shall not affect the requirement of exhaustion of administrative review procedures prior to recourse to judicial review procedures, where such a requirement exists under national law.

The second paragraph of Article 9 stipulates the access to a review procedure for members of the public concerned with challenging the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of Article 6 of the Convention. Pursuant to Article 9(2), the parties of the Convention have the choice to implement one of two admissibility criteria: either sufficient interest or the violation of a right. France has, for example, chosen the first option whereas Germany has chosen the second option. Environmental organizations within the meaning of Article 2, paragraph 5 Aarhus Convention are deemed to have a sufficient interest or to have a right that can be violated according to Article 9(2) Aarhus Convention. The European Union has adopted the provision of paragraph 2 with nearly identical wording in the EU Directive 2003/35 (Public Participation Directive) through the amendment of Directive 85/337 (Environmental Impact Assessment Directive (EIA Directive)) by the addition of Article 10a EIA Directive.[7] These directives have been transposed by the Member States.

7 Directive 2003/35/EC, OJ 2003 L 156/1.

In German literature, there has been significant controversy over whether §42(2) *Verwaltungsgerichtsordnung* (hereinafter: *VwGO* (administrative procedural law)) is compatible with these international and European provisions.[8] The provision reads in English:

> Except where otherwise provided by law, such an action is admissible only if the claimant asserts that his rights have been impaired by the administrative measure or by the refusal or failure to act.[9]

The *VwGO* contains a very strict admissibility criterion and the consequence thereof is a limited right of appeal. The German criterion is a stricter criterion than, for example, the criterion used in the Netherlands. The German legislature has chosen for the "violation of a right"-criterion, where sufficient interest grants no standing. The appellant is required under §42(2) *VwGO* to demonstrate that his subjective rights have been violated by a decision. An appellant only has a subjective right when the violated norm intends to protect the appellant's individual interests. Therefore, the violation must be a breach of a so-called *Schutznorm*. The decision on whose rights a legal provision protects lies with the legislator and is therefore a purely legal decision. As a result, damage suffered by an individual does not result in access to a court if the law does not aim to protect the injured party. Consequently, the interpretation of legal provisions is of crucial importance. Due to this system, there is, in principle, no appeal possible for the protection of general interests, such as the environment. These general interests cannot be protected by environmental organizations either, since they cannot have subjective rights. As mentioned, the German literature raised the question whether §42(2) *VwGO* was compatible with Article 9(2) Aarhus Convention and Article 10a of the EIA Directive.

The legislator decided to keep on the safe side and adopted a new act for the transposition of the EIA Directive, namely the *Umweltrechtbehelfsgesetz* (hereinafter: *UmwRG*).[10] According to Paragraph 2(1)(1) of the UmwRG a "recognised"[11] domestic or foreign association may, without being required to

---

8 Cf. A. Epiney, K. Sollberger, *Zugang zu Gerichten und gerichtliche Kontrolle im Umweltrecht* (Berlin 2002), p. 85; A. Epiney, "Verwaltungsgerichtlicher Rechtsschutz in Umweltangelegenheiten in Europa", *EurUP* 2006, p. 242, at pp. 243 et seq., who compares the legal systems of different EU Member States with regard to access to justice; Cf. also Nicolas de Sadeleer, Gerhard Roller; Dross, Miriam (eds*), Access to Justice in Environmental Matters and the Role of NGOs; Empirical Findings and Legal Appraisal* (Groningen: Europa Law Publishing 2005).

9 And in the original German text: "*Soweit gesetzlich nichts anderes bestimmt ist, ist die Klage nur zulässig, wenn der Kläger geltend macht, durch den Verwaltungsakt oder seine Ablehnung oder Unterlassung in seinen Rechten verletzt zu sein.*"

10 Gesetz Ober ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz) of 7 December 2006, BGBI. I 2006, p. 2816, 14 December.

11 *See* § 3 UmwRG.

maintain an impairment of its *own* rights, bring an action to challenge a decision, provided that the association asserts that the decision contravenes legislative provisions "which seek to protect the environment, which confer individual rights and which may be relevant to the decision".[12]

The problem, however, in this new provision was that although environmental organisations were granted access to the administrative courts, they still had to show that the decisions they want to challenge in a judicial review violate rules "which confer individual rights". The problem with this condition is that, once again according to German legal doctrine, many provisions in environmental legislation, in particular on nature protection and air quality, do not confer "individual rights" but are enacted to protect the public at large. In short the result of this is that environmental organisations had access to the court, but there were hardly any provisions they could rely on to challenge decisions in a judicial review. This triggered Advocate General Sharpston to remark that the German system of judicial review looked "like a Ferrari with its doors locked shut, an intensive system of review is of little practical help if the system itself is totally inaccessible for certain categories of action."[13]

Not very surprisingly was that this "individual rights" condition was challenged in court with the argument that it was not in line with the Aarhus Convention and the Aarhus implementing directive at EU level. The Court of Justice of the European Union decided on this in the *Trianel* case.[14] In this case, the German company Trianel was granted permits to build a coal fired thermal power plant near five Natura 2000 sites, even though the environmental impact assessment of the project did not show that it was unlikely to have a significant effect on the special areas of conservation located nearby. Therefore, it was argued that the permits were granted in violation with German nature protection law and Article 6(3) of the Habitats Directive. The environmental organization BUND wanted access to court to challenge the decision authorising this project.

The national court dealing with the case (*Oberverwaltungsgericht Nordrhein-Westfalen*) argued that most of the provisions BUND relied upon primarily concerned the general public and not the protection of individual rights and that according to German administrative procedural law they had to be declared inadmissible in their appeal. However, the *Oberverwaltungsgericht* wanted to be sure that the restrictions on access to justice in German were compatible with EU law and asked the Court of Justice for a preliminary ruling.[15] The Court of Justice ruled as follows:

---

12 In German: "*dem Umweltschutz dienen, Rechte Einzelner begründen und für die Entscheidung von Bedeutung sind*".

13 ECLI:EU:C:2010:773, point 77.

14 Case C-115/09, *Trianel*, ECLI:EU:C:2011:289.

15 OVG NRW, Beschluß vom 05.03.2009, 8 D 58/08.AK. Cf. i.a. A. Schwerdtfeger, " 'Schutznormtheorie' and Aarhus Convention - Consequences for the German Law",

> If, as is clear from that provision (*Article 10a EIA Directive* (addition authors)), those organizations must be able to rely on the same rights as individuals, it would be contrary to the objective of giving the public concerned wide access to justice and at odds with the principle of effectiveness if such organizations were not also allowed to rely on the impairment of rules of EU environment law solely on the ground that those rules protect the public interest. As the dispute in the main proceedings shows, that very largely deprives those organizations of the possibility of verifying compliance with the rules of that branch of law, which, for the most part, address the public interest and not merely the protection of the interests of individuals as such.[16]

The Court concluded that Article 10a of the EIA Directive precludes legislation that deprives the access to court from environmental organizations on the ground that the violated environmental provision only protects the interests of the general public and not the interests of individuals.

Although in the aftermath of *Trianel* German courts recognised the access of NGOs without requiring the infringement of an individual right,[17] it was quite clear that the German legislator had to become active again and introduced new legislation whereby the requirement that an environmental standard should protect individual rights was deleted from the *UmwRG*. The new provision entered into force on 29 January 2013 and reads as follows:[18]

> § 2 Rechtsbehelfe von Vereinigungen
> (1) Eine nach § 3 anerkannte inländische oder ausländische Vereinigung kann, ohne eine Verletzung in eigenen Rechten geltend machen zu müssen, Rechtsbehelfe nach Maßgabe der Verwaltungsgerichtsordnung gegen eine Entscheidung nach § 1 Absatz 1 Satz 1 oder deren Unterlassen einlegen, wenn die Vereinigung
> 1. geltend macht, dass eine Entscheidung nach § 1 Absatz 1 Satz 1 oder deren Unterlassen Rechtsvorschriften, die dem Umweltschutz dienen und für die Entscheidung von Bedeutung sein können, widerspricht, […].

JEEPL 2007, p. 270-277. *See* also the overview from S. Schlacke, "Die Novelle des Umwelt-Rechtsbehelfsgesetzes – EuGH ante portas?", *ZUR* 2013-4, p. 195.

16 Case C-115/09, *Trianel*, ECLI:EU:C:2011:289, para. 46.

17 *See Oberlandesgericht Münster* 1 December 2011, Az: 8 D 58/08.AK.juris, and *Oberlandesgericht Mannheim* 20 July 2011 10 S 2102/09. Cf. also M. Eliantonio and Ch.W. Backes, "Access to Courts for Environmental NGOs at the European and national level: Improvements and room for improvement since Maastricht", in: M. de Visser & A.P. van der Mei (eds.), *The Treaty on European Union 1993-2013: Reflections from Maastricht* (Cambridge: Intersentia 2013), p. 557-580; F. Grashof, "Judicial Coherence in Public Environmental Law", to be published in *Review of European Administrative Law* 2015/2.

18 BGBl. 2013 I, 95.

The problematic condition "*Rechte Einzelner begründen*"[19] in the old text of the *Umwelt-Rechtsbehelfsgesetz* was deleted and as a consequence, environmental organisations in Germany can now appeal against decisions where an environmental impact assessment should have been prepared (correctly). However, as the new text added some new conditions, in particular in §4a *UmwRG*, it is not quite clear whether the current text of the *UmwRG* is in line with the Aarhus Convention and the implementing EU legislation.[20] Whatever the case may be, it is clear from the judgment of the Court of Justice in Case C-137/14, that the German legislator is bound to change the *Umwelt-Rechtsbehelfsgesetz* once again, as various provisions of it were declared incompatible with EU law.[21]

The example of access to justice of environmental organisations in German law provides a fine example of what we call 'front-door lawmaking". In order to align German administrative procedural law with its international and EU obligations the standard provision of §42(2) *Verwaltungsgerichtsordnung* was supplemented by the German *legislator* with new rules in the *Umwelt-Rechtsbehelfsgesetz*. However, these new rules were, according to the Court of Justice of the EU, not good enough, and therefore the German *legislator* acted again and amended the *Umwelt-Rechtsbehelfsgesetz*. However, these changes were also inadequate according to the Court of Justice and therefore the German legislator has to become active once again and change the law accordingly. We cannot assume that this will be the end of the saga either! This case is therefore a good illustration of judicial dialogue in a complex multi-facetted shared legal order. The current text is the result of a dialogue between a national administrative court (*Oberverwaltungsgericht*), the EU Court of Justice and the German legislature, with input from legal doctrine in Germany and throughout the EU and beyond.

3. The back-door method

Let us now compare the example of the *Umwelt-Rechtsbehelfsgesetz* and alignment with international and EU law via the national legislation (front-door lawmaking) with the following example of back-door lawmaking. It concerned,

---

19 In English: "which confer individual rights".

20 *See inter alia* D. Schmitt, "Das neue Umwelt-Rechtsbehelfsgesetz und seine Vereinbarkeit mit dem Unionsrecht", *ZEuS* 2013, pp. 359-384 and F. Grashof, *National Procedural Autonomy Revisited. Consequences of differences in national administrative litigation rules for the enforcement of environmental European Union law – The case of the EIA Directive*. Dissertation Maastricht University 2015, p. 158. It seems that one of the problems of the new provision is that the intensity of judicial review is somewhat less intense than the default standard of review. And because the *Umwelt-Rechtsbehelfsgesetz* is exclusively meant to implement EU Directive 2003/35, one could argue that this is incompatible with the principle of equivalence from the *Rewe/Comet*-case law of the Court of Justice. *See* on this principle J.H. Jans, S. Prechal, R.J.G.M. Widdershoven (eds.), *Europeanisation of Public Law* (Groningen: Europa Law Publishing 2015), chapter 2.

21 Case C-137/14 *Commission* v. *Germany*, ECLI:EU:C:2015:683.

once again, alignment of the German law on access to justice with the Aarhus Convention. In this case Article 9(3) of the Convention which states:

> In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Although attempts have been made by the European Commission to implement the third paragraph into a EU directive and a draft was published, the directive never became reality because of strong resistance from some Member States.[22] Unlike Article 9(2) of the Aarhus Convention, Article 9(3) never resulted in any changes in German administrative procedural law. The special provisions of the German *Umwelt-Rechtsbehelfsgesetz* only deal with access to justice regarding decisions falling within the scope of Article 9(2) Aarhus Convention. That implies that access to justice for environmental organisations with respect to decisions falling within the scope of Article 9(3) of the Aarhus Convention are still governed by the "default" provision of §42(2) *Verwaltungsgerichtsordnung*, discussed earlier in this chapter. And as we have stated above, this means that environmental organisations are *de facto* precluded to challenge acts and omissions which contravene environmental law.

However, in a remarkable judgment, the so-called *Slovak Bears* case, the Court of Justice of the European Union ruled that, even in the absence of any implementing EU measures regarding Article 9(3) Aarhus Convention and irrespective of the fact that this provision is not directly effective in the Union's legal order, the Member States of the EU are required to interpret their national provisions on administrative law in such a manner that it is consistent with the obligations resulting from Article 9(3) Aarhus Convention:

> (..)It is, however, for the referring court to interpret, to the fullest extent possible, the procedural rules relating to the conditions to be met in order to bring administrative or judicial proceedings in accordance with the objectives of Article 9(3) of that convention and the objective of effective judicial protection of the rights conferred by EU law, in order to enable an environmental protection organization, such as the zoskupenie, to challenge before a court a decision taken following administrative proceedings liable to be contrary to EU environmental law.[23]

---

22 Cf. COM(2003) 624 final.

23 Case C-240/09, *Lesoochranárske zoskupenie*, ECLI:EU:C:2011:125 (*Slovak Bears*).

According to this judgment the EU principle of judicial effective protection is "coloured" by Article 9(3) Aarhus. As a matter of Union law, the national courts of the EU Member States are required to interpret their national access to justice law in order to be "Aarhus consistent".[24] The German *Bundesverwaltungsgericht* took up this challenge in a remarkable judgment in 2013. In this case a German environmental organisation requested that the responsible authority would change its air quality plan in order to improve the air quality in the Rhein/Main-area. As no action was taken, judicial procedures followed. It was quite clear that under the default provision of §42(2) *VwGO* the NGO should have been declared "inadmissible" in court. The legal provisions regarding German air quality are not meant to confer an individual right for NGOs. The first court *Verwaltungsgericht*, however opened up §42(2) *Verwaltungsgerichtsordnung* and dmitted the NGO standing in court. That judgment was upheld by the highest German administrative court the *Bundesverwaltungsgericht*. The *Bundesverwaltungsgericht* relied very heavily on the judgment of the Court of Justice in *Slovak Bears*. The *Bundesverwaltungsgericht* ruled that the case law of the Court of Justice with regard to the Aarhus Convention (i.e. *Slovak Bears* case) requires that environmental organizations are granted access to the courts in order to guarantee the implementation of European environmental law. In accordance with this, §42(2) *VwGO* in combination with Article 47(1) of the German Anti-Pollution Law (*Bundesimmissionsschutzgesetz*; *BImSchG*)) can be interpreted in such a manner that environmental organisations are granted a right, enforceable in court, to require compliance with the requirements of air pollution control legislation, adopted to comply with an EU directive. Via this method of "Aarhus-consistent interpretation" of German administrative procedural law, the *Bundesverwaltungsgericht* greatly expanded access to justice of environmental organizations under the default provision of §42(2) *VwGO*.

4. Concluding remarks

In this chapter two methods to comply with obligations from the Aarhus Convention to broaden access to justice for environmental organizations were shown. With respect to Article 9(2) of the Convention the traditional "front-door" method was used. The German legislator assumed its responsibilities and changed German procedural law – in a dialogue with the EU Court of Justice – in order to comply with that provision. With respect to Article 9(3) of the Convention no legislative action was taken. Not by the EU, and not by the German legislator. Instead, it was the courts that took action. Triggered by a judgment of the EU Court of Justice, the highest German administrative court decided to interpret national administrative procedural law in such a manner that it is consistent with Article 9(3) Aarhus Convention. Although not identical, the result from this 'back-door" way of lawmaking is quite similar to the 'front-door" method.

[24] BVerwG 7 C 21.12, ECLI:DE:BVerwG:2013:050913U7C21.12.0.

From a democratic and legitimacy point of view, and hence from a public trust perspective, the route via the 'front-door" must be preferred for obvious reasons. Courts do not have the same democratic legitimacy as the legislature. Moreover, as the German constitution so aptly states, Art 20(3) *Grundgesetz*: *Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden*. The *judiciary* is bound by the law, whilst the *legislature*, within the boundaries of the constitution, can change the law.

Indeed, courts always have to interpret the law, that is their job. And in order to bring the national legal order in sync with the countries international obligations, courts are required to be active, innovative and, if necessary, break new ground. However, a court is not a legislature and in order to avoid blame for having acted as a "quasi-legislator", the court must exercise some restraint in lawmaking via the "back-door".

Who Decides What Is Significant?
The Case of Nitrogen Deposition on Dutch and German Natura 2000 Sites

Peter Mendelts[*]

1. Introduction

Public trust in legal institutions such as courts and legislatures is dependent upon many factors. For the good functioning of a legal system it is essential that people have a good level of trust in its functioning. This holds true for national legal systems as well as for international legal systems such as the law of the European Union. This is even more interesting where there is an interaction between the national legal systems and the European system. Although trust is in itself an extra-legal concept, for the functioning of the legal systems one should be careful to preserve the trust of the public.

Looking at legal norms with the concept of trust in the back of our mind, open norms are particularly interesting. An open norm set by a legislator needs further interpretation of that norm. This holds true for open norms in private law, that are interpreted by private parties and, in case of conflict, by courts that decide cases between those private parties. For open norms in administrative law, the role of government bodies that apply the law and pre-interpret the norms, come into play. It is the government body that first interprets an open norm. A private party may challenge that before a court, and the court gives a more prevalent interpretation of the open norm. This whole process may become more diffused when the norms are interpreted at different jurisdictional levels, where different government bodies and courts at different levels function.

Open norms in European Directives can lead to national legislations and government practices that differ from Member State to Member State. A common complaint about these divergences is that they distort the level playing field between the Member States. In this article I will do a case study on the way The Netherlands and Germany deal with nitrogen deposition on natural protected areas that are part of the European Natura 2000 network, the so-called Natura 2000 sites, and how they judge the significance of the effects. The case study is based on the fact that there are some vague terms to be found in Art. 6 of the European Habitats Directive (Directive 92/43/EEC of 21 May 1992). Art. 6 of the Directive requires that "any plan or project not directly connected with or necessary to the management of [a Natura 2000 site] but likely to have a

[*] Ph.D. Legal advisor and part-time lecturer in administrative law at the University of Groningen.

significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives." The focus will be on the terms "likely to have a significant effect", as these are particularly vague. I will demonstrate that two adjacent national systems, The Netherlands and Germany, have two largely divergent approaches to the question of when a nitrogen deposition may have a significant effect on protected habitats.

First I will give a brief description of the interaction between national courts and legislators and the ECJ. Paragraph 3 will hold a short description of the obligations under the Habitats directive. In paragraph 4.1 I will describe how the Dutch authorities have in vain tried to escape some of the obligations under the Habitats Directive by labelling measures to create a new habitat to compensate for the loss of quality of the same habitat elsewhere, as a mitigating measure rather than a compensatory measure, in the so-called *Briels*-case. In 4.2 the Dutch practice of "external netting" will be described, followed by a description of the new Programmatic Approach to Nitrogen in 4.3 and a comparison to the German method in paragraph 5. In paragraph 6 the risk of divergent interpretations of what is a significant effect and of what is a significant amount of nitrogen, will be briefly considered.

2. The interaction between national courts and legislators and the ECJ

European Directives are legal measures enacted by the institutions of the European Union in specific areas. According to Art. 288 of the Treaty on the Functioning of the European Union (TFEU), those Directives are binding, as to the result to be achieved, but the choice of form and methods are left to the national authorities. The Directives typically contain rules that have to be translated into national law in the form of Acts of Parliament by the national legislators.

When applying these Acts of Parliament, the national courts must stay within the boundaries set by European law, including the Directives. So, when the national courts decide cases, they must apply European law. In cases where important questions concerning the interpretation of a Directive comes up before a national court, the court may decide to ask preliminary questions to the European Court of Justice (ECJ).[1] The national court will use the answers given by the European Court to decide the case. When the national law is hard to reconcile with or even contrary to the Directive, the court may either re-interpret the national law so that it is no longer contrary to the Directive, or even decide to leave the national law without application.

1 *See* for a description of the procedure R. Barents, EU Procedural Law and Effective Legal Protection, in: Common Market Law Review 2014, p. 1437-1462.

The interpretation of the Directive by the ECJ will in some cases incite the legislator to new legislation, to change the national implementation of the Directive. This may be an attempt to bring the national law closer to the Directive. But, as legislation is policy-driven, it may also be an attempt to reach other policy goals in a way that is reconcilable with the Directive. Then new cases may appear before the court, and new questions of conformity of the national law and European law may arise and new questions may be asked to the ECJ. There is therefore a circle of interpretation of a Directive (Act of Parliament – national courts – ECJ – Act of Parliament – etc.).

This process is even more interesting where the Directive contains vague terms that constitute open norms, which may be interpreted in variable ways. The question then may be asked what role the ECJ sees for itself, as it is the counterpart of the national courts on the one hand, but also the delimiter of the legislator's leeway on the other hand. Does the ECJ take full jurisdiction and pinpoint the exact meaning of the vague terms, and thus take a role as a legislator to the national legislations? Or does the ECJ take a more judicial, court-like approach, and leave room for the national authorities to manoeuver? And how do legislators and courts respond to the position the ECJ takes? Do legislators acquiesce in the ECJ's interpretation of the Directive, or do they actively fight it by issuing new legislation? And how do the national courts position themselves in between the national legislator and the ECJ?

Open norms in European Directives are first and foremost interpreted by national government bodies and by national courts with the assistance of the European Court of Justice (ECJ). If, however, the outcomes of the interpretation are unfavourable in the eyes of the national authorities, the national legislator or national government bodies may act to come up with a new interpretation of the open Directive norms. Thus, there is an ongoing debate between the courts and the national legislators and government bodies. The legislators, on whom the duty to implement the Directives rests in the first place, are first in line to give their interpretations of the open norms of the Directive and of the obligations that the Directive imposes on the Member State. The national legislators may in a certain way respond to the case law to bend the development of the law in a direction they perceive as desirable.[2] However, they cannot escape the judicial interpretation of the Directive and certainly not that of the ECJ.[3] If the political desire would be to go against the line of jurisprudence, it would be up to the European organs (Council and Parliament) to change the wording of the

2 *See* G. Davies, Legislative Control of the European Court of Justice, in: Common Market Law Review 2014, p. 1579-1608.

3 *See* R. Bieber and F. Maiani, Enhancing Centralized Enforcement of EU Law: Pandora's Toolbox?, in: Common Market Law Review 2014, p. 1051-1092.

Directive or even come up with a new Directive altogether.[4] All these actors may either boost the public trust in the legal system as well as undermine that trust. Divergent interpretations of open norms may undermine the people's trust in the system.

3. The obligations under the Habitats Directive

Within the European Union there is a network of nature reserves known under the name Natura 2000. The core of the network had been established under the 1979 Birds Directive[5] already, but the 1992 Habitats Directive[6] instituted the Natura 2000 network as such.[7] Since then, the 28 EU Member States have assigned over 27,000 sites as Natura 2000 sites. As to the protection and management of these sites, Article 6 of the Habitats Directive is relevant. The Member States must in short establish the necessary conservation measures, and preferably management plans for the sites (Art. 6 (1)), and they must prevent the disturbance of habitats and the disturbance of species (Art. 6 (2)). The culmination point in the protection of the sites, is Art. 6 (3), which reads as follows:

> Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

Art. 6 (3) obliges the Member States to make appropriate assessments of the impact of plans and projects, if they are *likely to have a significant effect* on the site. The next step is that permission for the plan or the project may only be given when the integrity of the site is not adversely affected. Art. 6 (4), finally, defines when a derogation is possible, namely when there is no alternative for the adverse plan or project and there are imperative reasons of overriding public

4 *See* further A. Alemanno and O. Stefan, Openness at the Court of Justice of the European Union: Toppling a Taboo, in: Common Market Law Review 2014, p. 97-140.

5 Council Directive 2009/147/EC of 30 November 2009 on the conservation of wild birds (codified version). The original version is Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

6 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

7 *See* for the process D. Evans, Building the European Union's Natura 2000 network, in: Nature Conservation 1:11-26 (2012).

interest, and the Member State shall take compensatory measures to ensure the protection of the overall coherence of the Natura 2000 network.

Art. 6 (3) is to be implemented in national law by the EU Member States. This means that its legislation must provide for an appropriate assessment for all activities that are likely to have a significant effect on a Natura 2000 site. For the Netherlands, this has been done in Art. 19d of the *Natuurbeschermingswet 1998*, in Germany by Art. 34 (1) of the *Bundesnaturschutzgesetz* (and in the legislation of the different *Länder*). These provisions have as a consequence that some economic activities will not be allowed because of their adverse effects on the protected natural values. The Dutch and German legislators and government bodies have been looking for ways to reconcile the wish to protect the natural values in Natura 2000 sites on the one hand, and economic development on the other.

4. Nitrogen deposition: the Dutch method

In the Netherlands, nitrogen levels are relatively high compared to most other European nations. Whereas nitrogen is essential to crop growth, an excess of nitrogen is a risk to the environment and especially to certain vulnerable habitat types for which Natura 2000 sites are designated.[8] Therefore, projects such as farm expansions or infrastructural developments that lead to an increase of nitrogen deposition, cannot be licensed easily. As this puts brakes on economic development, the Netherlands has tried to deal with Art. 6 (3) of the Habitats Directive in ways to evade overly stringent consequences. First, I will illustrate that the Netherlands has tried in vain to find leeway for licensing by labelling measures that are really compensatory measures as mitigation measures (Section 4.1). Then, I will show that the Netherlands has licensed some developments by using decreases in nitrogen deposition to license new increases. Until 1 July 2015 this was done by "external netting" (Section 4.2) and since 1 July 2015 by the Programmatic Approach to Nitrogen (PAN) (Section 4.3).

8 *See* M. Pau Vall and C. Vidal, Nitrogen in agriculture, http://ec.europa.eu/agriculture/envir/report/en/nitro_en/report.htm.

4.1 Mitigation or compensation: the Dutch motorway A2

An illustrative case is the widening of the Dutch motorway A2 in the south of the Netherlands, between the cities of Den Bosch and Eindhoven. The A2 was and is a well-known congestion point and the Dutch Ministry of Infrastructure and the Environment had decided on the widening for economic reasons. The project comprised the construction of four additional motorway lanes resulting in a motorway with four lanes in each direction instead of two. It provides for a good insight in how the Dutch government has been struggling the last few years with nitrogen deposition on Natura 2000 areas. This case led to a judgment by the European Court of Justice of 15 May 2014, the so-called *Briels*-case.[9]

From the point of view of nature protection law, the problem with this project was that the motorway is adjacent to a Natura 2000-site called *Vlijmens Ven, Moerputten & Bossche Broek* and the presence of the protected habitat type Molinea meadows in the part of the Natura 2000-site right next to the motorway which would suffer from an increase in nitrogen deposits. Molinea meadows are sensitive to nitrogen, and the broader motorway would attract more traffic and therefore the nitrogen deposits on the Natura 2000-site would increase. But there was a solution found for that: A new area of Molinea meadows was to be developed in a more distant part of the Natura 2000-site, so that the total area and quality of the habitat type would not be diminished and actually enlarged.

The competent Dutch authority argued that the development of a new area of molinea meadows was not a compensatory measure for the disappearance of natural values elsewhere, but that it could be considered as a mitigation measure. The difference is, that if it is considered compensation, Art. 6 (4) requires that there are no alternatives for the widening of the motorway, and that there is a compelling reason of public interest to carry out the project. If it is judged a mitigation measure, the line of reasoning is that there are no significant effects and therefore the project may be carried out without further demands.

The Court denounced the Dutch line of reasoning:

> 39 Consequently, it follows from the foregoing considerations that Article 6(3) of the Habitats Directive must be interpreted as meaning that a plan or project not directly connected with or necessary to the management of a site of Community importance, which has negative implications for a type of natural habitat present thereon and which provides for the creation of an area of equal or greater size of the same natural habitat type within the same site, has an effect on the integrity of that site. Such measures can be categorised as "compensatory measures" within the meaning of Article 6(4) only if the conditions laid down therein are satisfied.

9 ECJ 15 May 2014, C-521/12.

4.2 The Dutch practice of "external netting" until 1 July 2015

Nitrogen deposition on Natura 2000 sites does not only cause a problem for road builders, but also for farmers that wish to increase their cattle stock and for factory builders. As many of the Dutch Natura 2000 sites have been identified as sensitive to nitrogen, even very small increases in nitrogen deposition are deemed to have a significant effect. Whereas some infrastructural works and some factories and power plants may pass the ACC-test of Art. 6 (4) Habitats Directive, for farmers who want to increase their stock, this can hardly be the case. What compelling reason of public interest can be found for a private agricultural business expansion?

Therefore, the licensing under the Dutch Nature Protection Act esp. in the agricultural sector has become increasingly difficult. The only real possibility for licensing a stock increase was for a farmer to buy out another business and to use those "deposition rights" to increase his own cattle stock. This is called "external netting" and allowed by the Council of State if there is a clear connection between the one's business stopping and the other's increase in cattle. Such a connection may be established by a contract between the two farmers.[10] The idea is therefore that a farmer who wishes to extend his business, may use the fact that one of his neighbouring farms stops his business buy buying that neighbour's "deposition rights", and thus the project as a whole (which consists of an extending business on the one hand and a diminishing or stopping business on the other) does not have a significant negative effect.

4.3 The Programmatic Approach to Nitrogen since 1 July 2015

The possibility of "external netting" is over since 1 July 2015, the day the new Act of Parliament on the Programmatic Approach to Nitrogen (PAN) has come into effect.[11] The Dutch legislator has been looking for ways to give more space to more economic development despite Natura 2000. It has considered that, on the whole, nitrogen deposition is decreasing over time, be it in a slow pace. This is a result of the development of more environmental-friendly techniques to make cars and factories less polluting. This decrease, so it is considered, may partly be used to grant licenses for new economic development. Thus, nitrogen deposition on nitrogen sensitive Natura 2000 areas is still falling but at a lower rate than without the extra licensing.

The PAN has a threefold objective, namely to reduce the levels of nitrogen deposition on the whole, to impose restoration measures on nitrogen sensitive Natura 2000 sites, and to give some leeway for licensing to allow some more economic development. Also from the perspective of nature protection, there are

10 E.g. Council of State, 16 March 2011, ECLI: NL:RVS:2011:BP7785.
11 *See* the proceedings of the States-General nr. 33 669.

certainly good things about the PAN. One of the most important measures seem to be changes to the water management in and near Natura 2000 sites, as this may increase the ability of the present habitats to deal with the nitrogen deposition. Nevertheless, the PAN would not be in place if it weren't for the perceived need of more space for economic development.

How does the PAN work?[12] Underlying the whole system is a computer programme called Aerius in which a whole range of Natura 2000 sites are included. In the programme an extensive number of nitrogen emitters are included, and it can calculate the effects a change – like the construction of a road or an increase in livestock – will have on the nitrogen deposition on the different Natura 2000 sites. As there is an expected decline in background levels of nitrogen deposition, the computer programme registers "development space" available for economic development. It's the different government agencies that hand out that "development space" by licensing projects, if they need more than 1.00 mole/ha/year of development space. In Aerius, development space is reserved for developments between 0.05 and 1.00 mole/ha/year that no longer need a license but for which it is sufficient if they are reported. When the development space threatens to run out, the 1.00 mole/ha/year level is lowered to 0.05 mole/ha/year, so all developments with effects over 0.05 mole/ha/year must be reported. All effects under the 0.05 mole/ha/year threshold are considered not to be significant.

As to how the development space will be divided, the Secretary of State of Economic Affairs has the first say. She has identified priority projects, which are the first eligible for development space. After the priority projects, the provinces may prioritize projects and give policy rules (soft law) as to how the space will be divided. The national PAN programme including the priority projects has been under consultation and the final version is soon to be published.

Among lawyers, there are serious doubts as to the compatibility of PAS with Article 6 (3) of the Habitats Directive.[13] The main problem is that Article 6 (3) demands an appropriate assessment on the level of the project. If the project has negative effects that may adversely affect the integrity of the site, permission is only granted under the ACC-test, which can only be done if the project has no alternatives and there are imperative reasons of overriding public interest to execute it. In the case of development space for allowing extra nitrogen deposition handed out under the PAN, this development space is calculated by the Aerius computer programme. That development space comes from developments exterior to the project and is not a result of an interior mitigation

12 Much Dutch-language information on the PAN can be found on http://pas.natura 2000.nl/.

13 *See* e.g. A.A. Freriks, Juridisch gekissebis over mitigatie en compensatie: wankelt het fundament van de Programmatische Aanpak Stikstof?, in: T.W. Franssen a.o. (eds.), Op het grensvlak, The Hague: Instituut voor Bouwrecht 2014.

measure. It is therefore very doubtful that the Courts will allow for the handing-out of development space to be seen as mitigation measures. This will mean that most projects will not be eligible for development space out of the PAN. And for those who do qualify under Article 6 (4) and may get development space, we do not need the PAN to come to this conclusion. So, in sum, the problem with the PAN, being system-oriented, is that it does not fit well in the frame of thought of Article 6 of the Habitats Directive, which is project-oriented.

The Dutch government, however, maintains that the PAN is compatible with Article 6 of the Habitats Directive and is confident that it will stand the test before the courts.[14] We will see what the Dutch Council of State or maybe even the European Court of Justice will find as to the compatibility of the PAN with Article 6.

5. Nitrogen deposition: the German method

Looking at the Dutch case-law, one is struck by the low significance levels that are used. It makes one wonder what other European countries use as a threshold of significance. Therefore, I will look at Germany, the Netherlands' big neighbour. Large parts of Germany have background levels of nitrogen that are comparable to those of the Netherlands.

From the case-law of the *Bundesverwaltungsgericht*, the highest federal administrative Court, it turns out that nitrogen deposition first of all is not considered to have a significant effect if it does not reach a threshold of 100 g N/ha/year. Please note that this is a different unit than used in the Netherlands, but 100 g N/ha/year is about 7.14 mole/ha/year. The 7.14 mole threshold is much higher than either the 1.00 or the 0.05 mol/ha/year threshold used in the Netherlands. Furthermore, if the deposition exceeds the 7.14 mole but is less than 3% of the calculated critical load[15] and the maximum critical load has not yet been reached, it is also deemed to be not significant.[16] Thus, levels of nitrogen deposition that are judged not significant and therefore allowed in Germany, are not allowed in the Netherlands.

Why are there such huge differences between Germany and the Netherlands as to when an increase in nitrogen deposition becomes significant in the meaning

---

14 *See* the Explanatory Memorandum to the Act of Parliament, in the Proceedings of the Second Chamber of the States-General, 2012-2013, 33 669, nr. 3, p. 2.

15 The critical load being the maximum of nitrogen deposition the habitat type in question can handle.

16 Bundesverwaltungsgericht, judgment of 23 April 2014, 9 A 25.12, to be found on www.bverwg.de/entscheidungen and published in Natur und Recht (2014) 36:706-718. This method is described in S. Balla a.o., Eutrophierende Stickstoffeinträge als aktuelles Problem der FFH-Verträglichkeitsprüfung, in: Natur und Recht 2010, p. 616-625.

of Article 6 (3) of the Habitats Directive? After all, it is in the core the same open norm that has to be applied, be it in two different EU Member States. The Dutch approach seems to be that any measurable or calculable effect is significant, esp. for habitat types where the current deposition already is above the critical load the habitat type can take. In Germany there seems to be a different reading of the word "significant", where margins of statistical uncertainty play a role.[17]

It's not for me to answer which significance level should be taken: the Dutch, the German or even another one. In the end, the ECJ is the final authority to decide which levels of significance will be acceptable and which levels are not. However, the difference is striking. As a counterbalance it should be added, that if a Natura 2000 site suffers under overly high nitrogen deposition levels, the Member State is under the obligation to take measures under Article 6 (2) of the Habitats Directive, so if Germany is more lenient in its licensing it may have to take more positive government measures to restore the integrity of the site in another way.[18] The Dutch PAN does provide for such positive measures also.

Natura 2000 is a European network, and cross-border effects are to be taken into account also. When the Dutch provincial government granted a power plant near the German border, it decided that the nitrogen deposition on the Dutch Natura 2000 sites should be judged to Dutch standards, whereas for the effects on the German Natura 2000 sites, judged by the same Dutch authority, the German standard may be used.[19] The idea is that it must be assumed that the German method is in accordance with Art. 6 (3) of the Habitats Directive:

> 22.5. With regard to the method which is based on the report of the Kieler Institut für Landschaftsökologie, the Administrative Jurisdiction Division of the Council of State considers as follows. Given the obligations under Article 6 (3) of the Habitats Directive, the competent German authorities also may only authorise an activity when they are certain that the activity does not adversely affect the integrity of the site concerned, based on the best scientific knowledge and taking into account the specific characteristics of the German Natura 2000 sites. The methodology is applied in practice in licensing procedures in Niedersachsen. The use of the method is common in Germany. Also in view of Article 4 (3) of the Treaty of the European Union, the defendants may therefore in principle assume that the method used in the IBL report on nitrogen deposition for the assessment of the effects of the increase in nitrogen deposition on

17 *See* L. Boerema, Het stikstofdoolhof: Wat als de PAS omvalt?, in Journaal Flora en fauna (2014) 1:3-16.

18 Although it must be noted that nitrogen deposition does not stop at borders, so it lays the same burden on the neighbouring Member States as well.

19 *See* paragraphs 22 – 22.14 of the decision of the Council of State, 16 April 2014, ECLI:NL:RVS:2014:1312.

> German Natura 2000 areas is in accordance with Article 6 (3) of the Habitats Directive.[20]

Whereas it is understandable that the Council of State upholds the German method as being in accordance with European obligations, and that it allows the Dutch authorities to use the German method when considering the cross-border effects on the German Natura 2000 sites, it raises questions as well. If it is correct that the German threshold of significance of 100 g/ha/year (converted to Dutch units: 7.14 mol/ha/year) is in fact in accordance with Art. 6 of the Habitats Directive, which we do not know, it makes one wonder if the Dutch threshold of 0.05 mol/ha/year now and of 1.00 mol/ha/year in the near future, may be unnecessarily low. This, especially in the view of the fact that the Netherlands has now introduced a new system called PAN of handing out development space by the use of a computer programme of which, as explained, it is doubtful if it is maintainable under the Habitats Directive. In the end, it is up to the ECJ to give its final verdict, but we will have to wait for a case to be submitted to the Court.

6. Conclusion

The divergence of the interpretations of what is "a significant effect" between the Netherlands and Germany when it comes to nitrogen deposition is striking. The significance threshold of 7.14 mole/ha/year is approximately 140 times higher than the 0.05 threshold used in the Netherlands. When the relevant public, such as farmers and other economic actors, know about these differences (which they do, certainly in the border regions of the two countries), they complain that the level playing field between the two countries is distorted. In the eyes of Dutch farmers and their associations, the Dutch authorities are too strict in view of the more lenient German neighbour. This makes them lose trust in their own authorities.

There is a second, more internal reason why the way the Netherlands deals with nitrogen deposition on Natura 2000 sites is relevant in view of public trust. The introduction of the PAN with the promise that there will be development space for economic activities including farming boosts expectations, not only among farmers but also among other economic actors. If the Aerius computer programme used in the PAN does not provide enough development space to satisfy the demands, or if the PAN turns out not to be in accordance with Art. 6 of the Habitats Directive, the attitude of farmers and other economic actors may possibly change to frustration, and trust in government bodies and in the courts may diminish. This may have repercussions on the trust people have in the European institutions also. The fact that Germany uses higher thresholds makes the Netherlands - rightfully or not - look unnecessarily strict when it comes to

[20] My translation, PM.

nitrogen deposition on Natura 2000 sites. This creates the risk that the support for nature protection and for the Nature 2000 network, as well as the support for the European Union as such, may diminish. Only the future will tell if this risk turns out to be real.

In my view, what is needed to enhance public trust in the way nitrogen deposition on Natura 2000 is judged, is to come to more agreement between the European Member States than we currently have on what level of nitrogen deposition may constitute a significant effect on protected habitats as meant in Art. 6 (3) of the Habitats Directive. Small differences between Member States of the European Union may exist, but where large unexplainable differences emerge, such as illustrated above, public trust may be compromised. This means that the ECJ will on some day have to decide which level of significance is acceptable and which is not. In the meantime, we will have to live with the divergences and the strain it puts on public trust, in the absence of an ECJ judgment that leads us the way.

Goal Regulation, Democracy and Organised Distrust*

*Pauline Westerman***

Introduction

It is quite common to advocate alternative forms of democratic participation and control as a means to foster and enhance public trust in the performance of public institutions. Museums, hospitals, schools and universities are frequently required to make themselves accountable to the public by regularly reporting on the results they achieved, and to show what has been done with taxpayer money. Next to this, it is hoped that the distance between regulators and the regulated can be bridged by allowing for more direct forms of democracy, and to devise better and more direct forms of self-regulation. It is hoped that people will feel more committed to rules if the rule-makers are from within their own field, and endowed with the required local knowledge.

In this article I will analyse these new forms of accountability and participation under the heading of goal regulation, and inquire into the extent to which indeed public trust can be said to be enhanced by this alternative style of regulation. I will first sketch a rough outline of the special features of goal regulation and analyse its dynamic in terms of the familiar Principal Agent model. A central problem in P-A relations is to what extent the Agent can be trusted.[1] It is therefore of vital importance to adequately identify the Principal and the Agent in a system of goal regulation. After that, I will address the question of whether or not these new forms of participation and control can be interpreted as more democratic than classical representative democracy. It will be argued that their democratic merits are very limited and therefore cannot inspire the kind of public trust that is called for.

---

* This is an adapted version of my article "Doelregelgeving en democratie" in: *Recht in geding*, ed. by Groenhuijsen et al., Boom Jur., 2014, pp. 125-134.

** Professor in Philosophy of Law at the University of Groningen and member of staff at the Academy for Legislation in The Hague.

1 I will therefore confine myself to an analysis of trust in a P-A relationship and not deal with the various concepts of trust and their shades of meaning as such.

1. Goal regulation

Since the 1990s of the previous century, a new style of legislation has emerged that has been analysed under the heading of "principles-based regulation"[2] but which I prefer to call "goal regulation".[3] In a system of goal regulation, the legislator no longer issues detailed legislation that prescribes how citizens should act and what they should do or refrain from doing. In a system of goal regulation laws are made that merely indicate the goals to be achieved and/or the interests that should be protected. It is not prescribed *how* a goal should be achieved; the law merely imposes an abstract duty of care and commissions other parties to concretise that duty in more detailed rule-making.

Usually such a goal-law is not addressed to individual citizens but directed to a host of institutions, such as inspectorates, professionals, public institutions or professional associations. These actors are all in one way or another involved with the central goal or interest mentioned in the central abstract duty of care. Together they form a so-called *regulatory regime*.[4] This set of institutions is commissioned to take the necessary measures in order to achieve the imposed goal. Rulemaking is just one such measure.

This does not mean that rulemaking is entirely delegated to the regulatory regime. The central legislator remains responsible for the degree to which aims are realized and require the regime to regularly report on what has been achieved and which steps have been taken in order to reach the goal. Goal-laws, therefore, typically consist of three elements.

1. *The proper goal-prescription*: Aim A is desirable and needs to be furthered or reached.

2. *A duty to implement*: In order to achieve aim A, measures should be taken and rules drafted.

3. *A duty to report*: Report about the progress that is made towards aim A.

---

2 Julia Black, Decentring Regulation: Understanding the role of regulation and self-regulation in a post-regulatory world, in: *Current Legal Problems* (2001) 54, pp. 103-147 en *Forms and Paradoxes of Principles Based Regulation*, LSE Law, Society and Economy Working Papers 13/2008, London School of Economics and Political Science, Law Department, http://ssrn.com/abstract=1267722.

3 *See* P.C. Westerman "Governing by Goals: Governance as a Legal Style", in: Legisprudence: International Journal for the Study of Legislation, Hart Publishing, 2007, pp. 51-72, The Emergence of New Types of Norms, in: Luc J. Wintgens (ed.) *Legislation in Context: Essays in Legisprudence*, Ashgate, Aldershot, 2007, pp. 117-133.

4 *See* Christopher Hood *et al*., *The Government of Risk*: *Understanding Risk Regulation Regimes*, Oxford U.P., 2001.

A good example of such an Act is the Wildlife and Natural Environment,[5] which states that

> 1. It is the duty of every public body, in exercising any functions, to further the conservation of biodiversity so far as is consistent with the proper exercise of those functions. [….] In this section "public body" means–
> (a) a Northern Ireland department;
> (b) a district council;
> (c) a statutory undertaker within the meaning of the Planning (Northern Ireland) Order 1991 (NI 11);
> (d) any other body established or constituted under a statutory provision.
> (2) The Department must designate one or more strategies for the conservation of biodiversity (whether prepared by the Department or by one or more other persons).
> (3) The Department must–
> (a) not later than 5 years after the coming into operation of subsection (1),
> and
> (b) at least once in every period of 5 years thereafter, publish a report regarding the implementation of any strategy designated under that subsection.

It is clear that the Act is addressed to a set of "public bodies", and contains all three elements. In (1) an abstract duty of care is imposed to a large set of norm-addressees ("any other body…"). In (2) it is left unclear which strategy should be followed. The main thrust of the Act is its third element (3): the duty to report which strategies have been designated and followed. Only as regards this third element can non-compliance be sanctioned.

2. Outsourcing

Goal-legislation was initiated in Sweden as early as the sixties[6] and originated as a response to the complexities of regulating a welfare state. But it was only in the nineties, when the problems and pitfalls of the European harmonization process became clear, that the virtues of goal-legislation were advertised as a panacea against overregulation.[7] Goal-legislation was represented as a solution to two pressing problems: the need for flexible and tailor-made laws and the

5 Northern Ireland 2014. I owe this example to Ronan Cormacain. *See* http://www.legislation.gov.uk/nia/2011/15/pdfs/nia_20110015_en.pdf, last acces-sed Nov 4, 2014. Paragraph numbers have been changed in order to conform to my threefold division.

6 I learnt this from my – half-Swedish – PhD student Annewietske Enequist who also alerted me to the early literature concerning the pros and cons of goal regulation, which is unfortunately only accessible in Swedish.

7 *See* European governance: a white paper, Brussels, 2001, Commission of the European Communities.

impossibility of imposing uniform and detailed rules from one central point on various diverse institutional settings and legal cultures. Moreover, it seemed to be the ideal strategy to implement the principle of subsidiarity that had been adopted in the Treaty of Maastricht as one of the pillars of European unification. This principle requires that powers or tasks should rest with the lower-level sub-units of a certain political order "unless allocating them to a higher-level central unit would ensure higher comparative efficiency or effectiveness in achieving [the policies]".[8]

Various arguments have been adduced in favour of the principle and the corresponding alternative forms of legislation, mainly based on expectations rather than empirical data. One of these expectations is that the central units will be relieved from their heavy regulatory tasks; another is that the lower echelons, since they are more directly involved with the issues at hand, will have more detailed knowledge than the central unit which is regulating matters from a distance. And finally it is hoped that these lower echelons will be more committed to compliance if they had been more directly involved in the making of these rules.

Outsourcing regulation is therefore the keyword. In order to conceptualise the relationship between those who outsource and those to whom it is outsourced we may make use of the old and well-known distinction between Principals and Agents. The Principal commissions the Agent to carry out a certain task in order to pursue an aim, desired by the Principal. The P-A distinction used to be applied mainly to the relation between electorate and parliament or between stakeholders and board of a corporate firm. But gradually the P-A terminology has been applied to all kinds of outsourcing relations and has brought about an abundant supply of literature on P-A relations.[9]

The central problem of this relationship is exactly one of the reasons why outsourcing is usually decided upon: The Principal outsources certain tasks if they have neither the knowledge nor the resources to perform the tasks themselves. This inevitably implies a certain information-asymmetry: The Agent knows more

---

8 Føllesdal, Andreas, Survey Article: Subsidiarity, in: *The Journal of Political Philosophy*, Vol. 6, nr. 2, 1998, pp. 190-218.

9 Mathew D. McCubbins, Roger G. Noll, Barry R. Weingast, Administrative Procedures as Instruments of Political Control in: Journal of Law, Economics, & Organization, Vol. 3, No. 2 (Autumn, 1987), pp. 243-277 Oxford University Press,; Moe, T., Political Control and the Power of the Agent, Journal of Law Economics & Organization 2006 vol:22 iss:1 pg:1 -29; Jonathan R. Macey, Organizational Design and Political Control of Administrative Agencies in: Journal of Law, Economics, & Organization, Vol. 8, No. 1, Conference on the Economics and Politics of Administrative Law and Procedures (Mar., 1992), pp. 93-110, Oxford University Press; Michael E. Levine and Jennifer L. Forrence, Regulatory Capture, Public Interest, and the Public Agenda: Toward a Synthesis Journal of Law, Economics, & Organization, Vol. 6, Special Issue: [Papers from the Organization of Political Institutions Conference, April 1990] (1990), pp. 167-198 Oxford University Press.

than the Principal. The recurrent question is therefore; how can the Principal be sure that the Agent does not utilize their knowledge for their own advantage instead of using it to achieve the goals of the Principal? A dilemma that is often compared to that of the tourist (Principal) arriving at an unknown airport and has no other option than just rely on the cab driver (Agent) to bring them as soon and as efficiently as possible to the hotel rather than taking costly detours or, worse still, bringing them directly to a slum in order to leave them there and then having their clothes and possessions robbed. The typical P-A dilemma is therefore about trust.

3. The proliferation of rules and actors

Goal-legislation should not be seen as a drafting technique that is only used at central government levels. The formulation of a goal-act usually entails a process in which all the parties involved (the entire regulatory regime) issue goal-laws in their turn. In this process the threefold structure of the goal-rules is continuously reproduced: goals are formulated and imposed on agents who are thereby commissioned to achieve those goals and are required to report on what has been done. Sometimes, the duties to draft rules are effectively carried out. Then, the agent effectively develops standards for what should be done or omitted. In most cases, however, we see that the Agent responds by formulating a list of *more concrete* goals and targets, which are then imposed in turn to another Agent. The process of rule-making should therefore be conceptualised as mainly a process of concretisation.

During this process the abstract goals (clean environment, reliable health care, good working conditions) are concretised in two ways. In the first place, the abstract goal is concretised by enlisting its *component parts*. E.g. "reliable health care" is analysed in more concrete goals such as "adequate training facilities", "hygiene", etc. The second way in which abstract goals are concretised is by indicating the *degree* to which these goals (or component parts of these goals) should be realised. This form of concretisation is achieved by means of benchmarking, often accompanied by the explication of best practices.[10] The input of (non-legal) experts is essential in order to regulate matters at this concrete level. We should note that at the most concrete level it can be difficult to distinguish goal-rules from the ordinary action-prescribing-rule. "Take measures in order that the window is closed" is a goal-rule but hardly different from an act-rule such as "close the window". Nevertheless, there is a marked difference between the prescription to use tiles "that can be easily cleaned" and a prescription that "tiles of such and such material" should be used. The former type of regulation can be categorized as a result-prescribing rule that is derived from more abstract goal-

10 The whole process is described by Enequist, who compares Swedish and Dutch concretisation practices of goal-legislation on Elderly Care: *see* Anne-Wietske Enequist, A.L.E., From abstract goals to concrete rules: Regulating nursing home care in Sweden and the Netherlands, PhD thesis, (Ridderprint, Ridderkerk, 2015).

rules. Such a goal-rule may leave some freedom on the part of the norm-addressee to determine the best means to achieve the result (and to experiment with different tiles). Also, since the rule is about the result rather than about the act, it is indifferent as to who should effectively bring about the intended result. Goal-legislation, even in its most concrete form, is therefore "naturally" accompanied by strict liability.

This process of concretisation and continuous outsourcing brings about an enormous proliferation of rules, standards, performance-indicators and benchmarks. They not only arise from the necessity to concretise the abstract goals, but also from the duty to report. It is not enough to report that one took an effort. The Agent should report by indicating concrete, controllable, measurable results as proof that she indeed furthered the imposed aim. The proliferation of rules corresponds to an equally intense process of proliferation of *actors.* Intermediate levels of employees are created who are constantly busy in developing benchmarks, gathering data, reporting and auditing. Goal-rules therefore set a dynamic in motion in which more rules call for more actors who in turn produce more rules.

4. In the shadow of the law

It is not my intention here to just reiterate the usual complaints about over-regulation. More important is the observation that all these rules and standards are predominantly made, applied and enforced outside the formal legal system with its in-built checks and balances. The only thin thread that links the (goal)regulatory rules and standards to the formal legal system is the – highly uninformative – original goal-act, issued by the central government. The further process of concretisation takes place in the shadow of the law. As such, it borrows its coercive force and efficacy from a large part from official law but is not accompanied with the usual formal warrants.

An example might serve to illustrate this point. In the Netherlands the legislator issued a legally valid and broad clause saying that companies using harbour facilities must take appropriate safety measures in order to prevent accidents in loading and unloading dangerous substances. Since this law does not stipulate precisely what counts as appropriate safety-measures, the scope for discretion on the part of the norm-addressees is fairly wide. Formally they had the choice to use gangways, ladders, or what else seemed fitting the situation. However, the Inspectorate drew up more precise standards, specifying – to an absurd degree of detail – the sizes and location of escape routes. It is important to note that these rules lacked legal status and were not formally binding. Moreover, the prescribed precautionary measures were generally perceived to be unnecessary since there were many more and less expensive ways to safeguard safety. Yet, the companies together spent 400 million euros in order to comply with these non-binding rules.

These rules were perceived to be legally binding, and it was believed that by not complying one risked incurring sanctions or in any case disreputable litigation.[11]

It should be clear that goal regulation is not a marginal affair. The majority of public institutions are regulated in this way. The average citizen is therefore much more often and much more intensely affected by these regulatory rules than by the official rules that unequivocally belong to the legal system. The average citizen may be occasionally in touch with private law when they buy a house, when they marry, set up a business or when they draw up a testament, and they may rarely if not never in their whole life be in touch with criminal law. But living in modern society, the average citizen is almost *always* affected by goal regulation.

If our average citizen teaches in a primary school, they have to fill in daily the forms required by the inspection about the progress made by their pupils. As director of such a school they have to fill in many more forms and to engage in an ongoing dialogue with inspection as well as a number of governmental or semi-governmental boards and intermediate institutions or committees. If our citizen happens to care for the sick or elderly, their professional work is surrounded, if not dictated, by rules telling them at which times they should wake up the patients, how they should supply them with their daily meals or how diagnoses should be established. Again, they should report daily on what has been going on. And if our citizen works as a plumber and has their own small plumbing company, they have to be kept informed about the kind of certificates that should be obtained in order to be recognised as a reliable plumber.

Since these all-pervasive rules are only partially connected to the formal legal system they not only fail to meet for a large part the requirements of the Rule of Law, but also seem to suffer from a democratic deficit. The standards, benchmarks and performance indicators are developed and changed by institutions and by actors who do not engage in a public debate and are largely hidden from view of those who are affected by these rules.

Yet, goal regulation has been advocated not as a threat to democratic decision-making but as a means to *enhance* democratic participation and control. The proponents of goal regulation usually adduce two arguments in favour of this view. The first argument runs that goal regulation calls for participation of "civil society". Goal regulation is not a top-down affair and invites those who are most intensely affected by regulation to really participate in rule-making; it develops a level of democratic deliberation and decision-making which cannot be attained by traditional representative democracy.[12]

---

11 Zie W. Timmer, *Bestemming bereikt! Een praktijkonderzoek naar de toepassing van doelregelgeving*, diss. EUR. 2011.

12 R.D. Putnam, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton U.P., Princeton, 1993; E.R. Engelen en M. Sie Dhian Ho (red.), De staat van de

The second argument runs that since goal regulation is always accompanied by a duty to report on what has been achieved, transparency is its main virtue. The duty to report to supervisory bodies also implies accountability to the public at large. Performances of hospitals and schools are publicised on the Internet and made accessible to all stakeholders involved, which in turn would enhance forms of democratic control.

In the next section I will examine the claim that the democratic quality of rule-making is improved; in section 6 I will deal with the accountability claim.

5. Democratic rule-making?

It is true that rule-making by field parties is one of the main features of goal regulation. But should we understand this rule-making as self-regulation? As I argued elsewhere,[13] self-regulation within a goal-regulative context is neither spontaneous nor voluntary. The social field regulates itself because the goal-act *obliges* the field to do so. Usually, self-regulation takes place because government officials threaten to regulate matters in a classical top-down manner if the parties do not develop the rules themselves (so-called "conditional self-regulation").[14]

The Principal not only imposes the obligation to make rules, but also determines *who* should do so. This seems at odds with the observation that goal-rules often leave the norm-addressees unspecified, but we should keep in mind that although such an act is formally addressed to a host of institutions, the government has a big say in composing the groups that are influential in shaping the rules of the field.

The Dutch Act on the Quality of Care Providers offers a striking illustration of this policy. Several years after the Act had been adopted, the field had barely taken steps to draft the various Quality Management Systems that were required by the Act. This prompted the Ministry of Health to establish a so-called Steering Group: a group in which insurance companies, care-providers, inspectorate and professional associations were represented.[15] The Steering Group initiated further regulation.

---

democratie. Democratie voorbij de staat, Amsterdam U.P. 2004. pp. 173-196.; Charles F. Sabel, Beyond principal-agent governance: experimentalist organizations, learning and accountability.

13 P.C. Westerman, Who is regulating the self? Selfregulation as outsourced rulemaking, in: Selfregulation, thematic issue of *Legisprudence: International Journal for the Study of Legislation*, Vol. 4, no 3 2010, pp. 225-241.

14 Eijlander, Philip, en Wim Voermans, *Wetgevingsleer*, Tjeenk Willink, Deventer, 1999.

15 *See* Enequist, *op.cit.,* Ch 3.

We can therefore safely assume that the way the "self" is constituted is largely determined by the civil servants of the Ministry.[16] The Ministry usually does not invite individual professionals; people are only involved as representatives of associations, institutions and boards. It is the intermediate level of managers rather than the individual nurses and teachers who are regulating the "self".

But even if the Principal would succeed in inviting all relevant partners, this kind of participation remains organised along the sectoral lines that are drawn by the policy-goals around which a regulatory regime is organised. Those who deliberate do not deliberate *as citizens* but as producers or consumers of the goods and services indicated by the central aim. The closest one can get to citizenship is by being a stakeholder organised in an interest group, but also there, the room for deliberation is determined by the central aim. A member of the environmental movement is not entitled to deliberate about higher education.

The sectoral organisation is also responsible for the *kind* of deliberation that is permitted in the context of goal regulation. There is only room for debate about what the aim consists in, and how the various ingredient parts of that aim or sub-aims should be concretised in targets or performance-indicators. There is no room for weighing and prioritising the relation *between* the various aims. As every discussant is so to speak locked up in their own sectoral regulatory regime, there is no room for a debate concerning the balance between e.g. employment and environmental issues.

This is more than just an academic issue. The director of a hospital is confronted with various lists of criteria and demands, stemming from different regulatory regimes, such as health care, labour conditions, or environmental measures. It is to the individual director to weigh and balance the various requirements; a public forum for discussion is systematically lacking.

6. Democratic control?

The second argument adduced by those who expect goal regulation to enhance democracy is that the duty to report adds to transparency and therefore accountability to the public at large. Here, the democratic potential is not sought in making the rules but in accounting for what effectively was achieved. I will abstain here from an elaborate analysis of different forms of accountability[17] and draw attention to just a few features of accountability within a regime of goal regulation.

---

16 M.R. Ramlal, Naar een glazen wetgevingshuis. Belangeninbreng, transparantie en de wetgevingsjurist in ambtelijk Den Haag, Boom juridische uitgevers, 2011.

17 Mark Bovens, Analysing and Assessing Public Accountability. A Conceptual Framework. European Governance Papers (EUROGOV) No C-06-01, http://www.commex-network.org/eurogov/pdf/egp-connex-C-06-01.pdf.

In the first place it should be noted that in a system of goal regulation the institution should not account for what went wrong but for what is positively achieved. The institution should report to what extent the objectives are realized. In itself this is a very difficult task. It presupposes consensus on what counts as a good performance.

In the second place: how is it possible to prove and demonstrate that a good quality of education/healthcare/art was achieved? Only by presenting indicators which are measurable, demonstrable and controllable. The relation of these indicators to the underlying aim, however, is often artificial and at best an indirect one (think of the number of articles in peer-reviewed journals as an indication of "academic excellence"). Often, performance-indicators are not even indirectly linked, as is the case with the policy documents, mission-statements, protocols and certificates, together forming a "portfolio" that act as a substitute for real achievements. Remarkably enough, these documents owe their value not to their content but to their existence. The protocol can be copied from other institutions. What counts is that it is there.

These more or less artificial criteria determine in turn the way how the aim is perceived by the broader public, i.e. the stakeholders such as clients, patients or visitors. The mere information that in a certain hospital the amount of cardiac surgeries performed falls below the benchmark that was determined by the Inspectorate will be interpreted by the larger public as an expression of the importance of this criterion. I don't suggest here that the criteria of Inspectorates lack relevance, but it is important to realise that to a large extent the judgment of the public will be *shaped* and informed by the very criteria that are drawn up by the same institutions that are evaluated at a later stage. Since the public does not have its own set of criteria, the transparency that is achieved here should not be overrated. The criteria that are determined by field parties are transformed into operational criteria by managers and then presented to the larger public as *the* criteria by means of which performances should be evaluated.

We should also be careful not to overestimate the role of the public, for the simple reason that in these contexts the public is not the Principal to whom the institutions are accountable. The public is a third party, a stakeholder. Not the one who commissioned the agent to carry out a certain task and not the one who attaches consequences to mal-performance.

7. The people: Principal or Agent?

This raises the question of whether or not it is possible for the public (or the "people" to use that old but nowadays obsolete expression) to act as a Principal at all. This is not a very farfetched question. As I noted above, the P-A model was traditionally applied to the relationship between the electorate and representative parliament. The electorate is then conceived as the Principal. They commission

the parliament to speak in their name. According to this classical view, the task that is entrusted to the Agent seems to consist of a broad mandate to represent the interests of the people.[18] If the Agent fails to live up to expectations, the electorate (Principal) can hold the Agent accountable for their failure to represent their interests adequately and decide not to vote for him again.

There is no such leverage in the two advocated possibilities to democratic participation in a goal-regulative context. Neither of these possibilities allow the public to act as a real Principal. In the first option (rulemaking by the field parties involved), the field parties act as Agent and not as Principal. Those who develop the standards and who draft the rules do this because they are required to do so and in pursuance of the Principal's policy aims. They make the rules not by virtue of their being citizens – citizens have disappeared from view in the goal-legislative landscape – but by virtue of their expertise as consumers or producers of the services and goods that are centred around the imposed aim. They are the cab drivers and not the clients. It is therefore not only artificial but also misleading to interpret the activities of such cab-drivers as forms of democratic participation.

The second option fares no better. It may be true that the public has access to the information concerning the performances of public institutions, but they are – again – not the true Principal. They are, at best, bystanders. The real Principals are those who allocate the resources, the subsidies as well as the licenses and accreditation necessary to continue what the agent is doing. They may decide to allocate resources on the basis of considerations such as the amount of visitors attracted, but in such cases the public is just a performance indicator, not a Principal.

One might object to that if the government acts as Principal, imposes its aims and gives subsidies, it thereby acts in name of the people, and that the people are in the final instance the last and true principal. Formally speaking, this is correct. But this means that democratic legitimacy then depends on the mechanisms of classical representative democracy. And we have seen that this formal form of democracy is only linked to the bulk of regulation by means of the very thin thread of the original abstract goal-act. This means that alternative arrangements such as new forms of self-regulation and of accountability do not *add* anything which makes this style of regulation more democratic. On the contrary; in the first option the citizen is obliged to commit themselves to the purpose around which their work is organised, and in the second option they function at best as a performance-

[18] It should be noted that in more recent versions, the mandate is understood more narrowly as the provision of certain (public) goods and services. *See* Randall G. Holcombe and James D. Gwartney, Political Parties and the Legislative Principal-Agent Relationship, *Journal of Institutional and Theoretical Economics (JITE) / Zeitschrift für die gesamte Staatswissenschaft*, Vol. 145, No. 4 (December 1989), pp. 669-675.

indicator. Only in representative formal democracy, despite its many shortcomings, the citizen is the true and only Principal.

8. Conclusion: organised distrust reversed

On the basis of my arguments so far we cannot arrive at conclusive evidence concerning the trust-generating qualities of goal regulation. We can only conclude that appeals to its democratic nature are mainly rhetorical. Self-regulation is structured and commissioned by the government, which sets the parameters for debate along sectoral lines. Accountability mechanisms fare no better. The public mainly plays the role of the bystander. Public assessment of results is shaped by means of criteria drawn up by institutions themselves and if from time to time newspapers reveal "real" performances, usually hidden from view by positive reports that are mainly based on the presence of protocols and quality management systems, this does little to inspire or enhance confidence.

In view of the Principal-Agent relations within a goal-regulative context, we might advance the claim that relations are reversed if we compare them to the classical ideal of the electorate as Principal and parliament as Agent. In the classical view the role of the citizen is marked by a system of checks and balances; i.e. of *organised distrust* of governmental power. In a system of goal-legislation, matters are reversed. The citizen *qua* citizen has disappeared from view. If people are consulted and commissioned to carry out regulatory and supervisory tasks it is by virtue of their being a member of institutions: of being producers and consumers of "deliverables": goods and services. In other words, in their capacity of Agents. And as agents they have to show and to prove that they can be trusted. Again there is organised distrust, not of governmental power, however, but of the performances of all those who are engaged in the production of goods and services, including rulemaking. Bearing in mind that people generally tend to reciprocate expectations and to respond in just the same way as they are treated, there is reason to believe that, as a result of this distrust in the public, public trust will dwindle as well.

Principles-Based Regulation and Public Trust in the Post-Crisis World: The Dutch Case of Financial Services

Herman E. Bröring[*] and *Olha O. Cherednychenko*[**]

1. Introduction

The financial crisis of 2008 and misbehaviour, such as the large-scale selling of exorbitant insurance policies, also known as *woekerpolis*, and the Libor interest rate manipulation scandal involving a major retail bank *Rabobank*, resulted in an enormous decrease of public trust in the Dutch financial services industry. While the post-crisis era has witnessed a move away from the principles-based public regulation towards more prescriptive and centralised public regulation, both at the EU and Member State level,[1] the principles-based regulation has not entirely lost its significance in the aftermath of the crisis. In this contribution, we examine the role of principles-based regulation in restoring public trust in financial institutions and their services in the post-crisis world: is principles-based regulation the right way to overcome the crisis of trust in the financial markets?

First of all, we have to acknowledge that this trust crisis is a very stubborn problem. It is difficult to gain trust, and it is easy to lose it. After one negative experience ten positive experiences are needed to regain trust. In case of complex products, services and markets, even more efforts are to be made to restore it. Human beings are sense-makers, constantly trying to understand social situations. Even when there is no trust crisis, it is normal to keep one's distance from the financial markets because of a great deal of complexity involved therein. People become alienated when misconduct appears to permeate the whole financial sector. When a single bank, insurer or financial intermediary is cheating on a consumer, the latter can go to a rival company. When misbehaviour seems to be

* Professor of Integrative Legal Studies at the University of Groningen.

** Associate Professor of European Private Law and Comparative Law at the University of Groningen and Director of the Groningen Centre for European Financial Services Law.

1 *Cf*. eg C. Scott, "Standard-Setting in Regulatory Regimes", in R. Baldwin, M. Cave, & M. Lodge (eds), *The Oxford Handbook of Regulation*, (Oxford: Oxford University Press, 2010) 9, available at: http://www.oxfordhanbooks.com; N. Moloney, "Financial Services and Markets", in R. Baldwin, M. Cave, & M. Lodge (eds), *The Oxford Handbook of Regulation*, (Oxford: Oxford University Press, 2010) 8, available at: http://www.oxfordhanbooks.com; N. Moloney, "The Investor Model Underlying the EU's Investor Protection Regime: Consumers or Investors?", *European Business Organization Law Review* 13 (2012) 169, 180.

inherent to the financial branch as such, people cannot escape from the inconvenient situation. Their estrangement from financial services thus acquires a structural character.

The consumer alienation from financial institutions and services, however, is highly disturbing. On the one hand, financial services, such as payment, credit, investment, and insurance, have become an essential part of the everyday life of Dutch citizens. Such services allow citizens to meet their *essential* needs, such as having a home or sufficient income after retirement, and to fully participate in society. In mobilizing savings and allocating investment, financial services are also highly important for the (EU) economy. On the other hand, consumer confidence in financial markets is essential for their proper functioning. The financial markets simply cannot function without public trust.

Our examination of principles-based regulation in the post-crisis world as a possible solution for resolving the trust problem starts with the analysis of the rationale for this type of regulation, as well as the problems involved therein (section 2). Subsequently, we discuss the traditional approach to rule-making as opposed to the modern approach thereto. In this context, attention is also paid to the relationship between the legislator, regulator, judiciary and financial services industry in shaping the content of open norms (section 3). These issues are further elaborated upon by using three examples of open norms in the Dutch Financial Supervision Act (*Wet financieel toezicht* (*Wft*)), which are of great importance in practice (section 4). We focus on the duty to supply accurate, clear and not misleading information (Article 4:19 Wft), the duty of responsible lending (Article 4:34 Wft), and the general duty of care (Article 4:24a Wft). The perplexity concerning the duty to supply accurate, clear and not misleading information illustrates the problem of ambiguity concerning the status of public soft law produced with a view to clarifying the meaning of open norms. The analysis of the duty of responsible lending in turn reveals a tension between public and private soft law in shaping the content of open norms. Finally, the general duty of care deserves special attention in the present context given its mega-open character combined with the special enforcement technique attached thereto. Our contribution ends with some conclusions on principles-based regulation and public trust in the post-crisis era (section 5).

2. Principles-based regulation: the rationale and problems

Principles-based regulation pre-dates the financial crisis of 2008 and its relevance is not limited to the financial services sector. Since the eighties, it has been recognised that a large number of sharp and precise rules with a command and control character has a negative side. In its report on the Future of the Rule of Law, the Dutch Scientific Council for Government Policy (*Wetenschappelijke Raad voor het Regeringsbeleid* (*WRR*), for example, has argued that this type of regulation undermines the *responsibility* of citizens and their organisations in

modern society and does not address the problem of the rapidly changing frontier of knowledge.[2] Goal regulation, or principles-based regulation, such as general duties of care, coupled with the corresponding forms of accountability, is presented as a plausible solution. Such regulation is regarded as more flexible and sustainable.

Another reason in favour of principles-based regulation stems from the well-known compliance theory developed by Malcolm Sparrow. Sparrow advocates a creative responsive attitude, contributing to avoidance of illegal as well as legal but undesirable behaviour.[3] A strict legal view is seen as too restrictive. The influences of economical and psychological factors become more important. As a consequence, the traditional focus on legality is put into perspective. The legality principle is qualified as relative.

Indeed, at first glance, open norms as the expression of principles-based regulation seem to be in conflict with the principles of legality and legal certainty. However, the government and parliament, as well as legal science, accept open norms. Most strikingly, even courts accept the use of such norms and do not consider them to be against the law, in particular the requirements of *foreseeability and accessibility*. The case law acknowledges the fact that open norms are inevitable because the legislator is simply not able to provide for detailed rules for all possible situations that may arise. Therefore, detailed rules may imperil legal certainty rather than contribute thereto.[4] Already in the seventies the need for open norms had also been recognized by the European Court of Human Rights (ECrtHR).[5] In its later case-law, the ECrtHR has argued as follows:[6]

> However clearly drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the United Kingdom, as in the other Convention States, the progressive development of the criminal law through judicial lawmaking is a well entrenched and necessary part of legal tradition. Article 7 (art. 7) of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the

---

2 WRR-Report for the government nr. 63, about the future of the Rule of Law, The Hague, Sdu Uitgevers 2002, p. 159 and 170. According to S. van Keulen, too much trust in regulation results in a decrease of accountability; *see* K. Akka, conference on effectivity of financial supervision law, OR 2011, 50, p. 247-251.

3 M.K. Sparrow, *The Character of Harms. Operational Challenges in Control*, Cambridge 2008, p. 60.

4 The Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*), 17 March 2010, AB 2010/182.

5 *See*, eg, ECrtHR 26 april 1979, A30 (The Sunday Times v. The United Kingdom).

6 ECrtHR 22 November 1995, A335B (S.W. v. The United Kingdom), para. 36.

> resultant development is consistent with the essence of the offence and could reasonably be foreseen.

The ECrtHR thus emphasises the inevitability of a step-by-step development of law. The legislator is not the only and final law-maker. It often uses open-ended norms for the reasons given above, followed by their "gradual clarification (…) from case to case."

How is this reality of lawmaking to be seen from the public trust perspective? Can it not only be accepted from a legal point of view but also from a public trust point of view? On the one hand, it speaks for itself that open norms do not contribute to public trust where people want to know precisely in advance which norms they have to comply with. On the other hand, public trust is not fostered by legislation dominated by detailed rules that fails to cover all relevant situations and, hence, to realize its regulatory objectives. When such "certainty-by-details" legislation constantly lags behind new developments in the financial services sector, the credibility of the regulator is at stake. Financial law is a complex and dynamic field where detailed norms simply cannot capture all instances of financial institutions' behaviour, their product innovations and organisational changes, or altering external circumstances. It is probably not going too far to argue that financial law is a domain where principles-based legislation is adequate par excellence.

At the same time, the resort to open norms is not a guarantee for public trust. At least the following five problems involved therein can be mentioned. First of all, an open norm is not immediately filled in by concrete elements as result of their interpretation by courts, financial regulators and/or the financial industry itself. It normally takes some time before an acceptable level of legal certainty is reached. Besides, it cannot be excluded that some open norms permanently remain vague. Secondly, rendering open norms concrete in itself does not guarantee that their addressees are satisfactorily acquainted with relevant court judgements or soft law, particularly if the latter is produced by financial supervisory authorities. Thirdly, as a consequence of the Sparrow attitude, open norms might be used by financial watchdogs for punishing conduct which is legal but, in their view, undesirable. In case of granting a license or enforcing the law, however, this is strictly speaking against the legality principle. According to the *lex certa* principle, a breach of law can only be established when the addressee of a norm knows in advance what the norm requires of him. In the fourth place, the resort to open norms gives rise to many complex and sensitive issues concerning the relationship and/or division of labour between the legislator, the financial regulator, the judiciary, and the financial services industry. Which actor should have the upper hand when it comes to shaping the content of open norms? Is it not true that in the case of law enforcement that this is always a court? Last but not least, the concretisation of open norms through the case law by the judiciary, as well as public and private soft law produced respectively by financial regulators

and the financial industry, may result in a very complex set of norms. This would force financial institutions to set up expensive compliance departments with the increase in costs of financial services and products for clients as a result.

3. *Lex certa* and open norms: a traditional approach *vs.* a modern approach

The powers of administrative authorities under a certain law generally have a *condition (X) – power (Y)* structure: an administrative authority is allowed to use its power (Y) to take a decision about, for example, granting a permit or sanctioning an infringement of legislation, but only if the legal condition (X) has been met. Consider the following examples.

> In case the insurer does not meet the standards of integrity (X), the financial authority can (Y) withdraw its license.
>
> If the prospectus is not clear for the client (X), the financial regulator can (Y) fine the bank up to a maximum of € 5.000.000.

In these examples, the "standards of integrity" and "not clear for the client" are open norms. The application of such norms is subject to the public authority's discretion (*beoordelingsruimte of-vrijheid*). That the financial supervisory authority can withdraw a license or impose a fine, is a matter of discretion too, and even in two respects: the authority has discretion regarding the question whether it wants to use its power to do so (Y1, *of beleidsvrijheid*) and, in case of a positive answer, how to use it (the temporary or permanent withdrawal of a licence? which fine? (Y2, *hoe-beleidsvrijheid*)).

All these elements – X, Y1 and Y2 – can be qualified as a matter of *discretion*. Suppose that the element X is clear and it is beyond any doubt that the open norm has been violated. Then, at least in the Netherlands, with respect to the Y elements, a distinction must be made between remedial and punitive sanctions. As far as the remedial aspect is concerned, in case of a breach of the legal standard, Dutch law recognizes the principle that the financial regulator must enforce the compliance with it (Y1). The implementation of this duty (Y2) is a matter of the financial regulator's discretion, subject to limited judicial review. When the regulator also has a power to impose a punitive sanction, such as an administrative fine, the decision of whether or not to use it (the Y1-element), usually lies within its discretion too. When the decision is made to impose a fine, the question to be addressed next is which fine. In all Western European countries, the decisions of administrative authorities concerning the amount of a fine can be fully reviewed by courts. So the question of whether or not to impose a fine is a matter of judicial deference, while the amount of a fine is subject to a fully-fledged judicial review. In fact, this is remarkable, considering that the first aspect is more drastic than the second.

In the following, we will focus on the preliminary question of whether there is a breach of an open norm: *The X-aspect*. The legality principle implies that norms must be clear and foreseeable. Sanctioning a violation of a vague norm is therefore not allowed when a reasonable person cannot know in advance when he breaches it. In the European continental jurisdictions, in particular, the Netherlands, Germany, and France, a distinction is made between open legal norms and policy discretion. Open legal norms are subject to one exclusive interpretation which can be fully reviewed by a court. In contrast, policy discretion implies the possibility of several diverging interpretations which must be reviewed by the court with deference.

The problem is evident. A bank or an insurance company should act in accordance with the standards of integrity. But what do these standards imply? When does a financial institution breach the law? Who has the final say in determining this? A financial regulator or an administrative court? Can someone breach the law without knowing the precise meaning of the norm? If the answer is yes, can the breach imply strict liability, particularly in case of a criminal charge?

The *traditional* doctrine says that sanctions can only be imposed when a norm is clear in advance. It also says that the question of whether the norm has been breached is not a policy matter but a legal matter which is subject to a fully-fledged judicial review. In contrast, the *modern* approach towards rule-making is more tolerant of open norms and more complicated at the same time. The starting point is the actual need for principles-based regulation. Precise and detailed norms are not seen as an ideal of the rule of law anymore. This approach implies a greater responsibility of citizens and their organizations in ensuring compliance with open norms. But how far does this responsibility extend? And what is the role of the judiciary in this new context?

In the case law of the Dutch courts, foreseeability and accessibility appear to be the main criteria. The *lex certa* principle requires that norms must be as clear as reasonably possible. Absolute clarity is thus not required. *Manifest unreasonableness* results in the annulment of an administrative decision. The reasoning behind the adoption of such a high standard of review is as follows. Different interpretations of an open norm are acceptable as long as they are not manifestly unreasonable. An administrative decision will only be quashed when no reasonable person would have made the same choice as the regulator.[7] In this way, courts avoid the need for providing their own interpretation of the open norm involved.

7 *See* eg District Court Rotterdam, 1 November 2012, JOR 2013/14, District Court Rotterdam, 3 January 2013, ECLI:NL:RBROT:2013:BY9414, JOR 2013/73. *See* also ABRvS, 10 August 2011, ECLI:NL:RVS:2011:BR4631, M&R 2012/20 (Barim; environmental law).

In the case of a manifestly unreasonable behaviour, every reasonable person, including financial institutions, is supposed to know that they are doing the wrong, illegal thing. When it is not entirely clear beforehand whether a certain conduct is compatible with an open norm, the *responsibility of the addressees* comes up. This is a rather severe responsibility because, as *professional* institutions, the addressees like banks and insurance companies are *presumed to know* the meaning of open norms. If they cannot establish it, they are *obliged to ask* the regulator whether their intended behaviour is in accordance with the norm or not. Thus, in the case involving ABP – one of the largest pension funds in the world operating in the Netherlands – the Industrial Organisation Appeal Court (*College van Beroep voor het Bedrijfsleven* (*CBB*)) ruled as follows:[8]

> One may expect from a big and experienced market participant like ABP that it makes inquiries about the goal and range of [the open norms involved]. As far as, according to ABP, things were not clear, ABP could have contacted the regulator DNB [the Dutch Central Bank]. However, ABP did not do that.

So in case of uncertainty about the meaning of an open norm, the professional's responsibility implies a duty to inquire into the meaning of such a norm, which can be done by simply asking the regulator about it.[9]

While it is easy to agree on this starting point, the modern approach towards the *lex certa* principle under Dutch law is not entirely uncontroversial. At least the following four shortcomings involved therein deserve special mention in this context:

In the first place, the Dutch financial regulators – the Dutch Central Bank (*De Nederlandse Bank* (*DNB*)) and the Dutch Financial Markets Authority (*Autoriteit Financiële Markten* (*AFM*)) – are *not obliged* to provide clear answers concerning the interpretation of vague standards, and the Dutch courts are very reluctant to qualify declarations to this effect as legal acts. In particular, Dutch law generally does not recognize an action for a declaration similar, for example, to the German "*Feststellungsklage*". Within this framework, the financial supervisory authorities are normally not pressed to give clear, individual, and precise answers which can be qualified as legally binding commitments or even legal acts. One notable exception thereto is the newly introduced general duty of care under section 4:24a Wft which is discussed in more detail below.

The second shortcoming is that regulators are not legally obliged to provide and publish interpreting guidance with respect to open-ended provisions. Of course, on many issues such guidance is available on their websites, in particular in the

8 Industrial Organisation Appeal Court, 1 April 2008, AB 2010/143 (our translation).
9 *See* also Industrial Organisation Appeal Court, 22 February 2012, JOR 2012/146.

Questions & Answers sections. Nevertheless, this information often remains vague as well.

The interplay between public soft law produced by regulators and private soft law developed by the financial services industry itself (such as banking codes) is the third area of concern. When professionalism of those to whom an open norm is addressed is highly valued, the standards made by the professional branch associations within the framework of open norms should be taken seriously by the regulators when interpreting and applying such norms. The duty of care and the justification principle compel the regulators to provide an explanation when their policy or decision diverges from private soft law. One may get the impression, however, that the Dutch courts give too much leeway in this context to the financial regulators. We will elaborate upon this issue in the next section.

Last but not least, when assessing the financial institutions' responsibility for knowing the content of open norms, the case law of the Dutch courts does not distinguish between different categories of the norm addressees. It is arguable, however, that big financial institutions like banks are expected to have more (responsibility for having) knowledge about open norms than small players in the financial markets.

Despite the existence of these problems, it can be concluded that compliance with open norms can be enforced in the Dutch legal system. Being seen as a rather flexible principle, *lex certa* does not pose significant obstacles thereto. Another important finding is that the public authorities' discretion is not an oversimplified black-and-white thing. It involves a sliding scale ranging from very limited to very broad discretion. Besides, in the course of time, the degree of discretion can decrease as a result of new case law, new (public or private) soft law and, more generally, an increase in experience and knowledge. In the end, legality and *lex certa*, foreseeability and accessibility are, in essence, a matter of *good communication* guided by the idea of the responsibility of all stakeholders involved in ensuring compliance with open norms.

4. Open norms in post-crisis financial regulation and their concretisation

4.1 General remarks

In this section, three examples of open norms in the Dutch financial supervision legislation will be discussed. How are they specified? In particular, what role in their concretisation is played by public and private soft law? As a preliminary remark, it should be noted that the Dutch AFM distinguishes between three types of its soft law, namely policy rules, guidelines, and interpretations. Policy rules are self-binding non-legislative rules of the AFM. With its own guidelines, the AFM aims to inform a specific group of persons about a particular topic. The guidelines can contain recommendations for financial service providers. The last

category – interpretations – gives insight into how, in the AFM's view, an open norm must be interpreted. According to the AFM, such interpretations are not binding and do not give any rights to the addressees of the open norm concerned. In addition, guidelines and recommendations can be issued by the European Supervisory Authorities (ESAs) concerning the matters within the scope of EU law. In this way, the ESAs can contribute to the development of consistent, efficient, and effective supervisory practices with a view to ensuring a common, uniform, and consistent application of European law.

4.2 The duty to supply accurate, clear and not misleading information (Article 4:19 Wft)

The first example concerns Article 4:19 Wft which reads as follows:[10]

> 1. A financial enterprise shall ensure that the information provided by it or on its behalf with regard to a financial product, financial service or ancillary service, including advertisement, is not detrimental to the information to be supplied or made available pursuant to this part.
> 2. The information supplied by an investment firm to clients shall be accurate, clear and not misleading. The preceding sentence shall apply mutatis mutandis to information to this part by a financial enterprise that is not an investment firm. (…)

The meaning of "accurate, clear and not misleading" information is further specified by the AFM in its policy rules.[11] When assessing whether the information is "accurate", for example, the AFM looks into whether the information is correct in substance; whether the consumer receives what he is told; and whether there are no contradictions in the information, either in one information document or between different information mediums. In addition, the policy rules of the AFM contain some examples of incorrect information. For instance, the information about a certain financial product on the financial institution's website is considered to be incorrect if it is not in conformity with the contract terms relating to the product.

Most strikingly, the AFM notes that in practice it always makes a specific assessment of each case and explicitly states:

> We emphasise that the qualification of information as inaccurate, unclear or misleading makes no difference for answering the question whether Article 4:19 (2) Wft has been violated.[12]

---

10 Unofficial translation, available at http://www.toezicht.dnb.nl/en/binaries/51-217291.pdf.

11 AFM, *Beleidsregel Informatievoorziening*, September 2013, section 2, available at http://www.afm.nl/~/media/files/wetten-regels/beleidsregel/beleidsregel-informatieverstrekking.ashx.

12 Our translation.

How can Article 4:19(2) Wft be understood in the light of this statement by the AFM? One possible interpretation is that qualifying certain information as inaccurate, unclear or misleading based on the AFM's policy rules does not preclude the AFM from finding in the specific circumstances of a case that Article 4:19(2) Wft has not been violated. This interpretation is in line with the doctrine of policy rules which does not preclude diverging decisions in favour of the addressee in a specific case.

Another plausible interpretation is that a violation of Article 4:19(2) Wft can be established even though, according to the relevant policy rule, the information provided is accurate, clear, and not misleading. This interpretation appears problematic in light of the principle of legitimate expectations. This principle implies that a diverging individual decision to the detriment of the addressee is forbidden. However, this problem can be overcome because the AFM's policy rule in question explicitly warns of the possibility of such a negative decision. This warning can be considered to eliminate the addressee's expectation that decisions to its detriment are excluded altogether.

Finally, one can also interpret the AFM's statement and, hence, Article 4:19(2) Wft, in the vein of the Sparrow's approach to regulation and enforcement. In this interpretation, it is possible to qualify information as inaccurate on the basis of the policy rule, but this would not amount to a violation of Article 4:19(2) Wft. This in turn would mean that no administrative sanctions could be imposed for acting contrary to the AFM's policy rule. However, the compliance with the policy rule could be ensured in more informal ways, in particular through communication between the regulator and the regulated.

At present, however, neither the legislator nor the AFM has made it clear in which sense Article 4:19(2) Wft should be understood. In fact, by publishing the above-mentioned policy rule the AFM has only exacerbated the legal uncertainty regarding the meaning of this provision. This is unfortunate, as financial regulators can be expected to play a key role in clarifying the content of open-ended norms.

4.3 The duty of responsible lending (Article 4:34 Wft)

The second example of an open norm worth mentioning in the present context is Article 4:34 Wft which reads as follows:

> 1. Before concluding a credit contract, an offeror of credit shall, in the consumer's interest, obtain information on the latter's financial position and assess, in order to prevent overextension of credit to the consumer, whether concluding the contract would be justified.

> 2. The offeror shall not enter into a credit contract with the consumer where this would not be justified with a view to overextension of credit to the consumer. (...)[13]

This open-ended provision imposes a general duty on creditors to act as "responsible lenders", so as to prevent consumer over-indebtedness; for this purpose, however, it only obliges creditors to assess whether the consumer is creditworthy before the conclusion of the credit agreement and to refuse granting credit if this is not the case. The meaning of this open statutory norm as far as the assessment of the consumer's creditworthiness in simple consumer credit transactions is concerned is mainly fleshed out in the codes of conduct of the three branch organizations: the Code of Conduct of the Netherlands Association of Consumer Finance Companies (*Vereniging van Financieringsondernemingen in Nederland* (*VFN*)), the Consumer Credit Code of the Dutch Banking Association (*Gedragscode Consumptief Krediet van de Nederlandse Vereniging van Banken* (*NVB*)), and the Code of Conduct of the Dutch Home Shopping Organisation (*Gedragscode van de Nederlandse Thuiswinkelorganisatie* (*NTO*)). All three codes of conduct share the same starting point for assessing whether the consumer is creditworthy and the provision of credit is thus justified: upon incurring interest- and repayment-related obligations under the credit agreement, the consumer must still have sufficient means to provide for his or her basic needs and to bear his or her recurring expenses.[14] If this is not the case, providing credit would be considered irresponsible. What is more, the Dutch AFM regards the provisions of the codes of conduct as *minimum* norms for responsible lending.[15] If a particular lender is not bound by one of the codes of conduct, it may use other norms provided that the latter offer the same or higher level of consumer protection. Consequently, the disregard of the provisions of the codes of conduct by the financial institution when providing credit to consumers may result in the violation of the statutory rules on responsible lending, regardless of whether the institution is formally bound by a particular code of conduct or not. In such a case, the Dutch financial supervisory authority may impose administrative sanctions. In this way, private soft law produced within the statutory framework can be supported by the public enforcement mechanisms provided by the state.

Yet, as the examples from the area of consumer mortgage credit show, public and private soft law may also be in tension with each other. In particular, public enforcement may also significantly undermine the practical importance of private soft law. This is demonstrated by the AFM's decision of 24 September 2010[16] in which this financial watchdog imposed an administrative penalty in the amount

---

13 Unofficial translation, available at http://www.toezicht.dnb.nl/en/binaries/51-217291.pdf.

14 *See* eg. the Code of Conduct on Consumer Credit of the Netherlands Banking Association, arts. 5 and 6.

15 *See* eg District Court Rotterdam, 4 May 2011, *JOR* (2011) 228.

16 Available at www.afm.nl.

of € 120.000 on one of the major retail banks operating in the Netherlands – Rabobank – for the breach of Article 115 of the Business Conduct Supervision (Financial Enterprises) Decree 2006 (*Besluit Gedragstoezicht financiële ondernemingen Wft* (*BGfo*)). This provision, which specifies the general public law duty of creditors to act as "responsible lenders", obliges creditors to establish and apply criteria for assessing the consumer creditworthiness with a view to preventing consumer over-indebtedness. The meaning of this open-ended norm was further specified in the Mortgage Financing Code of Conduct (*Gedragscode Hypothecaire Financieringen* (*GHF*)) drawn up by the Dutch Banking Association. In some cases, this Code of Conduct allowed lenders to deviate from the strict criteria for consumer lending laid down therein, provided they sufficiently motivated their decision given the specific situation of the consumer. Based on the respective provisions of the Code of Conduct and the statistical data, Rabobank formulated its internal rules for consumer lending. Under these rules, highly educated consumers under the age of 35 who were expected to get the salary increase could be granted a higher amount of credit than was normally allowed. However, in the view of the financial markets authority, this provision was contrary to Article 115 BGfo as specified in the *authority's own report* concerning the quality of advice and transparency in mortgage lending.[17] According to this report, the Rabobank was not allowed to deviate from the normal consumer lending rules based on statistical data; such a deviation was only permitted based on the data relevant for the specific situation of an individual consumer (such as the employer's statement of salary increases). In this way, the Dutch financial supervisory authority deeply interfered with the bank's internal policy concerning the prevention of over-indebtedness designed to implement the co-regulatory arrangement. This outcome was reached in the course of public enforcement whereby the administrative agency not only looked into whether the bank complied with the Mortgage Financing Code of Conduct drawn by the industry but also into whether it acted in accordance with the agency's own guidance.

This case provides a good illustration of the vulnerability of private soft law within the framework of public regulation as interpreted and applied by financial supervisory authorities. What is striking about it is that the open norm which was elaborated in the code of conduct produced by the industry under the vigilant eye of the financial supervisory authority was also specified by this authority itself in its formally non-binding guidance. In its enforcement action, therefore, the financial regulator followed its own interpretation of the code of conduct rather than the interpretation given to it by the bank. Obviously, such an approach may undermine the practical significance of private soft law within the statutory framework, leading to its substitution by public soft law produced by administrative agencies. What is more, it does not make it clear how public soft law and private soft law relate to each other, impairing legal certainty.

---

17 AFM, *Kwaliteit advies en transparantie bij hypotheken*, 1 November 2007.

In our view, in order to ease the tension between public and private soft law and to contribute to legal certainty in financial law, the AFM could learn from the experience of the Health Care Inspectorate of the Netherlands (*Inspectie Gezondheidszorg* (*IGZ*)). The latter exercises supervision over the national health care system with a view to promoting safe and high-quality health care. In the same way as the AFM, this regulator also has to supervise compliance with open norms. For example, under Article 40 of the Individual Health Care Professional Act (*Wet op de beroepen in de individuele gezondheidszorg* (*Wet BIG*)) and Article 2 of the Healthcare Institutions (Quality) Act (*Kwaliteitswet zorginstellingen* (*KWZ*)), a health care provider should provide "responsible" care. It is notable that, in relation to this general duty, the IGZ has set out a special enforcement framework in which it explains its approach to private soft law. The essence of this approach has been aptly summarized by the Council of State (*Raad van State*) as follows:

> (...) For the purpose of exercising its enforcement power, the IGZ has established an IGZ enforcement framework. It states that the legislator has left room for health care providers to specify generally formulated legislative norms based on their expertise and practice. The health care providers do this by translating their scientific knowledge in criteria for professional conduct of business and formulating these criteria as a professional standard relating to the norms associated with the field. Subsequently, the IGZ bases its enforcement *as far as possible* on these field norms. Therefore, it declares the field norm as an IGZ-enforcement norm. In its policy, the IGZ envisages that it considers the field norms as weighty advice. The health care provider should generally follow the field norms, but may deviate therefrom in the interest of the patient by providing a verifiable explanation. If there are no field norms or the existing field norms are, in the IGZ's view, insufficiently clear or insufficiently measurable, or otherwise unacceptable and inadequate for its enforcement, it may, if necessary for ensuring responsible care, decide to formulate independent specific IGZ-enforcement norms, informing the outside world when and how it will exercise its enforcement power in individual cases. Here, too, the health care providers may deviate therefrom by providing a verifiable explanation if this is in the interest of the patient. (...)[18]

Thus, the IGZ shows deference to private soft law produced by the health care providers. At the same time, it reserves itself the right to deviate therefrom. In particular, if the IGZ is of the opinion that the existing private soft law does not adequately fill in the respective open norm, it may produce its own soft law. In such a case, however, it is expected to make it clear in advance which set of rules it is going to enforce. Such a solution not only ensures respect for the knowledge and expertise within a particular branch, but also contributes to legal certainty as far as the relationship between public and private soft law is concerned.

---

18 Council of State, 14 January 2015, ECLI:NL:RVS:2015:58, para. 3.1 (our translation).

It is also notable in this context that in the aftermath of the financial crisis, the role of private soft law in specifying Article 4:34 Wft in the area of consumer mortgage credit has been considerably weakened by the rise of public regulation. The Dutch government largely replaced the provisions on responsible consumer mortgage lending laid down in the Mortgage Financing Code of Conduct with much more prescriptive and protective provisions of the delegated act.[19] Private soft law in this area enacted within the statutory framework was considered to have failed to provide for a sufficient level of consumer protection against over-indebtedness in the post-crisis era.

Not only private but also public regulation, however, faces difficulties in terms of designing an optimal regulatory regime. In particular, overprotective public regulation may not perform well in markets characterised by consumer heterogeneity.[20] A related concern is that highly paternalistic public regulation may backfire against the consumers and thus prove ineffective in practice. Restrictive rules on responsible lending, for example, may prevent consumers from gaining credit from licensed creditors and force them into the arms of shady lenders who charge much higher interest rates.[21] In fact, private soft law produced within the statutory framework may be better equipped to strike the right balance between freedom and protection, particularly if *both* financial institutions and consumer associations are involved in the process of rule-making. Therefore, the substitution of soft law in the financial services field by hard-core public regulation and/or public soft law produced by financial watchdogs is not without risk.

4.4 The general duty of care (Article 4:24a Wft)

The third example of an open norm which deserves special mention in the present context is the newly introduced Article 4:24a Wft which reads as follows:

> 1. A financial service provider gives careful consideration to the legitimate interests of the consumer or beneficiary.
> 2. A financial service provider who provides advice acts in the interest of the consumer or beneficiary.
> 3. The AFM applies Article 1:75 [Wft] in relation to the first and second section only in case of manifest abuses that can damage trust in the financial service provider or the financial markets. (...)[22]

---

19 Temporary Mortgage Credit Regulations of 12 December 2012 as amended on 30 October 2013 (*Tijdelijke regeling hypothecair krediet*). For instance, as of 1 January 2013 the maximum mortgage credit amount is being gradually reduced to 100 % of the property value by 2018.

20 *Cf* eg R.A. Epstein, "The Neoclassical Economics of Consumer Contracts", *Minnesota Law Review* 92 (2008) 803, 810.

21 *See* eg Epstein (2008) 831.

22 Our translation.

By including this general duty of care on the part of financial service providers in the financial supervision legislation, the Dutch legislator aims to improve consumer protection in financial markets and thus to restore public trust in financial institutions and the services provided by them. The rationale for the adoption of this mega-open norm is threefold.[23] First of all, according to the legislator, the general duty of care should ensure that, when providing financial serves to consumers, financial institutions always ascertain that their acts or omissions do not impair the "legitimate interests" of the consumer. These are "the interests which are directly or indirectly affected by the provision of financial services and which the financial institution can be reasonably expected to consider".[24] Such interests should be given due regard in view of information asymmetry between financial institutions and consumers. Furthermore, the second paragraph of Article 4:24a Wft makes it clear that the responsibility of financial institutions goes even further in cases of financial advice. The providers of financial advice must not only take the consumer's interests into account but act in the consumer's interests. Secondly, by explicitly anchoring the general duty of care in the primary legislation, the Dutch legislator hopes to contribute to the cultural change in the financial sector towards taking consumer interests seriously. Thirdly, the newly adopted general duty of care is supposed to play the role of a safety net under the existing specific consumer protection provisions in the financial supervision legislation. This would allow the AFM to intervene in the financial markets "in case of manifest abuses that can damage trust in the financial service provider or the financial markets" and that have not been captured by the more specific rules. Here also lies the limitation of the AFM's powers based on Article 4:24a Wft. They can only be used in extreme cases and in the absence of a specific legal ground that would allow the AFM to take action. The AFM thus cannot resort to this open norm in order to derogate from the more specific rules contained in the financial supervision legislation, and it should exercise self-restraint when applying it.

Perhaps the most striking aspect of Article 4:24a Wft is how the Dutch legislator sees the interplay between the enforcement of this open norm and its concretisation. According to the legislator, given its open nature, the general duty of care will be specified in individual cases. In this way, the legislator emphasises the indeterminate character of this provision as a safety net which can be enforced as such without any obligation on the part of the government or the AFM to fill it in beforehand. However, there is one important constraint on the enforcement of the general duty of care. An administrative order for periodic penalty payment (*last onder dwangsom*) and an administrative fine (*bestuurlijke boete*) can only be imposed if the AFM has first issued a binding designation (*aanwijzing*) and the financial institution has failed to comply with it. A binding designation requires the institution to adhere to a particular line of conduct within a reasonable term

23 *See Memorie van Toelichting Wijzigingswet financiële markten* 2014, *Kamerstukken II* 2012/13, 33 632, nr. 3, pp. 27-28.

24 *Id*., p. 27.

specified therein. In the legislator's view, when determining what conduct is expected from a financial institution on the basis of its administrative law on the general duty of care embodied in Article 4:24a Wft, regard should be paid to the private law duties of care as developed in the case law of the Dutch civil courts. Accordingly, as a primary enforcement tool with regard to Article 4:24a Wft, a designation could play an important role in the concretisation of the general duty of care in light of the corresponding obligations in private law. This enforcement solution has thus the potential to enhance legal certainty without undermining the open nature of this norm. Yet, at present, it remains to be seen to what extent this potential will be realized.

5. Concluding remarks

Given a high degree of complexity and innovation involved in the financial services industry, financial supervision legislation cannot achieve its regulatory objectives without open norms. According to the case law of the ECrtHR and the Dutch courts, such norms can be compatible with the principles of legality, *lex certa*, and transparency. Furthermore, the public authorities' discretion is not an either/or matter: it involves a sliding scale from very limited to very broad discretion. In the course of time, the degree of discretion can decrease as a result of new case law or new (public or private) soft law.

Despite the discretion being a relative and dynamic concept, however, the requirements of foreseeability and accessibility are applicable to open norms, too. With respect to these requirements, our analysis of the open norms in the Dutch financial supervision legislation has revealed an uneasy relationship between principles-based regulation and public trust in financial institutions and services in the post-crisis era. Principles-based regulation places a significant degree of responsibility for compliance therewith on financial institutions and in this way allows such institutions to engage with its goals and spirit. The open norms enshrined in this type of regulation have the potential to prompt a cultural reorientation within the financial sector towards the interests and needs of consumers of financial services and, hence, to promote public trust in the financial markets. In fact, principles-based regulation is a necessary prerequisite for restoring such trust given the limitations of prescriptive command and control regulation in capturing the complexity of financial services and markets.

The main question addressed in this contribution is whether principles-based regulation is the right way to overcome the crisis of trust in the financial markets. Considering all the above mentioned, the acceptance of principles-based regulation in the Dutch legal order is to be welcomed. At the same time, resort to principles-based regulation entails many challenges which may undermine its effectiveness and, hence, public trust in the financial markets. These challenges in the Netherlands include but are not limited to the absence of any significant pressure on the financial watchdogs to clarify the meaning of open norms, much

lack of clarity concerning the status of public soft law already produced to this end, and a tension between public and private soft law in shaping the content of open norms. Without addressing these challenges, principles-based regulation may prove to be too obscure to guide the financial services industry towards a cultural change.

What is the best way out of this dilemma? In our view, the way forward lies in improving *co-operation* between the regulator and the regulated in ensuring compliance with open norms and *transparency* of rule-making. *Effective communication* between the financial watchdogs and financial institutions in the course of interpretation and application of open norms is a key factor in this context. In our opinion, the guidance provided by the AFM with respect to the duty to supply accurate, clear, and not misleading information under Article 4:19(2) Wft does not provide an example of good practice in this context. Nor is such an example provided by the AFM's decision of 24 September 2010 imposing an administrative penalty on Rabobank for the violation of the responsible lending rules. In both cases, no effective communication between the regulator and the regulated actually took place.

Innovative solutions are needed to ensure such communication, and thus the effectiveness, of the post-crisis financial regulation in restoring public trust in the financial markets. Despite many obstacles, the Dutch legal system appears receptive towards experimentation with such solutions. On a policy level, the financial regulators could avoid producing additional ambiguity concerning the meaning of open norms. In addition, they should make it clear to what extent they follow private soft law and provide good reasons for deviating therefrom. The approach adopted by the Health Care Inspectorate could serve as an example of good practice in this respect. On an individual level, the effective communication could be ensured by using a binding designation as a primary enforcement tool with regard to open norms. The adoption of such a solution in relation to the general duty of care embodied in Article 4:24a Wft is a step in the right direction.

Public Trust and the Preparation of Regulation: The Case of ex ante Studies in the Netherlands

Heinrich B. Winter[*] and *Carolien M. Klein Haarhuis*[**]

1. Introduction

In the legislative process, empirical and analytical instruments of information provision play an increasingly important role. Legislation was originally a vertically structured process of policy development, primarily involving interaction within and between government ministries and, later on in the process, a dance between the Cabinet and Parliament. Society's role in that context was relatively limited. That changed rapidly in recent decades. Forms of feedback and dialogue have been embedded at both ends of the procedure. At the beginning, social consultation takes place with a clearly defined target group, supplemented by internet consultation with an open target group. After the fact, we see a surge in ex post evaluation since the 1980s. By now, it has become customary for the effects of regulations to be evaluated after legislation has been established. In general, the relevant regulation includes an evaluation clause that prescribes evaluation within three or five years after the law's entry into force, and then mandates repeated evaluation from then on, generally every five years. The content and/or implementation of the regulations are relatively frequently amended on the basis of ex post evaluations.[1] On the other hand: according to Michiels utilization of evaluations of the General administrative law act in the Netherlands seems to be limited.[2] A surge in ex ante research has been observed in the legislative process in the past decade. Before the definitive draft instrument of a regulation enters the procedure, the proposed arrangement or possible alternatives have often already been subjected to extensive testing and analysis. This article focuses on that trend towards information-driven legislation. It will address various forms of ex ante analysis, the use thereof and their consequences

* Professor of Public Administration at the department of Constitutional law, Administrative law and Public Administration of the Law Faculty of the University of Groningen.

** Researcher at the Research Centre of the department of Security and Justice (WODC).

1 *See*: H.B. Winter, *Evaluatie in het wetgevingsforum. Een onderzoek naar de relatie tussen evaluatie en de kwaliteit van wetgeving*, Kluwer, Deventer: 1996.

2 F.C.M.A. Michiels, Het evalueren van de Awb: een voortdurend proces, in: T. Barkhuysen e.a. (red.), *Bestuursrecht harmoniseren: 15 jaar Awb*, Boom Juridische uitgevers, The Hague: 2010, p. 41-55. Daalder is even more critical, when he judges utilization to be disappointing: E.J. Daalder, Voldoende kwaliteit van het bestuursproces: enkele opmerkingen naar aanleiding van het verslag van de Commissie Evaluatie Awb II, *NTB* 2002/6, p. 153-159 and E.J. Daalder, De derde evaluatie van de Awb: komt het einde in zicht?, *NTB* 2007/5, p. 141-146.

for the legislative process, as well as the confidence that society can have in these forms.

2. Legislation in the past

The various functions of legislation are referred to as guarantee and instrument.[3] The law as a guarantee addresses the values of the rule of law. Such principles as legal certainty, equality of rights and democracy become relevant.[4] The underlying concept behind legislation is that these principles are served by embedding legal rules in legislation. We are referring to the legality requirement that means that not only the citizenry, but also the governing administration are bound by the law. During the course of the previous century, the emphasis in legislation shifted from the guarantee to the instrument in terms of function. As the government took on clearer ambitions to achieve and regulate changes in society, the need for instruments that made it possible for the public administration to do so grew proportionately. Legislation was no longer primarily about codification, but also took on significance as an agent of modification.[5] That changed function of legislation is closely related to what we call the development of government from watchman state to welfare state.[6]

If legislation primarily serves a codifying function and aims to offer guarantees, legislating can remain a relatively internal matter. The concept of the legislative lawyer as a "plodder in the forecastle" references this as well.[7] This image is an exaggerated example, of course, but codifying legislation was generally established without intensive interaction with society, and without extensive consultation with implementing authorities and enforcement agencies. The decades following the Second World War showed many rapid changes in precisely that area.

3. Legislating in the welfare state

Legislation that has different, more modifying ambitions cannot automatically rely on societal support and are more likely to elicit questions regarding implementation and enforcement. Critical questions about realising those

3 P. de Haan, Th.G. Drupsteen and R. Fernhout, *Bestuursrecht in de sociale rechtsstaat*, Kluwer, Deventer: 1978.

4 *See* regarding these principles: M. Scheltema, J.W.M. Engels e.a. (eds), *De rechtsstaat herdacht*, Kluwer, Alphen aan den Rijn: 1989, p. 11-25.

5 It was Koopmans who first described this pair of concepts in this way: T. Koopmans, "De rol van de wetgever", in: *Honderd jaar rechtsleven*, Kluwer, Zwolle: 1970.

6 It may be too early to determine whether the recent shift to an "activation state" will once again have consequences for the function that legislation serves.

7 Former legislative lawyer W.J. van Eijkern used the term *zwoegers* or plodders, *see*: "De macht van de zwoegers in het vooronder. Rechtsvorming door juristen via het werk van de afdelingen wetgeving", in: *De jurist-ambtenaar (Kan-bundel),* W.E.J. Tjeenk Willink, Zwolle: 1977, p. 42-43.

ambitions – which are, after all, neither undisputed nor automatically successful – can be expected. Against that backdrop, it is easy to understand the intensification of analysis and empirical substantiation in the legislative process. At the beginning of the process, this has led to the emergence of countless forms of societal dialogue and stakeholder consultation. Implementation and enforcement organisations contribute in the form of implementation and enforcement checks. In recent years, internet consultation on proposed legislation has become a permanent fixture in the legislative preparation process. Anyone has the opportunity to respond to draft versions of bills via www.internetconsultatie.nl. Since 2009, several hundred proposed laws and orders in council (*algemeen maatregel van bestuur*, AMvB) have been subjected to public consultation using this method. Ex post evaluation studies have taken off. Since the early 1980s, when the first forays into legislative evaluation were made with the University Administration Reform Act, the Freedom of Information Act and the Noise Pollution Act, ex post legislative evaluation has more or less become a standard part of the legislative process. Although no policies have been developed for research on evaluating laws, it is standard practice for the introduction of new legislation to be accompanied by ex post evaluation studies. Many laws and regulations include an evaluation clause drafted according to the model of designation 164 of the "designations for regulations". Ex post legislative evaluation attracts scientific attention, including studies on the organisational context, the methodological structure, the results, and the use of these findings in the evaluations.[8]

Ex post evaluation yields very useful results in terms of the added value of the findings in making minor course corrections in the legal system. At the same time, ex post evaluation clearly has some disadvantages as well. It is no exception to see ex post evaluation studies used to reach a compromise or – conversely – to reopen a discussion of fundamental principles. Moreover, ex post evaluation research is an expensive undertaking. Conducting empirical research and collecting and analysing fact-based information on the implementation and effects of a regulation take time and require considerable budgetary commitments. This is an important consideration, especially in systematic design of evaluation research. Finally, ex post legislative evaluation is frequently also dysfunctional. Evaluation research rarely leads to dramatic change.[9] The consequences are generally confined to introducing limited amendments to the laws and regulations, the chosen organisational arrangements, and/or the method of implementation, and these changes are often technical in nature. Directional dependence may offer a possible explanation for this pattern. It is far from easy to abandon a regulatory

8 *See* e.g.: H.B. Winter, M. Scheltema & M. Herweijer, *Evaluatie van wetgeving: terugblik en perspectief*, Kluwer, Deventer: 1990; Winter, 1996; C.M. Klein Haarhuis & E. Niemeijer, *Wet en werkelijkheid. Bevindingen uit evaluaties van wetten*, BJu, The Hague: 2008.

9 Winter, 1996.

direction and embark on a new course. It would seem that evaluation cannot provide sufficient substantiation for the system-wide changes needed to make that happen. In some sense, that is understandable: evaluations generally only address the existing solutions; they do not usually extend to exploring possible alternatives. Intensification of research during the preparatory process for legislation (and policy) is therefore unsurprising in this context. The various forms of research and analysis in the legislative process will be addressed below.

4. Research and analysis of proposed laws and regulations

The process of preparing legislation naturally includes coordination between and within government ministries. Goals, methods and resources are coordinated throughout that process, often involving a process of exchange. Ministries frequently hold divergent views on policy problems and the solutions at hand. Those divergent views are also held by stakeholders and other parties who play a growing role in the legislative process. We also refer to legal, economic, sociological, scientific and political rationality when it involves the diverse interests and considerations of the various parties involved in legislation. Veerman states that political rationality often trumps the other rationalities in legislation.[10] Klein Haarhuis holds that scientific insights could help make choices in such a way as to achieve the goals of the law.[11]

Engaging many different parties in the preparation process suits the context of the "polder model" used in the Netherlands, but it goes beyond that when implementation and enforcement authorities are involved in the preparation process. Stakeholder engagement takes place not only from the top down, but at the grassroots level as well – only we call it "lobbying". Internet consultation is a relatively new phenomenon that was mentioned above. All these forms of engagement during the legislative procedure are relatively non-systematic and quality-oriented. Along the way, there has been a growing need for a more systematic focus on the process of preparing legislation. For that reason, various tests have been introduced over the past ten to fifteen years.[12] Sometimes it involves obligations dictated by law, and on some occasions also the requirement to engage external expertise or support. Statistics Netherlands is required to be called in to assess business impact; the National Institute for Public Health and

---

10 Gert-Jan Veerman & Robin Mulder, *Wetgeving met beleid. Bouwstenen voor een bruikbare wetgevingstheorie*, BJu: The Hague, 2010, p. 15 and following.

11 C.M. Klein Haarhuis, "Over nut en noodzaak van ex-anteanalyses bij de totstandbrenging van wetgeving", in: *RegelMaat* 2010/2, p. 65-79.

12 In a 2015 report OECD mentions the Netherlands as one of the early starters in Europe in the 1990s in developing better regulation and with a strong focus on reducing administrative burdens. The report also hints at the Integraal Afwegingskader (IAK) as a way to bring together guidance and instructions for impact assessments tools. Nevertheless, according to the report, the Netherlands is acting below OECD-average on the field of ex ante as well as ex post evaluation. OECD, *Regulatory Policy Outlook*, 2015.

the Environment (RIVM) has to assess environmental impact; the Council for the Judiciary or the Expertise Centre for the Administration of Justice and Law Enforcement must be brought in on matters involving the impact on the judiciary, or to test whether a proposed measure can feasibly be enforced or implemented.

As of 1 March 2003, pursuant to a decision by the Council of Ministers, a new structure for assessing the impact of proposed regulations became mandatory.[13] It consists of two phases. The initial phase involves substantiation of the selected instrument(s). Then the initiating ministry assesses whether the proposed law or order in council (or amendment to the legislation) is desirable and necessary to achieve the policy intention. The consequences it will have for the business sector and the environment will be addressed at that point, as well as whether it can feasibly be implemented and enforced. This takes place in the form of a quick scan. This step may be skipped if there is no room for an alternative choice of instruments, if no substantial consequences are expected for the business sector, the environment, or feasibility of implementation and enforcement, if it is clear in advance that no substantial societal costs or benefits are associated with the regulation, or if it involves regulations entailing EU implementation. Substantiation of the choice of instrument also remains necessary in those cases. Once the instrument has been selected and the choice has been substantiated, phase 2 starts. Various checks are conducted at that point. These may include a cost-benefit analysis, or a check of compliance with the draft regulation on business impact, an environmental impact check, or a check on feasibility of implementation and enforcement.

As of 2011, the Integral Consideration Framework for policy and regulation [*Integraal Afwegingskader voor beleid en regelgeving* (IAK)] in preparing for and providing accountability on laws and regulations.[14] 120 checks, among which the aforementioned cost-benefit analysis, the environmental impact check and the check of the feasibility of implementation and enforcement, have been combined and reduced to 16 mandatory elements that have to answer the following 7 questions about the policy to be prepared or the regulation to be drafted: 1) What is the cause or reason? 2) Who is involved? 3) What is the problem? 4) What is the purpose? 5) What justifies government intervention? 6) What is the best instrument for the purpose? and 7) What are the consequences? Relevant aspects include the effectiveness of the proposed intervention and the consequences it will have for citizens, businesses, the government and the environment.[15]

---

13 Information described here comes from "Effectbeoordeling Voorgenomen Regelgeving" [Impact Assessment for Proposed Regulations], a 2003 publication by the *Meldpunt Voorgenomen Regelgeving*, an alliance of various ministries, which guides and supervises the process of mapping the impact of draft regulations.

14 Parliamentary Papers 2010-11, 29 515, no. 330.

15 At first, there was the Regulation on Performance Data and Evaluation Research for the National Government in 2001 and 2006. This RPE required ministries to include the

The question with all these activities, of course, is whether they can help answer questions about achieving the set goals, at what cost point that will be the case, and the unintended effects. No systematic research had been done on that issue at that point, let alone an inventory of the nature and scope of the ex ante studies in the Dutch government ministries. In order to answer those questions, the Research and Documentation Centre of the Ministry of Security and Justice (WODC) conducted studies in 2013 and 2014 on the various checks and analyses that could be identified in the legislative preparation process, summarised as "ex ante studies", based on a review of these studies from 2005-2011.[16] The key findings from that study are outlined here. These studies were conducted during the preparation process for policies and for regulations. The findings reported below therefore extend beyond the strict scope of this chapter, i.e. the preparation of regulation.

5. Ex ante studies: nature and number[17]

The study focused on published studies, so only a small percentage of the ex ante studies and analyses were included; many of these studies are for internal use only. The study conducted by the Research and Documentation Centre focuses on two questions: how can ex ante studies be categorised based on reason, approach and commissioning party, and what do ex post evaluations teach us about the predictive value of ex ante studies? The latter question addresses the connection between ex ante and ex post research, closing the circle and making it possible to create actual added value. The ex ante studies involve published reports from studies on the consequences of one or more policy or regulatory options in national policy, legislation and regulations, commissioned by a government ministry or a ministerial research institute. To reiterate: the study does not exclusively look at laws and regulations, although that is the primary focus of this chapter; ex ante policy evaluation was also included in the study by the Research and Documentation Centre. 306 studies matching this description were founded in the period between 2005 – 2011. The studies can be grouped based on a number of characteristics. The following sections look at the cause or reason, the commissioning and implementing parties, the phase of policy preparation in which the studies took place, the number of alternatives that were studied, the nature of the subject of study, and the types of ex ante studies.

---

consideration of ex ante evaluation in policy preparations. The 2008 Regulation on National Budget Requirements later abandoned that requirement.

16 C.M. Klein Haarhuis assisted by S.A.C. Keulemans, *Ex ante onderzoek in meta-perspectief. Aard, aantallen en gebruik van ex ante studies door de rijksoverheid*, The Hague: Research and Documentation Centre of the Ministry of Security and Justice (WODC), *Onderzoek en Beleid* no. 311, 2014.

17 The original report and a publication about the report were used to write this chapter: C.M. Klein Haarhuis & M. Smit, "Ex-antestudies op de kaart. Onderzoek naar beleidsvoornemens (2005-2011): aard, aantallen en wat ex-postevaluaties erover zeggen", in: *RegelMaat* 2014/4, p. 229-245.

The cause

Over half of the studies (51%) are intended primarily to support policy formation or decision-making processes. In 12% of the cases, a question, pledge or motion in the House of Representatives was the primary cause. Nearly one in seven studies (15%) is intended to calculate the possible consequences of a proposed plan. In 9%, the study is designed to support implementation. 7% involved a different cause or reason, such as a statutory obligation; the remaining 6% were based on a combination of different reasons.

Commissioning and implementing parties

Most analyses were commissioned by the former Ministry of Transport, Public Works and Water Management (now the Ministry of Infrastructure and the Environment: 44), followed by the Ministry of Health, Welfare and Sport (38). The Ministry of Finance commissioned the lowest number of studies (4), but that ministry frequently co-commissioned studies in cases involving interministerial research. Nearly half of the analyses were conducted by private research or consultancy firms (45%); slightly more than a quarter (26%) were conducted by academic institutes, planning bureaus or other government-run scientific research institutes. Implementing organisations are responsible for 7%, while 14% of the studies are conducted by various types of research parties, generally an ad hoc partnership between private agencies and researchers. Only a very few (4%) were conducted by a ministerial body. Another 4% were assigned to a council or advisory committee.

Phase

Ex ante research is frequently criticised for being involved late in the policy process, and thus having limited impact on the policy formation process.[18] The Research and Documentation Centre study shows that nearly 85% of the studies were conducted at an early point in the process, when there were still one or more intentions that still needed to be decided on. Still, that does mean that 15% were conducted after the decision had already been taken. In those cases, the study was intended to run the calculations for the selected alternative or to continue developing it. Obviously, the earlier in the preparation process that the analysis is conducted, the more influence the results will have on considering the alternatives.

---

18 J. Hertin, K. Jacob, U. Pesch & C. Pacchi, *The production and use of knowledge in regulatory impact assessment: an empirical analysis,* Berlin: Freie Universität Berlin, Forschungsstelle für Umweltpolitik. FFU report, 01-2009, for the EU regulatory framework E. Beukers, L. Bertolini & M. te Brömmelstroet, "Percepties op het MKBA proces", in: *Tijdschrift Vervoerswetenschap*, 2012/2, 68-79.

Numbers of alternatives studied

The number of alternatives studied – following from the above – grows larger when the analysis is conducted in an earlier phase of the preparations: 3.7 compared to 1.8 in the second phase. On average, 3.4 alternatives were examined in the 306 covered here. Studying multiple options is customary in the cost-benefit analyses. In a few cases, a study looked at several alternatives after the policy or regulation was adopted; in these cases, the study involved modes of implementation or a baseline option to compare with the selected variant. It is striking to note that the studies conducted by private agencies looked at relatively many options, on average. The same held true for the studies commissioned by the former Ministry of Transport, Public Works and Water Management.

Manifestations

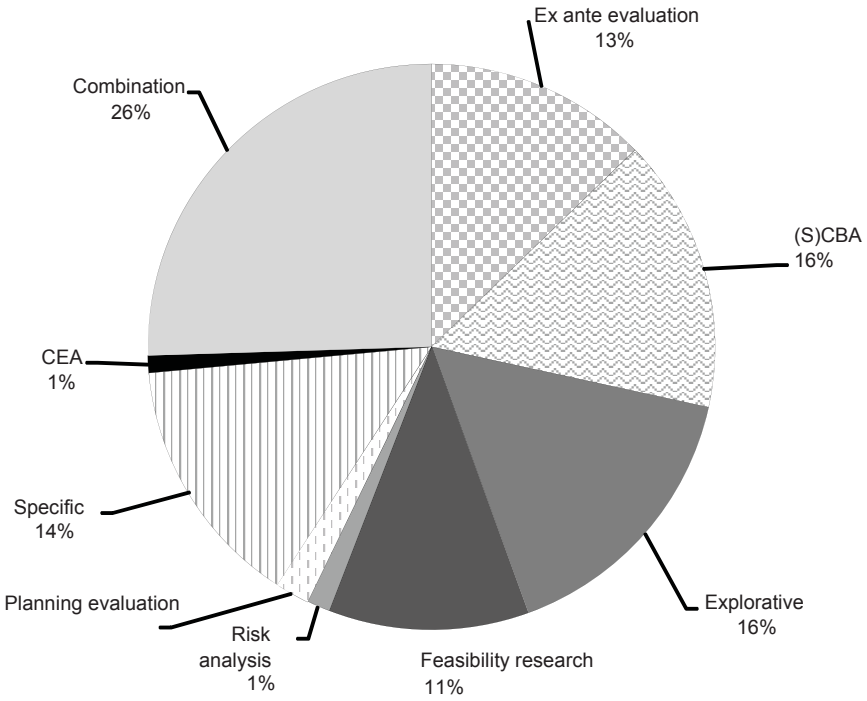
As stated, the study covers both regulations and policies. In many cases, it involves coherent, interconnected regulations or policies: a programme. Examples include the fifteen studies conducted in the framework of the kilometre pricing; various studies were also conducted on agreements involving environmental policy, as well as system-wide reforms (e.g. in health care). The examples show that they generally involve studies on policy. In 75 cases, it concerns ex ante research on regulations.

Types of studies

Eight different types of ex ante studies can be identified. These categories are subjective and do not follow clearly delineated boundaries or adhere to mutually exclusive criteria. There is also a significant degree of overlap between the categories: over a quarter of the 306 ex ante studies cannot be classified as a single type, but as a combination of types. The types of studies that occur most frequently are the cost-benefit analysis and the exploratory ex ante study. A cost-benefit analysis compares one or more alternatives to a baseline option, looking at a range of costs and benefits, which are expressed in financial terms wherever possible. Generally, the result is a positive or negative balance within a certain bandwidth. A societal cost-benefit analysis looks at costs and benefits in terms of the economy and society. The number of studies looking at societal costs and benefits increased between 2005 and 2011. This type of studies primarily occurred in the former Ministries of Transport, Public Works and Water Management and of Housing, Spatial Planning and the Environment; the scope of application has expanded to the social domain (the Ministry of Health, Welfare and Sport), but the Ministry of Economic Affairs and the Ministry of the Interior and Kingdom Affairs also use societal cost-benefit analysis more frequently. Exploratory studies refers to studies that explore policy options and are preliminary in nature or serve as a quick scan. These studies are often conducted in the earliest stages of planning. The question here would be whether the proposed instrument will

achieve the intended purpose, or whether an alternative would be preferable. 21% of the studies were cost-benefit analyses or societal cost-benefit analyses, if the combination studies are included; 19% were exploratory ex ante studies.

Figure 1: Types of published ex ante analyses in the Netherlands (2005-2011)



Of the total, 14% involves specific types of consequence-driven studies, e.g. looking at environmental impact, legal consequences, or consequences of the administrative burden on organisations in the public or private sector. In combination with other types of studies, this type occurs in 21% of cases. The potential effectiveness is the primary focus in 13% of the studies: the ex ante evaluations. An example is the analysis looking at whether the shift in nature policy by the former Ministry of Agriculture, Nature and Fisheries could achieve the intended ecological impact. In combination with other types of studies, the percentage rises to 14%. The consequences for implementation or feasibility of implementation were addressed in 11% of the analyses, e.g. in an organisational and financial context. The implementing organisations are generally involved in implementation themselves. Implementation analyses are frequently combined with other types of studies, which would bring their share to 17%. The least

frequent types are the planning evaluation, the risk analysis and the cost effectiveness analysis.

Ex ante evaluations are relatively more likely to be prompted by a political cause, such as a Parliamentary question or motion. Studies on the legal or environmental consequences and analyses of implementation and enforcement are more likely to be the result of a mandatory requirement. Implementation and risk analysis, ex ante evaluations and planning evaluations are seen more frequently in the context of proposed legislation and policy programmes than for other forms of policy.

6. Ex ante and ex post

An important question in this overview of the "state of the art" in ex ante studies is whether the predictions made by the studies actually come true. Very little is known about the relationship between ex ante and ex post research. The 2015 OESO-report discussed earlier refers to this as "closing the regulatory governance cycle". Does the cycle really gets closed in the Netherlands? Klein Haarhuis states that 47 of the 306 ex ante analyses (which represents 15%) were followed by an ex post study. This not only includes ex post effectiveness studies, but also process evaluations, mid-term reviews and implementation studies. It is striking to note that twice as many ex post evaluations were found when a plan or proposal had already been outlined to some extent during the ex ante analysis and could be calculated or assessed, or when it had already been adopted. Apparently, clearly defined plans have a greater chance of being embedded in policies or regulations. There is no correlation between the type of ex ante study and any later ex post evaluation. So why are so few ex post evaluations found? In 22 cases, the proposed policy or regulation did not move forward, so there was obviously very little reason for ex post evaluation. A comparable situation occurs in the 14 cases where the policy or regulation has not yet been established. In 13 cases, the ex post evaluation has been commissioned or launched, but the results have not yet been published. In a study from 2009 Berveling outlines four reasons why ex post studies were not committed: 1) a typical regulator is more interested in the present and the future and not in past performance, 2) the regulator does not want to annoy his positive evaluation of the regulation with negative information about its performance, 3) organizational impediments can hinder ex post evaluations for instance by means of lack of money, time, capacity etc and 4) methodological problems can block isolation of the effects of a regulation. Overviewing the very limited amount of ex post studies following ex ante analyses, it seems the regulatory cycle does not get closed as a result of several of these reasons.

7. Conclusion and discussion

The study leads to a number of conclusions. First, the number of studies that were found about the "future" of a policy or regulation was higher than expected.

Moreover, the number of ex ante studies is rising sharply. These studies are not distributed evenly across the ministries; ex ante studies are primarily conducted on a regular basis by the Ministries of Infrastructure and the Environment, Health, Welfare and Sport, Security and Justice, and Economic Affairs. The societal cost-benefit analysis is the most frequently occurring type of study, followed by the exploratory studies. It is striking to note the weak connection with ex post evaluation studies.

The study shows that it is quite possible to conduct ex ante analyses of the consequences of policies or regulations that are still in development. The diverse range of studies makes it clear that there are sufficient points of references in many different fields. The trend fits into a European context, in which regulatory impact assessments are increasingly mandatory.

The relationship between how legislation is prepared and the theme of "public trust, public law" would seem self-evident. From a positive outlook, an open and informed debate about the proposed alternatives increases quality and thus boosts public trust in the option ultimately selected. Cynics may protest that studies are often commissioned at a point when the debate can hardly be influenced. Similarly, ex ante studies are alleged to be nothing more than "ticking boxes", or mere window dressing. In that context, it may not be advisable to mandate ex ante analyses, as Meuwese advocates.[19] On the other hand, the research data shows that the vast majority of the ex ante studies are conducted in a relatively early phase – and in any case early enough for multiple alternatives to be considered. That would seem to indicate a serious approach, rather than tactical moves or political motives. This chapter does not address how the studies were used. The study did look at that aspect in five cases. In all those cases, indications of utilization were found: access to information by interest groups in the sector at large; positions taken by civic organisations (in four of five cases); and a response by Cabinet members in all five cases (in the Explanatory Notes or in response to Parliamentary questions). Further development took place in three of the five cases. All in all, these are not results that would support a cynical response.

19 A. Meuwese, "De kracht van 'juridische impact assessments' ", in: *RegelMaat*, 2012/4, p. 213-217.

Policy Change and Public Trust
The Case of the *Atomausstieg* in Germany: Who Has to Pay?

Dick A. Lubach[*]

1. Introduction

The voices claiming that the traditional ways of energy production should be abandoned in favor of more ecological methods recently became louder in the Dutch parliament: electricity generated from hard coal should be phased out within 10 to 20 years. This spells the demise of the three coal plants that were recently opened.[1]

This example illustrates that striving for a more ecological policy, which is a legal obligation according to recent court verdicts,[2] can imply major changes in situations created by governmental decisions that were deemed appropriate not long ago.

This orientation shift poses a problem that is well known in public politics. In cases where public authorities cooperate with private organizations in the so-called common interest, to what extent can the public authority unilaterally change its policy? There is no easy answer, but it seems likely that the private partners would claim that the public authority had put its trustworthiness at stake and would at least ask for damages as compensation.

Neighboring Germany's decision to close down its nuclear power plants in the aftermath of the Japanese disaster of Fukushima illustrates this reality. This decision has become known as the "Atomausstieg".[3] The Swedish company Vattenfall, which exploited two of the plants that are to be closed (Brünsbüttel and Krümmel), sued the Federal State of Germany for a sum of 4.7 billion Euro in an international arbitration procedure and filed, along with other companies, a lawsuit against the Federal State of Germany before the Constitutional Court in Karlsruhe.

---

* Dr., Professor of Construction Law at the University of Groningen.

1 Http://fd.nl/economie-politiek/1128913/tweede-kamer-stemt-voor-sluiting-kolencentrales.

2 District Court The Hague 24 June 2015, ECLI:NL:RBDHA:2015:7196 (English translation).

3 Exit from nuclear energy. In the following, the German terminology will be used.

The case is interesting for various reasons:

It can give an insight into what could happen should the Dutch government decide to put forward its own "Energiewende".[4] Some German lower court rulings have already held that the immediate closing down of the oldest plants in Germany is unlawful.

In the Netherlands, there is a comparable question that has led to diverging opinions in jurisprudence. The recent Act to put an end to the commercial elevation of minks is being challenged in court because it allegedly does not provide for adequate damage compensation for the businesses which have to close down.[5]

It shows the importance of supranational dispute resolution in these matters. Vattenfall did not only sue Germany before a national court, but also before the International Centre for Settlement of Investment Disputes (ICSID), an institution connected with the World Bank in Washington. The role of such institutions has recently been discussed in the context of TTIP and CETA, free trade associations at various stages of negotiation between the EU and, respectively, the USA and Canada.[6]

It therefore seems appropriate, in the context of the theme "Lawmaking and public trust", to discuss the following questions:

a. To what extent does a decision of policy change imply a breach of public trust and is there a ground for damage compensation?

b. What role should European and international institutions play with respect to dispute resolution in this context?

This paper does not purport to offer a full comparative analysis of German and Dutch laws regarding the issues it brings forth. It is mainly a description of the

---

4 The German word "Energiewende" refers to a policy change away from traditional forms of energy (coal, gas, nuclear energy) to more ecological and renewable forms such as wind and solar energy.

5 Wet Verbod pelsdierhouderij Staatsblad (Law Gazette). 2013, 11, abrogated by the District Court The Hague (ECLI:NL:RDHA:2014:6161) as not in compliance with Art 1 First Protocol ECHR. In appeal reversed by the Court of Appeal (Gerechtshof) The Hague ECLI:NL:GHDHA 2015:3025; A decision in higher appeal before the Supreme Court (Hoge Raad) is pending. It is noted here that in Germany, the role of the ECHR as a ground for review is less important because of the existence of constitutional review.

6 ec.europa.eu/trade/policy/in-focus/ttip and www.international.gc.ca/ceta; brought under a wider attention of the Dutch public (and politicians) by a.o. 2 broadcasts on March 15 and October 4 2015 of the TV program Zondag met Lubach (ZML) accessible via www.uitzendinggemist.nl.

German case of the Atomausstieg. This case can give an insight into some legal issues that arise when decisions regarding energy policy are changed, sometimes due to necessity. In this respect, the case is, in my opinion, interesting for the Netherlands as well for other (European) countries. Although national legal systems might differ, the issues of compensation for damages and the role of international arbitration are likely to come up anywhere. Where Dutch law is discussed, it is foremost done to enhance the understanding of the German legal system of government liability and compensation for damages. The conclusions in section 4 have to be read in that perspective.

Before studying the German case, a short reflection on the concept of the breach of public trust and the possible grounds for damage compensation in general is required. This is not only necessary to be able to answer the first question but it is also useful since there is, in this respect, a distinction between Dutch and German law.

2. Breach of public trust: the basis for damage compensation?

The concept of public trust supposes a public authority that acts in relation to its (private)[7] partners in a trustworthy way. At the same time, defending the public interest- the primary task of the public authority-implies the necessity of flexibility and the possibility of policy change. The tension between trustworthiness, implying certainty and stability, and flexibility, as well as adaption to new societal developments, is a never ending story of judicial disputes.

Going back to the basics, we have to take into account that administrative[8] law has two main functions: a. to protect the citizens (including private legal persons) against malfunctions of a powerful and often monopolist public authority and b. to provide the public authority with legal instruments to regulate societal relations. This dual character of administrative law already reflects the underlying tension. "Trusting" the decisions of public authorities cannot be equated with expecting that the right accorded to or the legal status created for a citizen will never change. In this way, public trust is inherently limited. That inherent limitation can be interpreted in two ways. It can mean that there are limits which, when they are not respected, imply a breach of public trust, or it can mean that public trust implies room for manoeuver and that, within certain limits, a change does not mean a breach of public trust.

---

7 Another topic is to what extent breach of public trust also plays a role in public-public relations. Although there are reasons to believe that this is the case, I will not pursue that question further since the subject of this paper is a dispute between a public authority and private companies.

8 Here, administrative law includes private law used by public authorities for public purposes and hence influenced by administrative law.

In the first type of reasoning, the following question arises: to what extent does the legally binding decision of a public authority create rightful legal expectations and limit the freedom of deciding otherwise? Crossing these limits is consequently illegal and implies the obligation to fulfill the expectations and/or to pay compensation for damages. This obligation is based on an unlawful act.

In the second type of reasoning, the question is: to what extent is a policy change possible without a breach of public trust? That change is not unlawful as such but can imply an obligation to compensate for damages caused by that change. This obligation is not based on an unlawful act but on the violation of the principles of equality and proportionality. The obligation to compensate for damages is, strictly speaking, not based on a breach of public trust but rather on a change within the limits of public trust.

I am inclined to support the second opinion. Changing public policy does not, in most cases, imply a breach of public trust. A change in policies is sometimes necessary due to changing societal circumstances. Also, changing some political decisions taken by a former government of a different political color is characteristic of a democracy. The question of damage compensation has to be judged in that perspective.

In Dutch law, the partner of a public authority is entitled to full damage compensation for an unlawful act. On the other hand, in cases of liability without an unlawful act, the extent of his own risk is taken into consideration. This "normal societal risk" has to be taken into account and be deducted from the calculated numbers of damage compensation at stake.

The development of Dutch law[9] shows that liability, and hence a public authority's obligation to compensate for damages, could originally only be based on an unlawful act. The idea of liability and damage compensation in the absence of an unlawful act is more recent.

In German law, this development took place in reverse.[10] The development of the theory of public liability starts with the obligation to pay damage compensation in cases where there is no question of unlawfulness as such because the damage causing act is in the common interest, but where is ruled that damage compensation is appropriate because it cannot rest with the individual. As will be elaborated in section 3.4, the concept of expropriation, and specifically the social

9 *See*, among many others: H.D. van Wijk, W. Konijnenbelt, R.M. van Male, *Hoofdstukken van Bestuursrecht* 16e ed. Chapter 21, p. 769ff. Wolters Kluwer 2014.

10 *See* D.A. Lubach, Overheidsaansprakelijkheid op grond van enteignungsgleicher en aufopferungsgleicher Eingriff; een worsteling op de grens van rechtmatigheid en onrechtmatigheid in Duitsland in T. Nijmeijer et al. (eds), Co & co, Liber Amicorum Co van Zundert, Kienhuis Hoving, Kluwer 2013, p. 113.

aspect of the property rights as codified in the Constitution,[11] plays an important role. We will see that the question of damage compensation in a case like the Atomausstieg and the fundamental question concerning the extent to which the necessary amendment of the law has to provide for (a possibility for) damage compensation is treated in this context.

3. The German case of the *Atomausstieg*

Amendment of the Atomic Energy Act

On March 11th 2011, a big tsunami caused substantial damages and a radioactive leak in several nuclear power plants in Fukushima (Japan). On March 14th 2011, the German government decided to impose a so-called moratorium on nuclear energy. On the basis of art 19 par. 3 of the Atomic Energy Act, which empowers the government to close down nuclear power plants temporarily for security reasons, it ordered the immediate closure of the 8 oldest nuclear power plants for a period of 3 months. On July 31st 2011, the Atomic Energy Act was amended. It confirmed the immediate closure of the 8 old nuclear plants.[12] The relevant permit to exploit the plants would be withdrawn on Aug 6th 2011(!). All the other nuclear plants would be gradually closed down by 2022. It is striking to notice that this very short amendment only dealt with the financial consequences of the technical procedure of the closure of the plants and the disposal of the nuclear waste. The other possible financial consequences of this important policy change were not discussed, except in the comments of the Bundesrat (the Senate), which remarked – at the very end of its paper – on the legal responsibility of the Federal government, implying possible damage compensation because the financial budgets of the Länder might be surpassed.[13] The government did not discuss or react to this remark and nowhere in the discussions in the Bundestag has this aspect been brought up. When financial aspects were discussed, they concerned the large profits of the four companies that were exploiting the nuclear power plants. Meanwhile, the political parties on the left advocated a complete closure on shorter notice.[14]

Unlawful moratorium

Meanwhile, it was clear that the four companies (RWE, EnBW, Eon and Vattenfall) did not agree with this sudden change and considered filing lawsuits. RWE first filed a lawsuit against the land Hessen regarding the order to close down the so-called Biblis plant for the duration of the moratorium. VGH

11 Art 14 II GG: Property entails obligations. Its use shall also serve the public good.

12 Dreizehntes Gesetz zur Änderung des Atomgesetzes Bundesgetzblatt 31 Juli 2011 Teil 1 nr 43.

13 Bundestag Drucksache 17/6246.

14 *Id*.

(Verwaltungsgerichtshof) Hessen[15] held that the order was illegal for two reasons: a procedural mistake - no fair hearing ("keine ordentliche Anhörung") - and a substantial fault - art 19 Atomic Energy Act does not give the authority to close down nuclear plants when there is no imminent danger.[16] Appeal to the BVwG (Bundesverwaltungsgericht) is not allowed by the VGH. This decision is confirmed by the BVwG (7B18.13).[17] This means that the unlawfulness of the moratorium is final.

Although the highest administrative court had decided that the moratorium was unlawful, there was no certainty yet on damage compensation. The question of damage compensation had to be decided by the civil courts. RWE and Eon filed lawsuits against NordRheinland –Westfalen and Niedersachsen which were to be decided by the Landgerichte (civil courts) in Bonn and Hannover. These cases concerned the temporary closure of the oldest plants and were unsuccessful on grounds which have little to do with the policy change as such and are therefore less interesting in the context of this paper.

Verfassungsklage

The more interesting question is whether or not the law, i.e. the Atomic Energy Act, can be amended without proper compensation for damages. The decision to amend the act implied, as we have seen, the definitive closure of all the nuclear power plants in the short or long term. This issue was dealt with by the Constitutional Court in Karlsruhe.

---

15 VGH Hessen 27-02-2013 Az 6C825/11T, accessible via: http://www.lareda.hessenrecht.hessen.de/lexsoft/default/hessenrecht_lareda.html? Kassel - 27.02. 2013 - A (3) The supervisory authority may order that a situation be discontinued which is contrary to the provisions hereof or of the statutory ordinances issued hereunder, or to the terms and conditions of the notice granting the licence or general approval, or to any subsequently imposed obligation, or which may constitute a hazard to life, health or property because of the effects of ionising radiation. In particular, the supervisory authority may order that 1. certain protective measures shall be taken, 2. radioactive material shall be stored or kept in custody at a place designated by it, 3. the handling of radioactive material, the erection and Z: VGH 6 C 824/11.T VGH Kassel - 27.02.2013 - AZ: VGH 6 C 824/11.T.

16 Die Anordnung sei zudem materiell rechtswidrig, da die Voraussetzungen der Ermächtigungsgrundlage - § 19 Abs. 3 Satz 1 i.V.m. Satz 2 AtG - nicht vorlägen, der Beklagte das notwendige Ermessen nicht sachgerecht ausgeübt und eine nicht mehr verhältnismäßige rechtsfolge gesetzt habe. The first part of Art 19 (3) reads: The supervisory authority may order that a situation be discontinued which is contrary to the provisions hereof or of the statutory ordinances issued hereunder, or to the terms and conditions of the notice granting the license or general approval, or to any subsequently imposed obligation, or which may constitute a hazard to life, health or property because of the effects of ionising radiation.

17 Accessible via: https://dejure.org/dienste/vernetzung/rechtsprechung?Text=7%20B%2018/13.

In 2013 Eon, RWE and Vattenfall filed a Verfassungsklage. They sued the Federal Government before the Constitutional Court on the basis that the 13th Amendment of the Atomic Energy Act allegedly constituted a violation of property rights and limitation of freedom of commerce, and was therefore unconstitutional unless there was compensation for damages.[18] The claim was based on a violation of article 14(I) GG jo. art 14 (III)GG.:

> I. Property and the right of inheritance shall be guaranteed. Their contents and limits shall be defined by the law
>
> II. (…)
>
> III. Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest of those affected. In case of dispute concerning the amount of compensation, recourse may be had to the ordinary courts.

Interesting in the context of this paper is the way the Constitution formulates the determination of compensation. Unlike in the Netherlands − where damage compensation in the case of expropriation always has to be granted in full[19] – in Germany there has to be an "equitable balance". That means that one is not always entitled to full compensation. That can be explained by the German concept of "Sozialbindung des Eigentums",[20] according to which property rights function in a societal context. An inherent societal risk can lead to partial, rather than full, compensation for damages.

As stated earlier under 2, we will discuss here the headlines of the history of the German expropriation law.[21] After WWII, the BGH (Bundesgerichtshof) developed a material concept of expropriation known as "Enteignungsgleicher Eingriff". If the consequences of restricting the use of a property were such that the limitation was disproportional to a certain extent, compensation for damages could be a constitutional obligation.

At the same time, the BGH developed the theory of the Sonderopfer,[22] which resembles to a great extent the Dutch system of "compensation of disad-

---

18 The suit not only raised the question of damage compensation but also that of the reasoning behind the sudden change of policy. That raises the fundamental question to what extent the constitutional control can interfere in highly politically influenced decisions like these. In the context of this paper, this question –though very interesting- is not discussed. The focus will be on the issue of damage compensation.

19 *See* art. 40 Expropriation Act (Onteigeningswet).

20 Art. 14 II GG as already mentioned (*supra* note 11).

21 *See* D.A.Lubach (*supra* note 10).

22 In English: Special sacrifice.

vantages".[23,24] According to this theory, there has to be a situation that creates a special and abnormal burden. It is self-evident that the 13.Amendment did not imply an expropriation in the formal sense. The property itself remained the plaintiffs'. Nevertheless, in this system the suit could have been based on art 14 GG (III). But the system has changed. In 1981, in the famous Nassauskiesungsbeschluss, the Constitutional Court[25] ruled that this expansion of the concept of expropriation was unconstitutional, mainly because it would mean that the court would decide on the amount of damage compensation and not the legislator as required by art.14 GG.[26] The Court stated that a distinction has to be made between the formal expropriation under art 14 GG and the determination of the content and limits of the property right. Expropriation always means the complete or partial withdrawal of the property.

Consequently, it seemed that the more recent jurisprudence left no room to ground a claim on art 14 III GG, at least not with the argument that the 13th Amendment is an expropriation and hence that there is a legal- even constitutional – obligation to pay compensation for damages under art 14 III GG. That had an important consequence. Although the authority to determine the content and limits of property rights is based on the Constitution (14 (I) S2 GG) there is no constitutional guarantee for damage compensation.

Moreover it created an additional problem. In the aforementioned (in note 23) case the Constitutional Court ruled that when an act creates a disproportional burden, the first step is to try to rectify the unlawful act. The unlawfulness, i.e. the disproportionality, cannot be "bought off" by damage compensation. That would contradict what is called "the primary legal protection".

Rectification in the above-mentioned sense may be possible in cases such as the protection of monuments or nature conservation. In the case of the closure of nuclear power plants, it is not feasible. The plant cannot be closed down partially and the measures cannot be taken in a less intense or less damaging way. If there is any disproportionality, the payment of damages seems to be the only way to compensate.[27] The Constitutional Court had ruled that, to be able to deal with

---

23 In Dutch: nadeelcompensatie. Recent legislation provides for a general basis for this type of damage compensation. *See*: Wet nadeelcompensatie en schadevergoeding bij onrechtmatige besluiten, Stbl. (Law Gazette) 2013, 50. (This part however has not yet entered into force; *see* Stb. 2013,162).

24 BGH 19-061952 BGHZ 6,270,279: "Bei der Enteignung handelt es sich um einen gesetzlich zulässingen zwangsweisen staatlichen Eingriff in das Eigentum ,sei es in der Gestalt der Entziehung oder der Belastung, der die betroffenen Einzelnen oder Gruppen im Vergleich zu anderen ungleich besonders trifft und sie zu einem besonderen,den übrigen nicht zugemuteten Opfer für die Allgemeinheit zwingt."

25 BVerfGE 58 300.

26 *See* above par. 1… "shall be defined by law" and 3…pursuant to a law that determines the nature and extent of compensation".

27 In the German terminology: Ausgleichspfichtige Inhalt-und Schrankenbestimmungen.

cases like these, the act had to contain a procedure in which, together with a decision on the content and limitation of the property right, a decision had to be taken on the right to damage compensation.[28]

Therefore, the question that had to be decided by the Constitutional Court seemed indeed to be whether or not the 13.Amendment was unconstitutional, violating art 14 (II) GG, since it did not contain such a provision. RWE aimed exactly at this question in the first part of its suit:

> In der Verfassungsbeschwerde von RWE wird erstens beantragt, festzustellen, dass Art. 1 Nr. 1 lit. a) bis c) des Dreizehnten Gesetzes zur Änderung des Atomgesetzes mit Art. 14 GG insofern unvereinbar ist, als sie keine Entschädigungs- und Ausgleichsregelung für den Eingriff in die Berechtigung zum Leistungsbetrieb vorsehen.[29,30]

Damage compensation?

Let us assume that the 13th Amendment should be completed by a provision for damage compensation. In this case, the administrative courts would be competent to judge on issues arising from questions about damage compensations in the context of Art 14 par I S2.[31] Since the Constitutional Court has not spoken yet, there are evidently no judgements of the administrative courts on this issue. The history of the policymaking regarding the use of atomic energy in Germany in the last decades seems important in this respect. Three events have a landmark-like character. In 2000, consensus was reached on atomic energy policy in the 21st century. This consensus aimed at a gradual diminution of the role of atomic energy and an Ausstieg in the long run.[32] In December 2010, however, the government decided to prolong the lifetime of the nuclear power plants by an average of 12 years compared with the Agreement of 2000, thus changing the agreements concluded in 2000.The Atomic Energy Act, in which the agreements had been implemented, had to be changed accordingly.[33] This decision was

---

28 BVerfG 2-3-1999 1BvL7/9, NJW 1999, 2877.

29 To be found in the reaction of Greenpeace on the complaints of Eon, RWE and Vattenfall p. 84 https://www.greenpeace.de/sites/www.greenpeace.de/files/publications/20130805gp_stellungnahme_verfassungsbeschwerde_evus.pdf.

30 English translation: The constitutional complaint of RWE is firstly seeking a declaration that Article 1 no. 1 lit. a) to c) of the Thirteenth Act amending the Atomic Energy Act is in so far inconsistent with art. 14 GG, as they do not provide for compensation and a compensation scheme for damages occurring from the intervention in the operation of the business.

31 Par. 40 (II) S1 VwGO (Verwaltungsgerichtsordnung).

32 The lifetime of a nuclear power plant was limited to 32 years (Entwurf eines Gesetzes zur geordneten Beendigung der Kernenergienutzung zur gewerblichen Erzeugung von Elektrizität) and would imply the closure of the last plant in 2022 (http://dipbt.bundestag.de/dip21/btd/14/068/1406890.pdf).

33 11th Amendment of the Atomic Energy Act (http://dip21.bundestag.de/dip21/btd/17/030/1703051.pdf).

motivated by the necessary role of nuclear energy during the transition period until the full implementation of ecological renewable energy. In July 2011 – 7 months later! − the 13th Amendment was adopted. This abrupt change and the reasoning behind it was challenged in the lawsuit before the Constitutional Court[34] and it goes without saying that the suddenness of the decision will play an important role when it comes to damage compensation. It is impossible and not necessary, in the context of this paper, to predict if the high claims of the industry will be honored, but there are some clues that can give an indication as to the result.

First, it is important to note that there is no protection of expected profits under art. 14 GG.[35] Moreover, the described policy changes show that the nuclear energy policy in Germany- as almost anywhere else in Western Europe- has been the subject of continuous discussion in the last decades. The parliamentary documents show that the political opinion on this issue was heavily dependent on the "political color" of the government in power. In 2000, the Agreement on the use of Atomic Energy[36] was concluded with a left-wing government[37] and, as soon as that color changed[38] in 2005, the lobby of the nuclear industry tried to get rid of it.[39] This lobbying resulted in the 2010 decision to alter the Agreement of 2000 and rely on atomic energy for a considerably longer period of time. That means that, at least until 2010, there was uncertainty as to whether the use of nuclear energy in Germany would come to an end in 2022 such as provided for in the agreement concluded in 2000. As 2022 is also the year wherein the last nuclear plant has to end its activity under the 13th Amendment, this could be an important factor in the discussion on damage compensation.

Breach of contract?

Apart from the question on the extent to which claims for damage compensation based on a legal provision in the Atomic Energy Act can be put forward, the issue of damage compensation can be raised in a different way. In the framework of the decisions of 2000 and 2010, contracts, or at least agreements, were concluded.[40] In 2010 RWE, Eon, EnBW and Vattenfall had explicitly stated that a contract would be necessary in order to make sure that a subsequent government (with

34 *See supra* notes 18 and 29.
35 *See* BVerfGE 74,129 (148).
36 The so-called Atomkonsens.
37 Rot-Grün: SPD-Grünen.
38 Schwarz-Gelb: CDU/CSU-FDP.
39 In contradiction with the statement mentioned in note 42 *infra*.
40 Atomkonsensvereinbarung of June 11 2000 (http://www.bmu.de/atomenergie/doc/2708.php) and Förderfondsvertrag of Sept 6 2010 https://www.bundesregierung.de/ContentArchiv/DE/Archiv17/_Anlagen/2010/2010-09-09-foerderfondsvertrag.pdf;jsessionid=797F95BC19998C3B9279C8E427BC1C8C.s4t1?__blob=publicationFile&v=2.

another political color) would not change their policy.[41] This implies that the question of damage compensation could also be examined in the context of a breach of contract and a lack of public trust.[42]

In that respect, we have to examine whether those politically motivated agreements can qualify as legally binding contracts. If so, they would, according to German law, be administrative contracts (Verwaltungsverträge).[43] Jurisprudence and literature though seems to be of an almost unanimous opinion that the Agreement of 2000 cannot qualify as a binding contract but has to be seen as a gentlemen agreement,[44] firstly because the government did not intent to conclude a contract[45] and secondly because the government cannot bind the legislator and prevent him from subsequently changing the law.[46] Also, the Constitutional Court has ruled that the Agreement of 2000 is not a legally binding decision or anything equivalent. Regarding the specific article at stake, it judged that its content was not more than a political statement "an denen kein vernünftig und verantwortlich Handelnder ein "Tau festbinden" würde"(translation: "that cannot be regarded as binding by any reasonably and responsibly acting person").[47]

Thus, a claim for damage compensation directly based on breach of contract will probably fail.

The non-binding character of the Agreement of 2000 also means that a certain phrase in its introduction that is particularly interesting the context of this paper cannot be more than "wishful thinking". In the introduction, the parties express their assumption that the agreement will not lead to claims for damage compensation.[48] This is important because the fear of damage compensation

41 It is noteworthy that the 13th Amendment was put forward by the same government!

42 Interesting in this respect is the remark of the chairman of Eon at the signing of the Atomkonsensvereinbarung 11-06-2000 (cited in the paper mentioned in note 27 p. 84) that emphasizes the importance of trust: "Politische Kompromisse sind auch eine Frage des Vertrauens. (...) Die Vereinbarung ist ein erster Schritt. Entscheidend ist, dass beide Seiten sich auch in Zukunft an ihren Inhalt und Geist gebunden fühlen. Wir sind dazu bereit."

43 As codified in par. 55 Administrative Procedure Act (Verwaltungsverfahrensgesetz).

44 *See*: Prof.Dr Joachim Wieland, Rechtsprobleme der Strommengenübertragung gemäss par. 7 Abs.1b bis 1d AtGesetz Reihe Umweltpolitik Bundesministerium für Umwelt, Naturschutz und Reaktorsicherkeit BMU 2007.

45 *Supra* note 32 p. 17.

46 *Id*.

47 BVerfG 19-2-2002, 2BVG 2/00 BVerfGE 104,249,266,288.

48 *Supra* note 32 p. 16: "Bundesregierung und Versorgungsunternehmen gehen davon aus dass diese Vereinbarung und ihre Umsetzung nicht zu Entschädingungsanspruchen zwischen den Beteiligten führt. Wieland ((note 44) p. 17) remarks that the companies will need more to defend a waiver of the sort among the shareholders.

claims was the reason for which the government chose "the informal way" of lawmaking, i.e. amending the Atomic Energy Act.

Hence, arguing that the principal decision of the Ausstieg already dates back to the year 2000, that the Agreement of 2000 contains a waiver of damage compensation and that the decision to extend the lifetime of the nuclear power plants in 2010 was nothing more than a short interlude will not hold either.

As to the agreement that has been concluded concerning the decision to extend the lifetime of the power plants in 2010, we have to acknowledge that it deals with a specific aspect of that decision. As a result of the extension, the companies would make their considerable profits for a longer period than was foreseen in 2000. By the institution of a special fund, the companies would contribute to the financing of the change to more ecological energy resources in the long run. Apart from this fund and apart from this agreement, a special tax (Kern-brennstoffsteuer)[49] would be introduced. The terminology of the document- the word "Vertrag" is used- gave the impression that this agreement was meant to be binding. Whether or not that was the case[50] is less important in the context of this paper. It is clear that this "Vertrag" did not imply an obligation to extend the lifetime of the power plants as such. It simply contained a financial obligation to be put in place if and when the Atomic Energy Act was changed accordingly. The 13th Amendment brought a withdrawal of the aforementioned fund with it.[51]

International arbitration

In this respect, two questions arise. First, the possible danger of the importance of these systems of supranational dispute resolution for the democratic character of decision-making on a national level is at stake and the second question is if the major role played by these institutions with respect to the litigation of important decisions of EU member states is in accordance with EU law. The European Commission has joined the Vattenfall case as "amicus curiae" to put forward its opinion that questions like these are to be decided within the system of the national and European judiciary. Both issues will be discussed hereafter.

It took a while before Vattenfall joined the other plaintiffs in the lawsuit before the Constitutional Court. This might have to do with the fact that Vattenfall is (indirectly) fully owned by the state of Sweden and, hence, can be seen as a (foreign) legal person according to public law or at least as a private company

49 In the preamble of the document, the companies made it clear that they would sue that plan in court.

50 In literature, doubts are expressed; *see* a.o. Hanka von Aswege, Christian Waldhoff, Kernenergie als goldene Brücke, Nomos, Reihe Steuerwissenschaftliche Schrifte Bnd 24.

51 http://www.umwelt-online.de/cgi-bin/parser/Drucksachen/drucknews.cgi?texte=0338_2D1_2D11#h2.

held by a public authority . Therefore, it could be argued[52] that Vattenfall is not entitled to protection under the German Constitution. The Constitutional Court has ruled that legal persons according to public law, including private legal persons held by a public authority, do not have the right to file a lawsuit on the ground of violation of a constitutional right before a German court.[53] However, Vattenfall could, as a foreign company, go another way. It has the right to sue the Federal state of Germany before the International Centre for the Settlement of Investment Disputes in Washington (ICSID).[54] The basis for this request for supranational arbitration is the Energy Charter Treaty (ECT).[55] The relevant standards in this case could be:[56] 1. The provisions for protection against expropriation without compensation. 2. The obligation of fair and equitable treatment and the non-impairment through unreasonable or discriminatory measures. 3. The duty to observe any obligations vis-à-vis an investor or investment (umbrella clause)

It is important to note that the protection afforded under the aforementioned provisions goes further than what we have seen under German law. Art.13 ECT states that investments may not be nationalized or expropriated or subjected to *an action equivalent to nationalization or expropriation (*curs. author*).* That means that, under the ECT, Vattenfall can argue that there is an indirect expropriation,

---

52 As does Greenpeace (*supra* note 29 p. 82). Differently: Nathaly Bernasconi-Osterwalder & Rhea Tamara Hoffman in The German Nuclear Phase-Out Put to the Test in International Investment Arbitration? Background to the new dispute Vattenfall v.Germany(II)to be found in the IISD (International Institute for Sustainable Development) brief series (www.iisd.org/investment). They hold that the German branch of Vattenfall that operates the power plants of Brunsbüttel and Krümmel is based as a GmbH in Hamburg and is therefore a domestic private legal person. This is disputable as at the same time Vattenfall can only file a complaint with the ISCID as a foreign company.

53 Beschluss vom 08.02.2006, 2 BvR 575/05 NJW 2006,2907: Als juristische Person des öffentlichen Rechts kann sich die Beschwerdeführerin nicht auf Art. 19 Abs. 4 GG berufen (vgl. BVerfGE 39, 302 <316>). Der Rechtsschutzstandard, wie ihn Art. 19 Abs. 4 GG für das Verhältnis der Grundrechtsträger zum Staat vorhält, gilt mit Blick auf die im Bereich der öffentlichen Aufgaben grundsätzlich fehlende Grundrechtsfähigkeit nicht für juristische Personen des öffentlichen Rechts (vgl. Maunz/Dürig/Herzog, GG, Art. 19 Abs. 4 Rn. 42). Für eine Differenzierung zwischen inländischen und ausländischen juristischen Personen des öffentlichen Rechts ergeben sich keine Anhaltspunkte. Danach sind ausländische wie inländische juristische Personen des öffentlichen Rechts auf die Geltendmachung einzelner Prozessgrundrechte wie Art. 101 Abs. 1 Satz 2 und Art. 103 Abs. 1 GG beschränkt.

54 icsid.worldbank.org/apps/ICSIDWEB/process/Pages/Arbitration.aspx.

55 The ECT was concluded in 1994 and entered into force in 1998. It is a multinational treaty that controls the transnational environment for trade, transfer and protection of investment in the energy sector; art. 26 provides for a dispute settlement mechanism between an investor and a contracting partner.

56 *See* Bernasco-Osterwalder and Hoffman (*supra* note 52) p. 2.

an argument that, as we have seen, would not hold in a case before the German Constitutional Court.[57]

Article 10 ECT requires that each contracting partner encourage and create stable, equitable and transparent conditions for investors of other contracting partners. This is, according to Bernasco –Osterwalder and Hoffman, the most effective and most frequently sought remedy by foreign investors. They suppose that Vattenfall will likely argue that it has not been treated fairly and equitably as it had legitimate cause to believe that the legal extension of 2010 would remain in force. In this context, Vattenfall will likely refer to its "legitimate expectations", an element that tends to constitute a major factor for arbitral tribunals in assessing a violation of the principle of fair and equitable treatment.[58]

To what extent these "legitimate expectations" will be honored remains to be seen. The factors already mentioned in section 3.5 should play a role.

The umbrella clause in art 10(1) ECT implies that the country where the investments are made is in general required to observe all obligations that it has entered into with an investor. Vattenfall could thus argue that the decision of 2010 to extend the lifetime of the power plants was an obligation to which Germany had committed itself and that the 13.Amendment would constitute an infringement of the ECT.

The result of the arbitration will probably be available later this year.[59] To which extent the claim of 4.7 billion euro will be honored is still uncertain. [60]

The possibility of settling investment disputes in an international context has raised questions concerning the extent to which it could be harmful to the enforcement of domestic regulation.[61] A full discussion of the pros and cons of

---

57 Idem, Bernaso-Osterwalder and Hoffman (*supra* note 52); they observe that the protection against indirect expropriation is particularly important in the context of international investment protection law because it often differs significantly from domestic approaches, which tend to be more mindful of public welfare perspectives (p. 2).

58 *Id*. p. 3.

59 http://www.mittelbayerische.de/wirtschaft-nachrichten/klagewelle-wegen-atomausstieg-rollt-21840-art1320650.html.

60 *Id*.

61 Especially in the context of the negotiation on the conclusion of the Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the USA and the already concluded but not yet ratified Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada. The idea of an Investor-State Dispute Settlement (ISDS) is much more widespread and is incorporated in a multitude of Bilateral Investment Treaties. It is also much older (ICSID was started in 1966). *See* http://www.theguardian.com/business/2015/jun/10/obscure-legal-system-lets-corporations-sue-states-ttip-icsid.

this issue is beyond the scope of this paper, but the history of the relation between Vattenfall and the Federal State of Germany is nevertheless an interesting example of what could happen if this way of dispute settlement were used more frequently, for Vattenfall is a repeat player. An earlier dispute involving Vattenfall was resolved by the ISCID in 2011. It filed a complaint against the state of Germany on the issue of the construction of a coal-fired power plant in Hamburg/Moorburg, stating that a permit imposing water quality standards made the project "unviable" and asking for damages of 1.4 billion euro. The result was that the standards were lowered.[62] It is interesting to know that, in March 2015, the EU commission has filed a complaint against Germany in this case because they allegedly violated the Habitat Directive in issuing the relevant permits for the Hamburg/Moorburg plant.[63] That raises the question of the extent to which the outcome of an international dispute settlement can supersede EU law. In this respect, the European Court of Justice has ruled that "where an international agreement provides for its own system of courts, including a court with jurisdiction to settle dispute between the Contracting partners to an agreement, (…) the decisions of that Court will be binding on Community institutions, including the Court of Justice (…). An international agreement providing for such a system of courts is in principle compatible with EU law".[64] But the ECJ has also decided that Arbitral Tribunals do not actually constitute "ordinary courts" in the sense of article 267 of the Treaty on the Function of the European Union (TFEU) and that the decisions of those Tribunals should not be executed within member states without proper examination of their consistency with EU law.[65] Doing so, the ECJ opens the door for the lawsuit against Germany.

Finally, in July 2015, the European Commission joined the procedure of Vattenfall before the ICSID as amicus curiae.[66] The EU commission claims that the procedure is illegal and violates art. 3 TFEU. The Lisbon Treaty has considerably changed the landscape of investment treaty law. Investment treaty law is now, to a large extent, formally within the exclusive competence of the

62 *See* Bernasconi-Osterwalder and Hoffman (*supra* note 52) p. 2.

63 http://www.germanenergyblog.de/?p=18291) en http://europa.eu/rapid/press-release_IP-15-4669_en.htm.

64 CJEU 14 December 1992,Opinion I/91-European Economic Area I, ECR 1001,I-6079 para. 39, as cited in Amélie Noilhac Intra-EU arbitration under the Energy Charter Treaty, The European Union competence in Foreign Direct investment; fundamental change for intra-EU energy arbitration (http://ajis-strasbourg.weebly.com/uploads/4/0/6/6/40666569/m%C3%A9moire_de_stage_a._noilhac.pdf).

65 Eco Swiss v. Benetton, ECJ, 1 June 1999, Case C-129/97, ECR 1-3055, para. 34, cited by Noihac in note 24 (*supra* note 64).

66 *See* more on this issue: Carlos Gonzalez-Bueno and Laura Lozano, More than a friend of the court. The evolving role of the European commission in Investor State Arbitration; http://kluwerarbitrationblog.com/2015/01/26/more-than-a-friend-of-the-court-the-evolving-role-of-the-european-commission-in-investor-state-arbitration/.

European Union (cf. Articles 3.1(e) and 2.1 TFEU).[67] This could imply that conflicts in this field should be resolved within a European context, because EU law has priority over the ECT since it now (i.e. after the Lisbon Treaty) governs the same competence regarding investments.[68] It can also be argued, however, that the parties in the ECT have agreed on the precedence to be given to particular obligations to ensure the most favorable treatment of and dispute resolution between investors. The ECT standards override those provided by EU law and art. 16 ECT[69] implies that EU law is complemented by the ECT but does not supersede it.[70]

We will have to wait until at least the fall of 2016 to know what the outcome of this dispute will be.

4. Conclusion

The case of the Atomausstieg discussed here has raised an intensive judicial discussion that is far from over. At least two important judgements have yet to be rendered. The Constitutional Court has to decide on the constitutionality of the 13th Amendment of the Atomic Energy Act and the ISCID has to give a decision on Vattenfall's claim for a huge compensation for damages. It is probable that more claims will be filed before national German courts in the future. Nevertheless, the study of this case allows us to reflect on the two questions raised in section 1.4:

---

67 Dr Jan Kleinheisterkamp, The Next 10 Year ECT Investment Arbitration: A Vision for the Future – From a European law perspective Report for the SCC / ECT / ICSID Conference on "10 Years of Energy Charter Treaty Arbitration" 9-10 June 2011 (http://sccinstitute.com/media/61991/jan_kleinheisterkamp_report-ect-eu-law.pdf).

68 *See* C. Söderlund, The future of the Energy charter Treaty in the Context of the Lisbon Treaty, in G. Coop (ed) Energy Dispute Resolution; Investment Protection, Transit and the Energy Charter Treaty, Jurisnet LLC, 2011, at 104 cited in note 43 by Noilhac (*supra* note 64).

69 *See* Noilhac (*supra* note 64) .Art 16 ECT provides that "where two or more Contracting Parties have entered into a prior international agreement, or enter into a subsequent international agreement, whose terms in either case concern [investment protected by the ECT]: 1. Nothing in Part III or V of this Treaty shall be construed to derogate from any provision of such terms of the other agreement or from any right to dispute resolution with respect thereto under that agreement; 2. Nothing in such terms of the other agreement shall be construed to derogate from any provision of Part III or V of this Treaty or from any right to dispute resolution with respect thereto under this Treaty, where any such provision is more favorable to the investor or investment".

70 *See* Noilhac (*supra* note 64) p.8, after having analyzed art 16 ECT as a conflict clause that discards the application of the general conflict rule of the Vienna Convention on the Law of Treaties, more specifically art 30 that consists the principle of lex posteriori, according to which the later law supersedes the earlier.

1. To what extent does a decision of policy change imply a breach of public trust and is there a ground for damage compensation?

When it comes to changing public policy, public trust is inherently limited. Changing public policy does not, in most cases, imply a breach of public trust. However, that does not mean that there is never a ground for damage compensation. The development of the constitutional control in Germany shows that, in cases solely concerned with the determination and limitation of property rights, there is no constitutional right to damage compensation since there is no formal expropriation. However, legal measures that imply a special burden can only be constitutional when the legislator has first tried as much as possible to minimize that burden and, secondly, provided a procedure for obtaining damage compensation. In my opinion, the lack of attention to this aspect in the 13th Amendment of the Atomic Energy Act makes it probable that the Constitutional Court will conclude to its unconstitutionality.

The general opinion in literature and jurisprudence is that the Agreement of 2000 does not qualify as a binding contract, which leads to the idea that, in practice, the role of binding contracts to determine long-term policy decisions, such as those at stake here, is limited, especially when the subject entails legislative amendments. Damage claims based on breach of contract in those cases seem to be hardly successful.

The decision to abandon atomic energy in 2011 implied a sudden change in comparison with the decision to extend the lifetime of the nuclear power plants in 2010. However, in the end it entails the phasing out of nuclear energy in the same time frame as was foreseen in 2000. This, combined with the fact that there had been intensive discussion in the German society for decades and the fact that exploiting a nuclear power plant has raised huge profits for a long period of time, will influence the civil courts' decisions with respect to the amount of damage compensation to be paid out.

2. In such cases, what is the role of European and international institutions in dispute resolution?

Foreign investors – among other exploiters of nuclear power plants- can use the ISCID arbitration procedure to challenge the decisions of host countries with allegedly negative consequences for their investments, while this procedure is not available to domestic investors.

In the case of Germany, the ICSID arbitration procedure can lead to decisions that are more favorable for investors than those that could be obtained from a national court.

The case of Vattenfall vs Germany in the case Hamburg/Moorburg coal fired power plant shows that a settlement in the ICSID procedure can lead to tensions between European and national regulations.

It is yet to be decided whether or not the amendment of the Treaty on the Function of the European Union by the Lisbon Treaty means that intra-EU investment disputes cannot be brought any longer before international (i.e. non-European) arbitration courts. I would not bet on a EU victory here.

On Administrative Adjudication, Administrative Justice and Public Trust.

Analyzing Developments on Access to Justice in Dutch Administrative Law and Its Application in Practice

Kars J. de Graaf[*] and *Albert T. Marseille*[**][1]

1. Introduction

In efforts to improve the good administration of justice in the context of administrative law disputes in the Netherlands, the Dutch legislator regularly amends the procedures that the General Administrative Law Act (GALA) has prescribed since 1994 for settling disputes concerning single case decision-making by public authorities. For the same reasons, public authorities and administrative courts sometimes change the manner in which these procedures are applied in practice. A basic assumption in this chapter is that administrative adjudication, administrative justice, and public trust are interconnected. Administrative procedural law and its application in practice can contribute to the acceptance of public law decision-making, the court's judicial review of those decisions and therefore public law in general.

Legal protection against administrative law decisions (single case decision-making) is available to interested parties in the Netherlands. First, an interested party may object to a decision by lodging a formal objection with that public authority. Lodging an objection leads to an objection procedure that is regulated by provisions found in Chapters 6 and 7 of the Dutch GALA. This procedure allows the public body to re-evaluate its decision in light of the applicable norms and all the relevant public and private interests involved. Secondly, this party may – if the objection procedure didn't successfully address the objections – lodge an appeal with the administrative court. In administrative court procedures, Chapters 6 and 8 of GALA provide the necessary procedural provisions to allow for a full judicial review of the administrative law decision by a specialized administrative law court.

---

[*] Associate Professor with a Chair in Public Law and Sustainability at the University of Groningen, the Netherlands.

[**] Professor of Public Administration, particularly the Empirical Study of Administrative Law, at the University of Groningen, the Netherlands.

[1] The authors wish to thank G.C. Verhagen who has been helpful in providing information for this contribution.

Improving the adjudication of administrative law disputes is a concern for both public authorities in objection procedures and administrative courts in appeal procedures, as well as for the legislator. Public authorities, when re-evaluating a decision in the objection procedure, administrative courts, when reviewing the legality of an administrative law decision, and the legislator, when amending the procedural provisions for the objection procedure and the administrative court procedure, all strive to find a balance between the need for efficient procedures and professional treatment that will lead to legally sound decision-making and/or judgments.

In this paper, we intend to analyze the changes and developments in practice and law during the last 20 years in the light of Mashaw's theory of administrative justice. This theory, which can be used to analyze the changes in the objection procedure and which can be inspirational in analyzing changes in the procedure before the administrative law courts, distinguishes between three ideal types of decision-making. Decision-making by public authorities in the objection procedure and the preparation of judgments by administrative law courts can be assessed by using these three models. The main questions we want to answer are rather simple. Could analyzing the changes in law and practice using Mashaw's analytical framework provide relevant insight? Will such an assessment provide clarification with respect to the developments that aim to improve the administration of justice in Dutch general administrative law? Can a general trend be observed? Since Mashaw's theory of administrative justice is concerned with governmental bodies delivering justice in a bureaucratic context, this theory seems especially relevant for the assessment of the objection procedure's developments. That assessment will be complemented by a recent Dutch model that has been introduced in order to assess governance in the judiciary. This model seems relevant for assessing the developments in the administrative court procedure. In Sections 3 and 4, we apply this framework to several developments in both the objection procedure and the administrative court procedure. The analysis allows us to answer the questions above and draw conclusions on possible trends in the efforts made in both practice and law to improve the good administration of justice in administrative law disputes (section 5).

2. Analytical framework to assess developments

The theory of administrative justice

The manner in which legal rules are implemented in practice has always been a topic of research and discussion. Many agree that the administration of justice should be the aim of any legal system. This is also true in administrative law where governmental bodies strive to deliver justice in a bureaucratic context. In his 1983 work *Bureaucratic Justice*, Mashaw[2] has given a definition of justice in the

2 J.L. Mashaw, *Bureaucratic Justice*, New Haven: Yale University Press 1983.

context of an administrative system. According to his work, it means "those qualities of a decision process that provide arguments for the acceptability of its decisions". Based on an empirical study of the administrative decision-making concerning the American Disability Insurance Scheme, he expanded on this definition by identifying and assessing three different models of administrative justice. He named these Bureaucratic Rationality, Professional Treatment, and Moral Judgment. According to Mashaw, these models are competitive, but not mutually exclusive, within any administration.[3]

According to the *Bureaucratic Rationality Model*, the administrative justice system should be developed in a way that enables it to process as many cases as possible at the least possible cost. It should therefore be both accurate and cost-effective, accuracy being defined here as the ability to distinguish between right and wrong. Focusing on facts and knowledge, bureaucratic rationality provides for decision-making that is rationalized to keep costs in mind. It therefore ignores arguments of value, preference or ethics. This bureaucratic view is legitimized by its conservation of state budgets and realization of politically (democratically) set goals. While bureaucratic rationality is focused on the effective and efficient implementation of the rules, the goal of the *Professional Treatment Model* of administrative justice is to serve the client. The legal professional should not just blindly follow the system, but should also make sure that the client is provided with the resources or help that is needed. The Professional Treatment Model also lets the professional himself make the appropriate decisions, thus relies less on rationalized systems. However, this means that, besides efficiency, hierarchical control is also somewhat lost. The professional is given freedom, which can lead to decisions that are difficult to check and review. This is acceptable because of the service the professional can deliver. The *Moral Judgment Model* revolves around the ideas of fairness and fair allocation of benefits and burdens. In considering the purpose of adjudicatory situations, it is accepted that one of its main aims lies in the resolution of disputes. Decision-making is a defining value according to the Moral Judgment Model. This means that there should be an even opportunity for all parties to prove their claims. Also, it promotes results that are agreed upon by all parties. The legal professional should seek the ultimate outcome using common moral principles within the context painted by the different parties.

According to Mashaw, these three models of administrative justice can be distinguished by their legitimating values, their primary goals, their structure or organization and by their different cognitive techniques (Figure 1).

---

3 J.L. Mashaw, "Conflict and compromise among models of administrative justice", *Duke Law Journal* 1981. p. 181-212. Jerry L. Mashaw, "Judicial review of administrative action: reflections on balancing political, managerial and legal accountability", *Rev. direito GV* 2005 4.5 Especial 1, p. 153-170.

Figure 1: Features of Mashaw's models of administrative justice

	Legitimating Value	Primary Goal	Structure or Organization	Cognitive Technique
Bureaucratic Rationality	Accuracy & Efficiency	Program Implementation	Hierarchical	Information Processing
Professional Treatment	Service	Client Satisfaction	Interpersonal	Clinical Application of Knowledge
Moral Judgment	Fairness	Conflict Resolution	Independent	Contextual Interpretation

Since 1983, many scholars have offered criticism of Mashaw's three models of administrative justice. Sainsbury[4] has criticized Mashaw's interpretation of administrative justice. According to Sainsbury, the efficiency of Bureaucratic Rationality has nothing to do with justice and should therefore not be included as a legitimating goal. Besides that, the features related to "structure or organization" and "cognitive techniques" should not be considered components of administrative justice. Sainsbury argued that only two qualities should be shown during a decision-making process: accuracy and fairness (fairness in this case entails promptness, impartiality, participation and accountability). One other critic is Adler, who attempted to improve Mashaw's work. An overview of Adler's ideas on administrative justice is given in his 2010 work *Administrative Justice in Context.*[5] He identifies three more models and makes some adjustments to Mashaw's original three models. He adds the *managerial, consumerist* and *market* models and renames the existing three models as the *bureaucratic, professional* and *legal* models.

Although Adler's criticism is convincing and certainly brings new value and nuance to the existing theory of administrative justice, we are of the opinion that Adler's view on administrative justice – for the purpose of this paper – is unnecessarily complicated. In the sections below, we will therefore primarily focus on Mashaw's three decision-making models and use them as the analytical framework for assessing the developments in the objection procedure and the administrative court procedure. A limitation of all theories of administrative justice is that they concern justice as delivered by organizations that belong to the executive. However, a recent report on the future governance of the judiciary seems to suggest that theories concerning the justice of an administrative system can also be relevant for organizations that are within the judiciary, like

4 R. Sainsbury, "Administrative Justice, Discretion and the 'Welfare to Work' Project", *Journal of Social Welfare and Family Law* 323.

5 M. Adler, "Understanding and Analyzing Administrative Justice", in: M. Adler (ed.), *Administrative Justice in Context,* Oxford: Hart Publishing 2010. M. Adler, "A Socio-Legal Approach to Administrative Justice", *Law & Policy* 2003 (Vol. 25), 4, p. 323-352. M. Adler, "Fairness in context", *Journal of Law and Society* 2006 (Vol. 33), 4, p. 615-638.

administrative courts. Remember that justice in the context of an administrative system refers to those qualities of a decision process that provide arguments for the acceptability of the decisions.

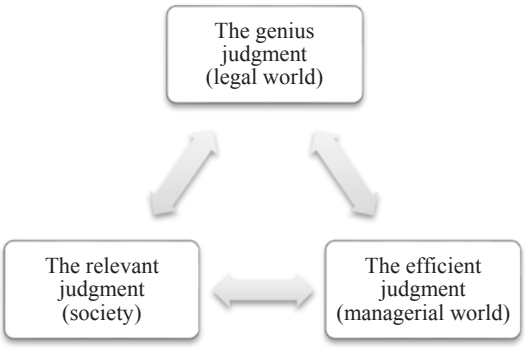
The governance model of the Dutch judiciary

In the beginning of 2014, the Dutch School for Public Governance (DSPG)[6] released a report that offered a framework for reflection on the current and future forms of governance within the Dutch judiciary branch. One of the main goals of the research was to assist the Dutch judiciary to start an appropriate, well-structured and thought-out discussion on the current governance model in order to improve the manner in which the judiciary governs itself. For the purposes of the report, the researchers interviewed many different stakeholders that play relevant roles within the Dutch judiciary, such as judges and their managers.

The report concluded that, in the last 25 years, a development in the Dutch judiciary has resulted in the rise of a new, modern public management style of governing, co-existing in parallel with the traditional, professional way of governing. This development caused a visible tension between the world of "governance" or "management" and the legal "professionals" who "just want to do their job", according to the report. Two opposite views of the governance structure of the Dutch judiciary are reinforcing this struggle. According to one viewpoint, the judiciary simply consists of a group of professionals who should be left alone as much as possible; this viewpoint embraces a highly decentralized form of governance. From the other point of view, the judiciary is a national system that should function as one single organization. This viewpoint advocates not only the introduction of central policies on many issues, but also the uniformity and transparency of these policies. In the report, the researchers distill, from their research and interviews, three different viewpoints on the governance of the Dutch judiciary. The term "judgment" is used as a metaphor for the judiciary in the figure that is used in the report to explain the three viewpoints (Figure 2).

6 http://www.rechtspraak.nl/Actualiteiten/Nieuws/Pages/Rapport-over-governance-Rechtspraak.aspx.

Figure 2: Three viewpoints on governance in the judiciary



The first viewpoint (the genius judgment) is that the legal magnificence should be at the core of the judiciary's organization. The second (the efficient judgment) stands for the opinion that the judiciary should function as a business and be managed in the sense that the best results are reached at the lowest possible cost. The third viewpoint is that of the relevant judgment (for society): the goal is to resolve the parties' dispute and make sure that the conflict is settled. The report goes on to state that, in the Netherlands, the "genius judgment" is no longer the most important or dominant view. Many perceive the "efficient judgment" to be the dominant view nowadays. This can be attributed to the rise, in recent years, of the managerial style of governance in the judiciary.

These three views are rather similar in nature to the three models of administrative justice that were established by Mashaw in his 1983 research, but they are not the same. The "relevant judgment" reiterates the importance of the service the judiciary provides for society: dispute resolution within a legal framework. Therefore, it resembles the Professional Treatment Model, which puts emphasis on providing a service to clients (e.g. parties to a conflict). However, there are aspects of the "relevant judgment" that are similar to Mashaw's Moral Judgment Model. The "efficient judgment" resembles the Bureaucratic Rationality Model since it focuses on accuracy and effectiveness, and stands for a managerial style of governance. But the "efficient judgment" also reminds us of Mashaw's Professional Treatment Model. Finally, one could argue that the "genius judgment" and the Moral Judgment have a similar background since both put emphasis on allowing either civil servants or judges to function independently in their work to resolve conflicts in a certain context. The "genius judgment" does, however, have some resemblance to the Bureaucratic Rationality Model as well. Our conclusion is that there are indeed both important similarities as well as relevant differences between the models used to analyze the forms of governance within the judiciary and those used in the theory of administrative justice.

In the next two sections (3 and 4) we will use both Mashaw's theory of administrative justice and the viewpoints on governance in the Dutch judiciary to analyze several important developments in both law and practice in the context of the Dutch objection procedure as well as the administrative court procedures.

3. Analyzing developments: the objection procedure

The objective of the legislator

The objective of the legislator in 1994, when it was decided to introduce a mandatory objection procedure in chapter 7 GALA, was that it should be a gateway for the administrative court procedure. When an interested party cannot agree with an administrative law decision rendered by an administrative authority, lodging an appeal with a specialized administrative law court must be allowed. However, court proceedings are expensive and take a long time. They should therefore be avoided in cases where they are not necessary. The GALA therefore provides that interested parties can appeal to the court only if they have first lodged an objection and participated in an objection procedure. The main goal of the procedure was to increase the chances that the public authority and the interested party reach a solution to their conflict and that, as a result, the court is not appealed to in order to settle their dispute.[7]

When designing the objection procedure, the legislator had several goals in mind. The first of these was flexibility. The legislation gave the public authority the freedom it needed to implement the objection procedure at its discretion. A second goal had to do with the legislator's fear that the public authority would not take the objections to its administrative law decision seriously. He sought to prevent cases where an interested party would not be granted a fair procedure.[8] Several measures were taken to reach this goal. Amongst other measures, a formal hearing was made mandatory. Another relevant measure was providing that the objections would not be assessed by any civil servant that had been involved in the preparation of the disputed decision, so that the re-evaluation of the decision would be unprejudiced (or by the public authority itself). Furthermore, article 7:13 GALA confers on the administrative body the competence to establish an advisory committee with external members that could conduct the hearing. A third goal was to make sure that the public authority would not assume too quickly that the objections were resolved to the satisfaction of the objector. It was stipulated that the public authority can only assume that an objection is withdrawn when it is done in writing.

---

7 *Parliamentary Papers II* 1988/89, 21 221, No. 3, pp. 115-116.

8 M. Scheltema, "Inleiding", in: A.T. Marseille & L. van der Velden (eds.), *Vertrouwen verdient. Verdiend vertrouwen. Visies op geschilbeslechting dor de overheid*, The Hague: Sdu Uitgevers 2013.

The provisions in Chapter 7 GALA on the objection procedure ensure that the public authority will take a serious look at the concerns of the interested parties. In addition, the legislator stressed the need for an objection procedure with a rather informal character; the legislator intended the objection procedure to be an informal procedure. As soon as an administrative law court is involved in the dispute, there is a risk that the dispute will be subject to unnecessary juridification. To avoid this, the interested party and the public authority should try to use the objection procedure to resolve their dispute. The reconsideration of the disputed decision should not only concern the legality of the decision but also its effectiveness and the question of whether or not the outcome is reasonable.

In light of the above, we conclude that the aim of the legislator was – in terms of the models of Mashaw – to realize administrative justice by Professional Treatment.

Developments in practice

When the objection procedure was introduced, public authorities had broad discretion to choose how they wanted to fulfill their obligation to hear an interested party during the objection procedure. Large independent public authorities, such as the tax authorities and the Employee Insurances Implementing Agency, chose to entrust this task to their own civil servants, usually those with a legal education. However, almost all municipal public authorities established external advisory committees consisting of three independent members (art. 7:13 GALA). One reason for doing this was that those municipal public authorities wanted to show that they adhered to an unprejudiced assessment of the objections. There was also a pragmatic reason: establishing an external advisory committee is an inexpensive way to handle many objections. Members of most municipal external advisory committees were lawyers. As a consequence, the objection procedure acquired in practice a rather formal character. After all, when three lawyers are asked to form a committee to provide advice on whether an objection to an administrative law decision is well founded, there is a fair chance that they will take the three-judge section of the administrative law court as an example.[9] As a result, many of the hearings of municipal advisory committees were very similar to those of the three-judge sections of the administrative courts. Parties to the dispute (the objector and the administrative body) plead their case before the committee. They frequently expressed their views orally on the basis of written pleadings, as is the case with formal court hearings. Other consequences of the dominating presence of lawyers that were independent from the public authority were that the committee's written advice focused mainly on the legality of the objected decision and that there was hardly any attention to other aspects

9 A.F.M. Brenninkmeijer & A.T. Marseille, "Meer succes met de informele aanpak van bezwaarschriften", *NJB* 2011, 1586, p. 2010-2016.

of a reconsideration of the decision: effectiveness and reasonableness.[10] The question of whether it would have been possible for the public authority to pay more attention to the interests of the objector usually didn't have much impact since the advisory committee mostly concluded – in a judge-like fashion – that the outcome of the weighing of the interests involved was not in such a way unreasonable that no reasonable public authority could have reached that conclusion.

It was also found that – unlike the legislator had assumed – objectors frequently made use of lawyers to assist them in the objection procedure.[11] This meant a reinforcement of the formal nature of the procedure. The frequent presence of lawyers in the objection procedure raised the question of whether it should be considered reasonable to order the public authority to bear the costs of the legal assistance when the procedure resulted in the amendment of the disputed decision due to a mistake made by the public authority. The GALA did provide for such a provision with respect to the procedure before the administrative law court (article 8:75 GALA), but not with respect to objection procedures. In 2002, article 7:15 GALA introduced a similar scheme for the objection procedure.

A formal aspect of the procedure that was criticized by public authorities, was the way in which the obligation to hear the objector is regulated by the provisions in Chapter 7 GALA. Public authorities of course consider it reasonable that the objector is given the opportunity to explain his objections during a hearing. However, contestants frequently do not show up when the public authority organizes a hearing to provide them with this opportunity. For public authorities it would be easier if they had the power to inform the objector that he would only be granted a hearing if he explicitly informed them of his wish to be heard. If he did not respond within a specific time-period, the public authority would assume that the objector was not interested in a hearing. The risk thus shifts from the government (that organizes a hearing for which the objector does not show up) to the objector (who loses his right to a hearing if he fails to let the public authority know that he wants to be heard). The wish of the public authorities was granted in 2013. Since then, article 7:3 GALA stipulates that a hearing is not necessary when the objector has not declared, within a reasonable period set by the public authority, that he wants to be heard.

The choices made by public authorities concerning the practical aspects of the objection procedure and the amendments made by the legislator with respect to the objection procedure show that, during the first decade after the imple-

10 B.W.N. de Waard (ed.), *Ervaringen met bezwaar. Onderzoek naar de ervaringen van burgers met de bezwaarschriftprocedure uit de Awb,* The Hague: BJu 2011*;* L.M. Koenraad, "Moed om te heroverwegen", *Gst.* (2012) 7380.124.

11 B.W.N. de Waard (ed.), *Ervaringen met bezwaar. Onderzoek naar de ervaringen van burgers met de bezwaarschriftprocedure uit de Awb*, The Hague: BJu 2011, p. 114-115.

mentation of the GALA, Bureaucratic Rationality was the dominant model guiding the efforts to try and bring about the good administration of justice.

The objection procedure: mandatory or optional?

Prior to the introduction of the objection procedure in 1994, there were discussions about whether this procedure should be mandatory or optional. The legislator opted for a mandatory procedure. The debate on "mandatory or optional" did not fade away when the GALA came into force. A frequently mentioned disadvantage of the obligatory objection procedure was that, in some disputes, the public authority and the interested parties have already exchanged all their arguments in the period before the contested decision and will not be diverted away from their positions. In such a situation, the objection procedure is nothing less than a ritual dance with a predictable outcome and only results in a loss of time and energy. There was rather much support for introducing the possibility of skipping the objection procedure in such situations.[12] In 2004, article 7:1a was added to the GALA. It provides that if someone disagrees with a decision and wants to go directly to the administrative law court, he can raise an objection and ask the public authority to agree to skip the objection procedure. If both the public authority and the court agree, the objection procedure can be bypassed.

When objectors became legally allowed to bypass the objection procedure, it was expected that they would make extensive use of this possibility. That has not been the case. A request to skip the objection procedure is made in less than 1% of the objection cases. Contrary to expectations, the interested parties did not often feel the need to go directly to court and bypass the objection procedure.[13]

The informal pro-active approach model

The past decade has seen a shift in the way public authorities handle objections. While the Bureaucratic Rationality Model initially seemed dominant, there has been a shift during the last decade to a combination of the Professional Treatment and Moral Judgment models. This has everything to do with the emergence of mediation and insights from social psychology concerning procedural justice. In a sense, there is a movement "back to the source." The way in which a growing number of public authorities are implementing the objection procedure in practice

12 B.M.J. van der Meulen, M.E.G. Litjens & A.A. Freriks, *Prorogatie in de Awb* (Invoeringsevaluatie rechtstreeks beroep), *see* <https://www.wodc.nl/images/volledige-tekst_tcm44-58740.pdf>.

13 B.M.J. van der Meulen, M.E.G. Litjens & A.A. Freriks, *Prorogatie in de Awb* (Invoeringsevaluatie rechtstreeks beroep), *see* <https://www.wodc.nl/images/volledige-tekst_tcm44-58740.pdf>.

is called the Informal Pro-active Approach Model and resembles the initial ideas and intention the legislator had when introducing the objection procedure.[14]

What is this other way of treating objections? It is a pro-active, personal and solution-driven approach that consists of two interventions. First, when receiving an objection, a civil servant ensures quick and direct personal contact with the person that lodged the objection, usually by way of a telephone call. The civil servant tries to assess the reason for the objection and consults with the objector regarding how his objection may be best addressed. Sometimes, the telephone call is not just the first contact with the objector, but also the last. That may be the case if it turns out that the objection is based on a misunderstanding (for example, the objector has misunderstood the content of the decision). Usually, the conversation with the objector is followed by a meeting at the office of the public authority. The objector, an official who has been involved in the preparation of the disputed decision and an "independent" civil servant talk about how the problem which gave rise to the objection can best be solved. This procedure takes place in the shadow of the official procedure laid down in Chapter 7 GALA. Ideally, as a result of the informal approach, the objection is withdrawn. The reason may be that the public authority agrees to modify its decision. Another reason for withdrawing the objection may be that the objector concludes that the decision that he originally disagreed with is correct. A third possible outcome may be that, although it is not possible to change the disputed decision, the public authority can assist the objector in finding a solution for his problem.

The Informal Pro-active Approach Model, which is used by a growing number of public authorities, places the citizen's problem at the center of attention. The model ideally leads to the solution of his problem, but ensures, at least, that the objector is convinced that the public authority has taken a serious look at his case, resulting in his acceptance of the outcome. In this way of dealing with objections, we mainly recognize elements of the Professional Treatment Model (the public authority focuses on providing a service to the objector) as well as elements of the Moral Judgment Model (the public authority values an outcome that the objector considers fair).

4. Analyzing developments: administrative court procedure

The objective of the legislator

When the legislator codified general administrative law in the GALA in 1994, he had several goals in mind with the introduction of new provisions for administrative court procedures in Chapter 8 of the GALA. One of the key ideas of the Dutch legislator was that the provisions on administrative court procedures

14 A.T. Marseille & H.B. Winter, *Professioneel behandelen van bezwaarschriften,* The Hague: Ministery of the Interior and Kingdom Relations 2013.

should have as their primary goal the protection of the rights and interests of the individual claimant and should not pursue compliance with all public law regulations in general. In other words, the legislator wanted procedural rules to be an appropriate framework to allow the courts to settle cases relating to an individual's rights and obligations in a binding, effective, and efficient way. As a consequence administrative courts are, to a large extent, bound by the grounds for judicial review put forward by the claimant and are also restricted in their review by the scope of the request (non ultra petita). Judicial review of a public authority's decision should furthermore be easily accessible, although appeal periods are short (six weeks). As a consequence, the Dutch GALA does not require an interested party to have legal representation in court procedures and it arranges for a rather low court fee.

One of the distinctive features of general administrative procedural law relevant for our analysis and deemed important by the legislator in 1994, is the fact that an administrative court will always actively search for the relevant and objective truth. When considering questions of fact and evidence, the administrative courts are active and are not bound by what parties have put forward. The courts are granted broad discretion when applying investigatory powers to establish the relevant facts to rule on the dispute. It provides them with an instrument to compensate for the inequality that is deemed to exist between the public authority and the civilian interested party that lodged the appeal against its decision. Together with these discretionary powers, the courts were given freedom to divide the burden of proof between the parties and to assess the probative value of the evidence put forward.[15] Trusting courts with such broad discretion was based on the assumption that courts know best and that, therefore, there was no need for any substantive provision on evidence, the burden of proof or the probative value of the evidence.

A final element that is characteristic of judicial review in the Netherlands and interesting for our assessment is the fact that appeals are always concerned with the outcome of single case decision-making. Since public authorities are usually granted discretionary powers, many cases before the administrative courts would result in the annulment of a decision by the court only to conclude that the public authority is required to try and make a new decision that can once again be the object of an appeal by the same interested party. Many scholars have argued, in the past, that this potentially continuing ritual of annulment and decision-making is not very efficient and/or effective. Therefore, in 1994, the courts were conferred the power to decide that the legal consequences of an annulled decision will be allowed to stand (article 8:72(3)(a) GALA). The courts can also determine that their rulings will replace the annulled decision (article 8:72(3)(b) GALA). In both

15 *See* A. Tollenaar, A.T. Marseille & K.J. de Graaf, "Establishing Facts by the Administrative Judge (November 3, 2008)", available at SSRN: http://ssrn.com/abstract=1294303.

cases, the court can only use these powers when it is sure of the decision that should be taken by the public authority.[16]

In light of the above, we can easily conclude that the legislator has introduced provisions pertaining to administrative court procedure without any manifest elements of – in terms of the models of Mashaw – Bureaucratic Rationality. The model that seems to dominate in the brief recapitulation of the Dutch legislator's objectives in 1994 is Moral Judgment. The fact that emphasis was put on effectively and efficiently resolving disputes by Dutch administrative courts shows that elements of Professional Treatment were considered as well.

Developments in practice

After Chapter 8 of the GALA had been introduced in 1994, the administrative law courts were considered to be active courts with a keen interest in judging cases based on the objective truth. The general opinion was that the large discretion conferred upon the courts would lead them to actively apply their investigatory powers. Although some administrative courts remained (more) active then others, over time the courts became less inclined to use their investigatory powers. One explanation for this growing passive attitude could be that the interpretation of the new provisions on administrative procedural law is still evolving and that the passive attitude would better fit the developing ideas on the structure and the goals of judicial review. Another argument was that the courts' organization is a bureaucracy as any other and that agreements between individual judges, judges and their staff, and judges and their management might affect their choice of using an investigatory power.[17] One of the issues that relates to the lack of active attitude by the administrative courts is the fact that all courts applied the so-called court-hearing-centered organizational scheme for handling cases. The aim of this organizational scheme was to process many cases at low cost. In most cases this meant that a case would be "on the desk of a judge" only several weeks before a court hearing was held and that a judgment would be pronounced within several weeks after the hearing. In many cases, a judge might feel that there was not enough time for the court to use its investigatory powers; any formal investigative power would take time and would prolong an already lengthy procedure. Although the GALA provided a framework for tailor-made case-management by offering discretionary powers to the court, the court-hearing-centered organizational scheme was perceived in practice by both courts and claimants as a binding roadmap for all cases.

16 *See* K.J. de Graaf & A.T. Marseille, "Final dispute resolution by Dutch Administrative Courts: Slippery Slope and Efficient Remedy", in: Suzanne Comtois & Kars de Graaf (eds.), *On Judicial and Quasi-Judicial Independence*, The Hague: Eleven International Publishing 2013, p. 205-217.

17 *See* A.J.G.M. van Montfort et al, "The sooner the better", *International Journal of the Sociology of Law*, 2005 (33), p. 35-51.

A decade after implementing the new provisions in the GALA, it was clear that the notion of the administrative court as an active court could no longer be considered correct. The courts would frequently rule – much to the surprise of the claimant – that the claimant didn't bring forward sufficient evidence to support his argument. Courts themselves were in most cases no longer actively using their investigatory powers, which brought scholars to conclude that administrative courts no longer comply with the normative ideal of the legislator at the time of the codification of administrative procedural law.[18] Also, an evaluative study commissioned by the Dutch Government devoted to questions related to assessing the facts of the case in administrative procedural law came to the same conclusions.

Looking at these developments it is clear that practice has shown that administrative courts should no longer be seen as active courts.[19] In particular, the court-hearing-centered organizational scheme to handle cases has led in practice to the rise of elements of the Bureaucratic Rationality Model in the way courts handle their cases. It seems that the model of the Efficient Judgment (Management) has had some influence in these developments.

The administrative court procedure: efficient and effective dispute resolution?

The Netherlands is no exception to the rule that, in most cases of judicial review, the court's decision to annul the contested decision does not end the conflict between the parties. The public authority is usually required to make a new decision, which can then be the subject of a new appeal.[20] This is highly ineffective and inefficient. Although Chapter 8 of the GALA already focused, in 1994, on the possibility of granting the courts competence for final dispute resolution, the legislator found sufficient reasons, after 15 years of dispute resolution on the basis of GALA, to try to stimulate effective and efficient dispute resolution by administrative courts in order to provide a better service to the claimants and to protect their rights and interests.[21] The Dutch legislator is keen on the idea that administrative courts have an important role to play in finding

18 L.J.A. Damen, "Public administration: 'at your service!'", in: K.J. de Graaf et al., *Quality of Decision-Making in Public Law*, Groningen: Europa Law Publishing 2007, p. 151-167.

19 T. Barkhuysen, L.J.A. Damen e.a., *Feitenvaststelling in beroep* (Derde evaluatie van de Awb - 2006), The Hague: BJu 2007, with a summary in English on p. 341-344.

20 This is sometimes called the "yo-yo" effect, *see* Philip Langbroek, Milan Remac and Paulien Willemsen, "The Dutch System of Dispute Resolution in Administrative Law", in: Dacian C. Dragos & Bogdana Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer 2014, section 4.5.2.

21 We will not discuss here the amended art. 6:22 GALA (substantive and formal illegalities can be passed, should these not affect interested persons) and new art. 8:69a GALA (claimants can invoke only those rules that are specifically intended to protect their interests).

ways to stimulate efficient and effective final dispute resolution by the courts. The legislator has made several relevant amendments to the GALA.

An administrative court's possibilities to end a conflict by means of a judgment in judicial review procedures are limited due to the separation of powers. This separation would be jeopardized if the courts decided the correct way of exercising a discretionary power that was conferred to the public authority.[22] In 2010, the GALA was amended by introducing a new instrument for the courts to better serve their clients, by providing final dispute resolution without jeopardizing the separation of powers, and to improve the efficiency and effectiveness of administrative adjudication in the Netherlands. This instrument is called an administrative loop (*bestuurlijke* lus) and it provides the courts with the power to allow the public authority the opportunity to repair the shortcomings or unlawful elements found by the court in the contested decision. A new article, 8:51a GALA, allows the court to rule, in an interim judgment, that it has found unlawful elements in the contested decision and that it will annul the decision in its final judgment. However, the court will give the public authority time to try and repair these unlawful elements and, in that way, still have the possibility of a final judgment to end the conflict.

In the meantime, the case law of the highest administrative law courts in the Netherlands had changed the way the courts assess the possibilities of effectively and efficiently ending the conflict by applying the instruments provided for in article 8:72(3), in an effort to help claimants protect their rights and interests. In an effort to codify these new developments, the Dutch legislator introduced a new relevant provision on January 1st 2013. Article 8:41a GALA stipulates that administrative courts will resolve the parties' dispute when possible. Although this provision is more or less symbolic, it does encourage the administrative courts to focus on efficient, effective and final dispute resolution in order to provide a service to society. To complement the provision, the legislator also amended article 8:72 GALA in order to be in line with the new emphasis on final dispute resolution by administrative courts.

The emphasis the Dutch legislator has put on efficient and effective dispute resolution implies a shift from a perspective where the Moral Judgment Model was dominant to a perspective where elements of both the Bureaucratic Rationality and Professional Treatment models are also deemed highly relevant. One could argue that the Efficient Judgment and the Relevant Judgment models predominate with respect to these developments.

---

22 *See* K.J. de Graaf & A.T. Marseille, "Final Dispute Resolution by Dutch Administrative Courts: Slippery Slope and Efficient Remedy", in: S. Comtois & K.J. de Graaf (eds.), *On Judicial and Quasi-Judicial Independence*, The Hague: Eleven International Publishers 2013, p. 205-218.

The new case management procedure

The past decade has seen a change in the way administrative law courts handle cases. As explained in this section, the passive attitude adopted by courts when establishing the facts of a case has met with some criticism. Also, the courts had to change the way they treat their cases due to the emphasis that has been put on efficient and effective administrative adjudication. This has led the courts away from their dominant management scheme that was focused on the court hearing. Without relevant legislative amendments, the administrative law divisions of the Dutch district courts, and also, to some extent, the highest administrative courts, have been handling their cases in accordance with a New Case Management Procedure (NCMP) since 2012. This new scheme entails that cases are scheduled to be heard as soon as possible. The hearing is meant to allow for a discussion between the judge and the parties in order to deal with the dispute in a way that does justice to the parties' interests. Judges have a more active role at the hearing. Dealing with a case in an efficient and effective manner, allowing for customization and striving towards final dispute resolution are key elements of this – rather informal – hearing.[23]

The New Case Management Procedure seems to offer relevant elements for some of the developments we have discussed in this section. First, it could be argued that the NCMP has been introduced in response to criticism that administrative courts have not been very keen on applying their investigatory powers *ex officio*. The NCMP has not been introduced for the purpose of reverting to the legislator's initial objective and making administrative courts active once again. With court hearings scheduled as soon as possible and discussions between the judge and the parties on the procedure, claimants should not be surprised any longer by the court's conclusions concerning the establishment of the facts.

Second, the NCMP is focused on providing each case with the attention and conflict resolution technique that it deserves. In that respect, the NCMP for the administrative court procedure resembles the Informal Pro-active Approach Model for the objection procedure. The dispute between the parties is at the center of attention and this ideally leads to an amicable conflict resolution or to a court procedure that parties can agree upon. Judges do their best to implement theories from social psychology when applying procedure fairly from the users' perspective, in the sense that the parties feel that they have been heard and have been taken seriously.[24]

---

23 A.T. Marseille, B.W.N. de Waard & P. Laskewitz, "De Nieuwe zaaksbehandeling in het bestuursrecht in de praktijk", *NJB* 2015/29, 1482, p. 2006-2014, B. Brink & A.T. Marseille, "Participation of Citizens in Pre-Trial Hearings. Review of an Experiment in the Netherlands", *International Public Administration Review*, XII (2−3), p. 47-61.

24 A. Verburg & B. Schueler, "Procedural Justice in Dutch Administrative Court Proceedings", *Utrecht Law Review* 2014 10(4), p. 56-72.

After the adoption of Chapter 8 of the GALA, developments in legislation and practice have focused, on one hand, on efficiency and effectiveness, which could be interpreted as relating to Mashaw's Bureaucratic Rationality Model. On the other hand, one could easily argue that the most recent practical development puts an emphasis on the Professional Treatment Model. With respect to the models used in the future to assess the forms of governance in the judiciary, one could say that emphasis, in the case of the recent developments, has been put on both the Efficient Judgment and on the Relevant Judgment.

5. Conclusions

In this chapter we have analyzed some of the developments in Dutch administrative adjudication over the past 20 years, in both the General Administrative Law Act (GALA) that was introduced in 1994 and its application in practice. Improving the adjudication of administrative law disputes is interconnected with the idea of public trust and, therefore, a concern for both public authorities in objection procedures and administrative courts in appeal procedures. Of course, it is also a relevant concern for the legislator. All strive towards legally sound decision-making and/or judgments. In their efforts, all try to find a balance between the need for efficient procedures, professional treatment and an outcome that is in accordance with public law and is perceived as fair.

The analytical framework used to perform the analysis was chosen from the theory of administrative justice, specifically Mashaw's theory of administrative justice. Although this theory was developed on the basis of research within the bureaucratic context of a government agency, the assumption upon which this chapter is built is that Mashaw's model can be used to interpret the developments in administrative adjudication in the Netherlands. Some support for this assumption can be found in a recent study on the future forms of governance in the Dutch judiciary. We have endeavored to characterize the developments in decision-making by public authorities and administrative law courts in the context of both objection and appeal procedures by indicating the extent to which it corresponds with the ideal types decision-making that are distinguished by Mashaw: the Bureaucratic Rationality Model, the Professional Treatment Model, and the Moral Judgment Model.

Using Mashaw's analytical framework to interpret the developments that aim to improve the administration of justice in Dutch administrative law has led us to the following conclusions.

With the introduction of the objection procedure in the GALA in 1994, the legislator was aiming to implement a decision-making procedure that would primarily focus on Mashaw's Moral Judgment Model. The implementation of the provisions concerned with the objection procedure and the amendments brought to the procedure by the legislator first showed a trend towards decision-making in

accordance with the Bureaucratic Rationality Model. However, in the past decade, a strong trend towards the Professional Treatment and Moral Judgment models can be seen in practice. This trend is mainly due to public authorities embracing the so-called Informal Pro-active Approach Model as an appropriate scheme to handle objections. Focusing on procedural justice and professional treatment, this Informal Pro-active Approach Model seems relevant to improve the administrative adjudication in the Netherlands and therefore public trust.

When chapter 8 of the GALA on administrative procedural law was introduced in 1994, the legislator envisaged a procedure for decision-making (pronouncing judgment) that – as was the case with the objection procedure – would be based primarily on Mashaw's Moral Judgment Model. In the first decade, the implementation of the provisions which granted the courts discretion with respect to the establishment of the facts fell prey to the Bureaucratic Rationality Model. After years of applying the court-hearing-centered scheme of managing cases, the courts seemed to have become restrained and rather passive where the establishment of the facts was concerned. Also, much attention was drawn to wishes of final dispute resolution as both a service to the client (Professional Treatment) and as a measure to improve efficiency and effectiveness (Bureaucratic Rationality). However, in the past years, the courts have changed the way they manage their cases. The introduction of the New Case Management Procedure (NCMP) can be seen – as was the case with the Informal Pro-active Approach Model (IPAM) in the objection procedure – as a clear trend towards decision-making on the basis of both the Professional Treatment and the Moral Judgment models.

In conclusion, we have found that both the IPAM and the NCMP are primarily focused on decision-making according to the Professional Treatment Model and the Moral Judgment Model. Practical implementation of provisions on administrative adjudication in the Netherlands seems to show a trend towards these two models. Differing form the Bureaucratic Rationality Model, we feel that these two models are the most likely to bring about and promote public trust in administrative adjudication and government as such.

Participation Societies or Repressive Welfare States?

Rob Schwitters[*] and *Gijsbert Vonk*[**]

1. Introduction

In virtually the whole of Western society, a shift is taking place in the rationale of the welfare state. After the war this rationale was based on the principle of universal entitlement and the idea that social welfare would reduce inequality and foster solidarity. The focus was more on social rights than on duties. Since the nineteen nineties nearly all western states have introduced restrictive conditions. Only those willing to adjust themselves to the paid labour market have access to social security benefits and the individual (and civil society at large) is expected to take up more responsibilities in providing care and support for the needy. In the King of the Netherlands' speech of 2014 this shift was famously referred to as the dawn of a "participation society". Such a society is seen as a remedy for the Omni-present welfare state with its generous benefits and welfare dependency.

There is also another way of looking at the changes that are taking place in our welfare systems. The changes produce a constant stream of paternalistic interventions and new detailed entitlement conditions which are paired with an increasingly harsh regime of sanctions to combat fraud and abuse. These are the dark undertones of new welfare policies. They attract the attention of critical commentators who refer to these policies in less positive terms: as a process of "creeping conditionality",[1] "the rise of a repressive welfare state"[2] or as a way of "punishing the poor".[3]

It is tempting to perceive the participation society and the repressive welfare states as opposites. But these are concepts of a different order which are not necessarily mutually exclusive. Participation does not have to be voluntary. It can be mandatory under the threat of sanctions in the same way as, for example, education meant to enhance autonomy, is made obligatory for all minors.

---

* Dr., Associate Professor (sociology of law) and connected to the Paul Scholten Centre of the University of Amsterdam.

** Dr., Professor of Social Security Law at the University of Groningen.

1 Peter Dwyer, "Creeping Conditionality in the UK: From Welfare Rights to Conditional Entitlements", *Canadian Journal of Sociology*, 29(2) (2004): 265-287.

2 Gijsbert Vonk, "Repressive Welfare States: the Spiral of Obligations and Sanctions in Social Security", *European Journal of Social Security,* 2014, 16, 188-203.

3 Loïc Wacquant, *Punishing the Poor, The Neoliberal Government of Social Insecurity,* Durham/London: Duke University Press 2009.

Conversely, a permissive welfare state does not have to be a recipe for more social inclusion, as it may lead to benefit dependency and a continuation of poverty. The pair: participation – repression rather signify opposite normative viewpoints, along categorical lines, of structural transformations within the welfare state.

The purpose of our contribution is to discuss some prominent sociological and philosophical interpretations of the transformations that are taking place in the welfare state. The question we raise is: how would the recent trends in welfare reform be explained by leading scholars in the field of social science and philosophy and how do these explanations contribute to our understanding of contemporary discussions about participation and repression?

Below, in Section 2 we will describe the object of this contribution by giving a brief overview of the relevant trends in social welfare reform. Then, in Sections 3 we critically discuss some prominent interpretations available in social theory and philosophy. In order to streamline the discussion, we have differentiated between the *emancipationist school*, with authors who concentrate on the improvement of the individual and the society (Giddens, and Habermas) and the *disciplinary school*, with authors who reflect upon the role of the state as determinant for controlling individual behaviour (Foucault, and Wacquant). However arbitrary and artificial this distinction may be, it helps us better understand the two faces of contemporary welfare reform of participation and repression. In Section 4 we will finish with a short deliberative conclusion and some considerations concerning the implications of the theoretical exercises for actual welfare policies. We conclude that whatever the differences between the grand scholars Foucault, Wacquant, Giddens and Habermas, all show a commitment to equality, and are resisting a moral technology in which individuals are pressed into disciplinary (economic-utilitarian) frameworks. As long as the welfare state is presented simply in terms of participation, activation and individual responsibility; headings which in fact are merely covering up systemic deficiencies, failing collective responsibilities and the material divide between the rich and the poor, all theories provide ammunition to reject these tendencies. We argue that, in order to use this ammunition, academics must translate the implications of social theories into terms of more concrete political devices, which, as a matter of fact, is exactly what some contemporary scholars are attempting to do.

2. The birth of the participation society and the rise of the repressive welfare state

Active welfare state

The majority of Western welfare states have embraced the "active welfare state" as a normative objective, following the critical reception to unconditional entitlement to welfare which is, rightly or wrongly, often referred to as a typical

characteristic of the post-war welfare paradigm. The ethos of these active welfare states is one in which an "active" individual must "take charge" of their own responsibilities and "participate" in work and in societal relations. Such ideology has now gained widespread support in social security systems across Europe and other Western states.

In the book *Reshaping Welfare States and Activation Regimes in Europe,* Serrano Pascual[4] identifies three trends which are fundamental features of the activation policies in eight European countries. In the first place, it is an individualised approach. In the author's view, rather than creating appropriate political conditions for the fair distribution of wealth, the aim is to change individual behaviour, motivation and attitudes. These policies favour the increased individualisation of interventions (tailored, client centred services) and the greater involvement of the beneficiary. The second trend is the promotion of economic citizenship, which requires workers to be more or less unconditionally available to meet the demands of the market, but also expects them to show that they are available and willing to work. Work is increasingly seen as a civil duty and as such a perquisite of citizenship. The third trend is the "contractualisation" of the relation between the individual and the state, as a metaphor for a social regulation mechanism, which focusses on "reciprocity" and "deservingness".

Legal constituents of the active welfare state

These three trends resonate in the legal and institutional changes which are visible in the social security systems. Firstly, the individualised approach is facilitated by discretionary powers which in many countries have become more widespread, often situated at the local level.[5] The active welfare state is a "local, discretionary welfare state".

Secondly, the notion of economic citizenship translates itself into the introduction of a wide array of reintegration services made available to those out of work, varying from trainee schemes, employment subsidies and mandatory work programmes to job coaches and various forms of guidance and mediation. It is also visible in the surge in work obligations formulated by the legislature, cumulating in an obligation to accept unpaid work as a form of work rehabilitation or as a token of deservingness.[6]

---

4 Serano Pascual, Ampara and Magnussen, Lars (eds.), *Reshaping Welfare States and Activation Regimes in Europe*, Peter Lang, Brussels, 2007, 11-70.

5 Gijsbert Vonk, "Lokale verzorgingsstaat, nieuwe uitdagingen voor de sociale rechtsstaat", *Nederlands Juristenblad*, 2012, 2172, 2686-2713; Duco Bannink, Hans Bosselaar en Willem Trommel, *Crafting Local Welfare Landscapes*, The Hague: Eleven International Publishers 2013.

6 Anja Eleveld, "The Duty to Work Without a Wage: A Legal Comparison between Social Assistance Legislation in Germany, the Netherlands and the United Kingdom", *European Journal of Social Security*, 2014, 16: 204-224.

Thirdly, the notion of contractualism is visible in the increased articulation of legal duties imposed on beneficiaries, often deeply interfering with personal choices and behaviour. Some countries actually use a "contract" as a vehicle to express these duties, but very often the legal status of such documents as true contracts under civil law is highly questionable.[7] What follows when beneficiaries do not adhere to the legal duties imposed on them are benefit cuts and sanctions imposed under administrative or criminal law.[8]

The birth of the participation society

The active welfare state is neither a homogeneous notion, nor a static one. The latest financial and economic crisis has forced governments to make new choices and rethink the philosophy underlying welfare policies. In this process some of the constituents of the active welfare states develop their own flavour beyond the scope of the mere ideal of a better reintegration into the labour market. Thus, for example, in the UK and in the Netherlands governments actively promote the idea that citizens should engage more actively in meaningful horizontal relations in order to strengthen the fibre of the society which is then better capable to provide care and support. This ideology not only serves as a marketing tool for various budget cuts in welfare services as part of an austerity package in an ageing society, or as a legal argument not to provide individual care services (although it cannot be denied that is has this function).[9] It also promotes civil society as an alternative to the welfare state as whole. What is interesting is that notions such as the big society (UK) or the participation society (Netherlands) have left the bedrock of economic citizenship and have entered the domain of social citizenship. However, this social citizenship is not resulting from a bottom up movement of societal organisations, but rather one which is advocated in a top down manner as a government ideal.[10]

The rise of the repressive welfare state

The flipside of the coin of the participation society is the diminishing patience with persons who do not live up the highly voiced ideal of social and economic citizenship. These are the long term unemployed, the drop outs, the addicts, the recalcitrant youths, the petty offenders, stranded single mothers, the homeless and the tramps – in short, everybody who has taken a wrong turn in life or for whom

7 Els Sol en Mies Westerveld, *Contractualism in Employment Services: A New Form of Welfare Governance*, Kluwer Law International 2005.

8 Vonk, *o.c.* 2014.

9 In the Netherlands a new Act on societal care was introduced in 2015 (Wmo 2015) which obliges municipalities to first test the strength of the social network of a citizen in the setting of an informal "discussion around the kitchen table" (keukentafelgesprek), before deciding on a claim for individual care services.

10 Willem Trommel, *Gulzig bestuur*, Inaugural Speech, VU Amsterdam, The Hague: Lemma, 2009.

the bus did not stop. They bear the brunt of the increasingly harsh policies in response to inactivity or their "wrong behaviour". These are policies which translate into an explosion of co-operation and information duties, a system of increasingly harsh sanctions and the growth of the bureaucratic machinery to engage in the implementation of these measures with wide powers to inspect, control and discipline the behaviour of individual citizens, stretching from the highest central strategic level to the most local administrative level.

Repressive policies and practices have been reported in Australia, the US and in Europe (at least in Germany, France, the UK and the Scandinavian countries).[11] It is important to point out that this trend can only partly be seen as a consequence of the active welfare state. The arrows of the repressive welfare state are not only directed against economic inactivity but also point at those suspected of fraud and abusers of benefit rights and target disorderly and antisocial behaviour in a more general sense of the word. These policies are not necessarily based on empirical evidence or rational considerations. For example, the harsh Dutch Social Security Fraud Act of 2013 was a response to political pressure, not at all to increasing levels of fraud and abuse. In fact, the figures show that these have not increased at all.[12] Also, the call for higher fines is made on the assumption of wrongful behaviour which, in practice, cannot always be upheld. Not all recipients who do not adhere to the rules are intentional fraudsters. There is a difference between intentionally and unintentionally violating obligations and the extent of error may far outreach the extent of fraud.[13] Suspected fraud is not the same as the real extent of fraud.[14] Some people just get confused by the rules or experience events in their lives that make them unfit to do what is expected of them.

The repressive welfare state comes with collateral damage. The excessive obligations, harsh sanctions and far reaching local discretionary powers constitute a cocktail which some people who are unwilling or unable to adjust, can no longer swallow. This is something which has not yet been structurally researched, but there is increasing piecemeal evidence that such correlation exists.[15] If the system loses faith in the citizens, the citizens may lose faith in the system, thus giving rise to a new underclass which does not rely on the formal safety net, but on subsidiary services such as night shelters, temporary aid, local allowances and services in kind, food banks and help from family and friends. The quality of this

---

11 Terry Carney "Australian Social Welfare-to-Work: Avoiding Freudian slips?" *Journal of Social Security Law*, 15(2), 2008: 51-75; Peter Larkin, "The 'Criminalization' of Social Security Law; Towards a Punitative Welfare State", *Journal of Law and Society*, 34(3), 2007: 295-320: Wacquant *o.c.* 2009; Vonk *o.c.* 2014.

12 Vonk *o.c.* 2014.

13 C. van Stolk, C. and H. Elmerstig, "The economic cost of social security fraud" *Bulletin luxembourgois des questions sociales*, 2013, 30.

14 Wimand van Oorschot and F. Roosma "Perceptions of mis-targeting among citizens of European welfare states", *Bulletin luxembourgois des questions sociales*, 2013, 30.

15 Gijsbert Vonk, "Kwetsbare verzorgingsstaat, over juridische aspecten van ernstige armoede in Nederland", *Nederland Juristenblad* 2015, 913, 1280-1287.

sub minimal safety net is weak: legally badly articulated, exclusive and subject to erosion.[16] Thus, the repressive welfare state may well be just one more factor underlying the growing incidence of extreme poverty and homelessness in Europe. This is then in itself part of a negative spiral as, reportedly, states respond to extreme poverty and homelessness in an equally repressive manner, introducing public order measures against sleeping rough and begging and banning the poor from the public domain.[17]

3. Sociological and philosophical Interpretations of welfare policies

Labels such as *repression* and *participation* figure prominently in sociological and philosophical accounts of transformations of the welfare state. What the analyses of Habermas, Giddens, Foucault and Wacquant share is that repression and participation are incorporated in a wider explanatory framework which includes structural transformations within various social domains. What divides their accounts is whether these transformations tend to have exclusively a disciplinary character or might also be seen as offering opportunities to citizens for emancipation.

3.1 The disciplinary accounts of Foucault and Wacquant

The combination of individual responsibility and paternalism which characterizes recent tendencies within the welfare state can be conceived in terms of discipline and power. This is the explanatory rationale which is characteristic for how Foucault, and those inspired by his thoughts, conceive the recent transformations of the welfare state. He summarizes these features in terms of *biopolitics* and *governmentality.*[18] In this perspective, individual responsibility and autonomy are not seen as fortifying the liberty of individual citizens versus the state or other citizens, but as components of a new regulatory policy of risk management: A new supervisory strategy which regards free competition, free will and individual responsibility as socially beneficial factors, which contribute, for instance, to collective wealth.

In the 17th and 18th centuries governmental authorities used severe physical sentences to articulate their power. From the nineteenth century power-relations are modelled according to the *Panopticum-model,* which means that the thoughts and conduct of people are moulded in hierarchical structures, which allow

16 Vonk, *o.c.* 2015.

17 Gijsbert Vonk, "Homelessness and the Law: A General Introduction" in: *Homelessness and the law,* Gijsbert Vonk and Albertjan Tollenaar (eds.), Wolf Legal Publishers, Oisterwijk 2014; Foundation Abbé Pierre, Feantsa and Housing Rights Watch, *Mean Streets: A Report on the Criminalisation of Homelessness in Europe*, Samara Jones (ed), 2013.

18 Michel Foucault, *The Birth of Biopolitics, Lectures at the Collège de France 1978-1979,* translated Graham Burchell, New York: Palgrave Macmillan 2008.

governments to abstain from direct physical pressure. In those structures people are observed without themselves knowing when they are observed and by whom they are observed. They are submitted to a detailed set of standards of appropriate behaviour which they internalize. Doing well at school, at work or to be a deserving recipient of social assistance implies that you have to discipline yourself and comply with the standards prevailing in the distinct domain (normalisation). Autonomy, individual responsibility and subjectivity are the outcomes of these regulatory and disciplinary techniques which work through people rather than working on them. Foucault highlights the internalisation of the disciplinary effects of governing and administrative agencies as *governmentality.*[19]

The neo-liberal transformations of the welfare state of the most recent decades, are analysed in the later publications of Foucault. He sees the neo-liberal programme for the withdrawal of the state as a technique of government. What seems to be a transmission of power to markets and private actors is in fact a matter of indirect regulation. Neo-liberal models of government allow themselves to reduce intervention, not because they are less willing to control society, but because they can rely on self-control mechanisms.[20] They develop indirect techniques for leading and controlling individuals, substituting individual responsibility for collective responsibility. Individuals are held responsible for social risks such as illness, unemployment, poverty, etc. Neo-liberalism expects that a responsible and moral individual will behave according to an economic-utilitarian rationale. Responsibility in this context does not mean more than that individuals are expected to opt voluntarily for that behaviour that is beneficial to society.

What may be questioned is whether Foucault's analysis may help to explain the most recent repressive tendencies within the welfare state. It is difficult to discern in the introduction of a harsh regime of sanctions to combat minor abuses of recipients, the refined and mild disciplinary regime which is identified by Foucault. In that respect the observations of Wacquant, who explicitly addresses the more punitive character of current policies, may be more adequate. He explains the social transformations in terms of coping with legitimacy deficits of neo-liberal policies.[21] Privatisation, deregulation, the withdrawal of the state from issues of fair redistribution and the massive accumulation of welfare at the top-echelons of society have produced urgent problems of legitimacy. Governments try to remedy this through a combination of penal policies (incorporation of deviants in expanding incarceration institutions) and repressive welfare/work policies. It especially targets (black) minorities, those living in the marginalized poor neighbourhoods and single women with children. Large segments of the

19 Foucault, *o.c.* 2008.
20 Foucault, *o.c.* 2008.
21 Wacquant *o.c.* 2009.

population are controlled and addressed in terms of lacking responsibility, to hide the structural shortcomings of neo-liberal policies.

In the theoretical framework of Wacquant, the revitalization of responsibility is not just a sophisticated technique of social control, being opportune, as Foucault maintains, when the government may rely on the internalization of social norms instead of applying direct and repressive control. According to Wacquant the penal welfare state plays a major role in covering up new hierarchies and the defects of neo-liberal politics.

Although the analyses of Foucault and Wacquant diverge on several issues, they also express similar sensitivities. The revival of responsibility has to be explained in terms of the integration problems current societies are facing. In their analyses individual responsibility is not an area beyond the control of the governments, but rather a moral technology: an instrument of regulation and integration. We will turn now to the analyses of Giddens and Habermas in which there is still room for richer conceptions of responsibility. In their perception, transformations of the welfare state are not unequivocally strengthening the grip of governmental agencies on individual conduct. These may entail the promise of reflexivity and emancipation.

3.2 The emancipist accounts of Giddens and Habermas

In the discussions concerning the welfare state Anthony Giddens' approach stands for the "Third Way".[22] It is an attempt to follow the path of neo-liberalism in the direction of deregulation and privatization, without losing the concern for equality. He still attributes a role to the state to correct the inequalities created by the unrestrained logic of the market, but at the same time he postulates that the classical welfare state has to be reshaped because it is not able to cope with problems of contemporary rapidly changing societies. The rise of new global markets, the permanent application of advanced technology, and the spreading of scientific knowledge across society, requires a flexibility which cannot be provided by the classical welfare state. It can no longer be the exclusive task of governments to protect citizens and guarantee them sufficient financial resources. People have to be activated to be flexible, to find jobs, to follow life-long training.

In the classical welfare state, social justice was identified with ever higher levels of public spending, with more focus on social rights than responsibilities. But the adverse effect was that it created new dependency (on social benefits and those distributing these) and passivity. What social support should accomplish, according to Giddens, is social inclusion, and that has to be done either by

22 Anthony Giddens, *The Third Way,* Cambridge: The Polity Press 1998.

reducing the excluding effects of the market, or the excluding effects of the unconditional benefits and social support of the classical welfare state.[23]

The destiny of contemporary citizens, according to Giddens, is that they are reflexive. Most of the problems and dangers in modern societies are risks fabricated by human beings, and not the outcome of fate. We lean on scientific knowledge to monitor these problems and establish and transform social institutions to remedy these problems. This leads to an awareness that we do not merely shape our natural and social environment, but that our conduct is at the same time the product of our (fabricated) environment. This circular relation between causes and effects can also be discerned within the domain of the welfare state.

To a far greater extent than when the classical welfare state was established, we have become aware that risks are manufactured risks created by those institutions which were established to cope with the traditional risks of unemployment and industrial accidents. The establishment of institutions to remedy risks and compensate victims has created adverse effects. The risk of unemployment, for instance, will increase when guaranteed social benefits foster passivity, as moral hazards are the inevitable side-effect of insurance. We have to accommodate institutions and incorporate individual responsibility to remedy these adverse effects. This is reflected in Giddens' postulate that there are "no rights, without responsibilities".[24]

Giddens sees the revival of individual responsibility also as the consequence of the increasing significance of science in daily life. Science has eroded traditionally embedded customs. It requires individual actors to consider permanently alternative courses of conduct, which have to be evaluated in terms of prevailing scientific expertise. They have to anticipate the risks and plan their life as responsible subjects.[25] Today, responsible parents are expected to send their children to appropriate schools, which they have to select on the basis of objective assessments. Employees have to adapt their life style to reduce the chance of getting RSI, and a reduction in insurance premiums becomes available when the insured people adapt their life styles to statistically informed standards. Thus increasing knowledge of risks leads to an expansion of the moralisation of individual conduct. Behaviour that fails to incorporate risk-avoiding practices starts to be viewed as irresponsible.

There are certainly traces of an economic utilitarian rationale in the programme of the Third Way. But it cannot be maintained that Giddens has no broader

---

23 Giddens, *o.c.* 1998, 102-103.

24 Giddens, *o.c.* 1998, 6.

25 Anthony Giddens, "Risk and Responsibility", *The Modern Law Review* 62 1 (1991), 1-10 (1991a), 2-7, *see* also: Anthony Giddens, *Modernity and self-identity, Self and Society in the late Modern Age,* Cambridge: Polity Press 1991 (1991b).

aspirations; these may for instance be derived from how he conceives inclusion: "inclusion refers in its broadest sense to citizenship to the civil and political rights and obligations that all members of a society should have, not just formally, but as a reality of their lives. It also refers to opportunities and to involvement in public space".[26] In other words, inclusion and responsibility are not merely devices to increase economic welfare, but also refer to broader meanings of citizenship.

Thus, for Giddens the revival of individual responsibility is an inevitable consequence of social and cultural transformation, which combines the need to reduce the adverse effects of dependency with the requirement to build new social bonds in a rapidly changing society. His endeavour certainly is to increase collective welfare by activating people, but his ambitions are broader and include empowerment and the strengthening of social bonds which may be the basis for a more robust autonomy.

The dual perspective on recent transformations of the welfare state can also be recognized in Habermas' approach. The principal aim of his critical social theory is to analyse social tendencies which reduce and which may enhance autonomy and democratic citizenship. In Habermas' account the classical welfare state provided the necessary building blocks for autonomy and democratic citizenship by guaranteeing minimal financial resources and social rights. But once fully established in the eighties of last century it tended to frustrate these empowering effects by its bureaucratic administration which transformed citizens into dependent clients.

Habermas' ideas about the deficiencies of the classical welfare state have to be conceived against the background of his analysis of modernisation. He sees this as an imbalanced process in which instrumental rationality has become too prominent and is crowding out normative orientations. Habermas considers the growing intervention of instrumental rationality in our daily lives to be a consequence of the development of corporate capitalism, the welfare state and mass consumption. These trends submit widening areas of life to a generalising logic of strategical considerations, efficiency and control.[27] Although the integration of society can to some extent be based on strategical forms of action (e.g. success on the market), societies are stable over the long run only if the social order is perceived as legitimate and in accordance with what is true, right and good. The social order must be rooted in consensual norms, which rely on the force of the better argument.[28]

---

26 Giddens, *o.c.* 1998, 102-103.

27 Jürgen Habermas, *The Theory of Communicative Action, Vol. II, Lifeworld and System: A Critique of Functionalist Reason,* Translated by Thomas McCarthy, Cambridge: Polity Press 1987, 360.

28 Jürgen Habermas, *Between Facts and Norms,* Cambridge UK/Malden USA: Polity Press 1997, 22.

Habermas regards the provisions of the welfare state as a necessary intervention to provide compensation for market failures to those in weaker market positions. These interventions have a dual impact: On the one hand they contribute to communicative action because they create the material conditions for equal participation. On the other hand, the legal regulations of the welfare state also have a tendency to impair communicative action. Its institutionalisation is based on the differentiation of complex systemic interdependencies and the predominance of an instrumental rationale, which subordinate individuals to the needs of the welfare state and promote strategic orientations. An illustration of this is that the bureaucratic and anonymous operation of the arrangements providing social support easily provoke strategic orientations of their clients.[29]

To remedy the deficiencies of liberal and welfare state conceptions of law, Habermas suggests a third "*proceduralist*" model of law, which is fundamentally grounded on communicative rationality. This model evaluates the interventions of the welfare state in terms of enhancing citizens' autonomy and political participation.[30] Law has to provide the material preconditions for equal opportunities to realize freedom and autonomy. At the same time, welfare entitlements may not create dependencies and strategic orientations which undermine communicative orientations. This model is based on the proceduralist assumptions of the democratic process and of a public whose citizens actively participate in political argumentative deliberation and determine the standards according to which equals are treated equally and those who are unequal unequally. Characteristic for this paradigm of law is that it protects autonomy not only against interventions by the state, but also against economic and administrative powers. State intervention is allowed insofar as it contributes to the creation of a public of citizens who participate in political communication.[31]

In sum, both the shortcomings of liberal and the welfare state paradigms are avoided in a model which articulates the communicative power of citizens, contributing to more legitimacy of the welfare state because citizens can perceive themselves as the authors of the law.[32] Habermas perceives the welfare state in an emancipatory framework. The idea of a reflexive welfare state is based on the assumption that individual actors are not merely determined by the systemic matrix of governmental needs and requirements. The welfare state has to facilitate active citizenship and participation in political communication.

---

29 Habermas, *o.c.* 1997, p. 404; A similar conclusion: Cees Schuyt, "De terugkeer van de roep om eigen verantwoordelijkheid en de paradox van verzorging en verzekering", in: *Tegendraadse werkingen*, p. 62-79, Amsterdam: Amsterdam University Press 1995, 62-71.

30 Habermas, *o.c.* 1997, 118-122 and 408-409.

31 Habermas, *o.c.* 1997, 360-366.

32 Habermas, *o.c.* 1997, 127.

What Habermas shares with Giddens is that they both embrace a reconstruction of the welfare state which will enhance autonomy, individual responsibility and activate citizens. These emancipatory ambitions are based on a richer account of responsibility than Foucault's and Wacquant' accounts. They see the introduction of individual responsibility within the welfare state merely as a device to discipline individuals to bring their conduct and thoughts in line with collective aims.

4. Conclusion

Grand sociological and philosophical theories offer challenging interpretations of changes within the welfare state. By placing these changes in the context of wider structural social transformation, they sharpen the attention to underlying political assumptions and rationales. To that extent, these analyses may be helpful for developing the contours of a welfare state architecture which is more in line with social ideals. However, those who are looking for concrete and practical indications of how to remedy its shortcomings might be disappointed. What is required when the welfare state has to contribute to emancipation and civic citizenship? However, it is not the aim of the aforementioned theorists to provide building blocks which may meet with the needs of those engaged in actual policy issues. This accounts especially for Foucault and Wacquant: they provide critical descriptive analyses of social transformations rather than developing guidelines for the reformation of the welfare state.[33] The theoretical starting points of Giddens and Habermas are in this respect more promising: they are not satisfied with analysing social transformations merely from an objective descriptive stance. Both social theorists maintain that human agency, the intersubjective interpretations of actors, and their normative evaluations have to be included in social theory. Habermas criticises Foucault because he exclusively relies on observing systemic relations. Giddens' engagement with practical political issues can be recognised in his commitment to formulating the outlines for a transformation of the welfare state, in the programme of the Third Way.

Nonetheless, Habermas' and Giddens' ideas for a transformation of the welfare state are quite sketchy. Furthermore, one may criticize them for not appreciating the risks of a negative, coercive approach to activating policies and empowerment, thus turning a blind eye to the rise of the repressive welfare state. It is therefore important that social scientists attempt to translate the implications of grand social theories into concrete political devices which are devoid of such negative implications. It is not within the scope of this article to discuss those attempts. Let us just hint at some of these.

---

33 Foucault (*o.c.* 1990) in his later works has suggested self-care as a viable and governmentality-resistant device, but it may be questioned to what extent this can be fleshed out in practical instructions, and to what extent it leads to suggestion which alternate from those which would be based on the theories of Giddens and Habermas.

Eleveld has analysed the Life Cycle Arrangement in terms of Foucault's concept of governmentality.[34] She relies on his concept of self-care, a concept which figures in his later works and which indicates how, according to Foucault, individuals could avoid or resist the disciplinary mechanisms.[35] Applied to concrete social policies it requires respect for the diversity of lifestyles and that individuals not be pressed into disciplinary categories such as those defined by an instrumentalist economic rationale.

Bartholomew builds on Habermas' ideas in his plea for dialogical social rights.[36] According to him, it requires the incorporation of dialogue and democratic participation in the administration of social benefits and social assistance. Social policies and regulations should be guided by procedural norms that allow all concerned to participate equally in decision making.

Also in line with the enhancement of democratic citizenship and active participation are Bonvin's and Farvaque's suggestions.[37] Following the ideas of Sen, which are to a large extent similar to Habermas', they assert that responsibility should not be conceived as the outcome of public policies, but rather be seen as a starting point. An evaluation of responsibility should not be used as an instrument to decide about eligibility for cash benefits. Policy should aim to render recipients more active and responsible, to help them make good choices, rather than classify them with respect to their previous choices. In other words, responsibility has to be seen as a dynamic concept in which social responsibility, individual responsibility, regulation and autonomy, are combined. This policy requires an administration which is sensitive to individual circumstances and the specific social context.

Lastly, we refer to those who continue to argue in favour of a universal basic income which releases the granting of government benefits of the chains of any conditions. This is a separate school to which has attracted may scholars with a humanist and libertarian ideas, from Thomas Paine in the 18th century to Philippe van Parijs in the present.

---

34 Anja Eleveld, "Government through Freedom: The Technology of Life Cycle Arrangement", in: W. Zeydanlioğlu and J.T. Pary *Rights, Citizenship and Torture: Perspectives on Evil, Law and the State,* Inter-disciplinary Press, Oxford 2009 and *A Critical Perspective on the Reform of Dutch Social Security Law: The Case of the Life Course Arrangement,* Leiden University Press 2012.

35 Foucault, *o.c.* 1990.

36 Amy Bartholomew, "Democratic Citizenship, Social Rights and the 'Reflexive Continuation' of the Welfare State", *Studies in Political Economy* 42 (Autumn 1993), 141-156.

37 Jean Michel Bonvin and Nicolas Farvaque, "Social Opportunities and Individual Responsibility: The Capability Approach and the Third Way", *Ethics and Economics* 2 (2) 2004, 1-24.

This balancing between the insights of grand theories merely indicates how difficult it is find definite answers. The concrete is loaded with normative ambiguities and more issues which have to be dealt with in terms of more or less, rather than categorical classifications. Better to regard the grand theories as providing sensitising concepts which indicate which paths should be rejected or in which direction viable answers may be found. Whatever the differences between Foucault, Wacquant, Giddens and Habermas, all show a commitment to equality and resist a moral technology in which individuals are pressed into disciplinary (economic-utilitarian) frameworks. As long as the transformations of the welfare state are presented simply in terms of participation, activation and individual responsibility – headings which in fact are merely covering up systemic deficiencies, failing collective responsibilities and the material divide between the rich and the poor – all theories provide ammunition to reject these tendencies.

Public Trust in the Regulatory Welfare State

Albertjan Tollenaar[*]

Social security is by definition a mixture of public and private legal mechanisms. This mixture is expected to provide efficient, tailor-made solutions that still meet public interests like reliability, solidarity and equity. From the perspective of the individual citizen, this mixture of instruments might seem rather confusing. The central question of this contribution is therefore: what are the consequences of the mixture of public and private social security for public trust?

To answer this question, a model of the concept of "public trust" must be constructed. This model contains four factors that might affect public trust. This model is then used to compare the social security for short-term disablement and for sick employees in Germany and the Netherlands. The comparison focuses on the distribution of responsibilities and the criteria determining incapacity for work. The comparison shows that both countries score differently on the identified factors, meaning that it is likely that there is a difference in public trust in both countries.

1. Introduction

Social security is, by definition, a combination of public and private responsibilities and regulation.[1] *Private* social security is always the first safety net against the loss of income or poverty. Individual arrangements such as insurances offered by assurance companies and solidarity within a family or within a social group (charities) provide a certain protection against social risks. The instruments used are mainly contracts and gifts.[2] *Public* social security is subsidiary and provides income security where private instruments fail. The instruments in the public sphere are mainly benefits based on statutory acts.[3]

---

[*] Dr., Assistant Professor, University of Groningen, Faculty of Law, Department of Administrative Law & Public Administration.

1 D. Pieters, *Social security: an introduction to the basic principles,* Kluwer Law International: Alphen aan den Rijn 2006, p. 137.

2 J.B. Williamson & F.C. Pampel, "Does the privatization of social security make sense for developing nations?" *International Social Security Review* 1998 (4), p. 3-31.

3 A. Tollenaar, "Instrumentalisation of public interests: a legal perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state,* Intersentia: Antwerp 2010.

The last two decades show a new balance between these two types of instruments. The modern approach is to use more private instruments to fulfil public goals. Public coverage decreases, leaving room for society and the market to provide a safety net. In the institutional framework one can observe the use of private instruments to create new incentives that are expected to enhance efficiency.[4] These instruments are often derived from the school of New Public Management, and result in the contracting out of social services, or in creating a market to enhance competition between public and private providers.[5]

This contribution aims to explore the actual pathology of this public-private mixture in two modern welfare states and uses the perspective of the citizen. The question that will be addressed is: what are the consequences of the new balance between public and private social security for public trust?

The answer to this question first requires an exploration of the public and private regulation in the welfare state (section 2). Then a model for public trust will be developed (section 3). This model is meant as an instrument to assess the public-private mixture of welfare states and to identify potential threats therein for public trust. This model is then used to compare two systems of social security (section 4 and 5). Section 6 contains the concluding remarks.

2. The rise of the regulatory welfare state

A brief history of the welfare state

Western European welfare states show a similar history. In the era of industrialisation employees and employers founded mutual funds as a safety net against employment related risks like industrial accidents or unemployment. Poor relief was provided by churches.[6] In that period the role of the state was subsidiary; it was first and foremost a private matter to organize social security. As Vonk & Katrougalos observe, the legal conceptualisation of social security emerged in the 19th century as an institutional answer to "the social question" that dealt with

4 J. Pacolet & V. Coudron, "De Europese verzorgingsstaten: op zoek naar tendensen binnen een economische en sociaal-politieke samenhang" *Belgisch Tijdschrift Voor Sociale Zekerheid* 2006 (4), p. 495-586.

5 M. Plantinga, J. de Ridder & A Corrà, "Choosing whether to buy or make: The contracting out of employment reintegration services by Dutch municipalities" *Social Policy and Administration* 2011(45), p. 245–263; S. Greß, "Regulated competition in social health insurance: a three country comparison" *International Social Security Review* 2006 (3), p. 27-47.; R. Böckman, "The Private Health Insurance: Demarketization of a Welfare Market?", *German Policy Studies* 2009 (1), p. 119-140.

6 M. Dupeyroux, *Ontwikkeling en tendenties van de stelsels van de sociale zekerheid der lidstaten van de Europese Gemeenschappen en Groot-Brittannië*, EGKS Luxemburg 1966.

the position of the powerful working class and the fear of socialist revolution.[7] This did not result in entitlements immediately, but merely in a facilitative role of the state to enable societal institutions, like churches and trade unions, to provide social security.

The role of the state increased as a response to failure of these private institutions. Churches only provided security for their members leaving large groups of paupers unprotected. The mutual funds went bankrupt in case of an incident, or were not reliable due to mismanagement.[8] These apparent failures justified state interference. The Beveridge reports (1942) form an important milestone in this development. The state was given the responsibility for insurance against loss of income or poverty. Social security slowly transformed in a universal human right with the institutional framework of the International Labour Organisation and the Declaration of Philadelphia in 1944.

In this public welfare state, benefits and provisions were mainly based on acts and statutes. Social assistance became a right instead of a gift and anonymous public bureaucracies slowly crowded out the civil society organisations making these groups less and less relevant. In the words of Levi-Faur, one could call this a phase of nationalisation.[9]

The countermove emerged in the economic crisis of the last quarter of the 20th century. Public social security caused moral hazards: employers did not feel an incentive to invest in improving working conditions that might lower the risk of incidental accidents, and employees felt an incentive to claim for benefits.[10] Public bureaucracies lacked the capacity to verify claims resulting in an even further abuse of social schemes.[11]

The burst of the public welfare state seemed inevitable. In many Western European states, the solution was found in two mechanisms. On the one side the reac-

---

7 G.J. Vonk & G. Katrougalos, "The public interest and the welfare state: a legal approach", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state,* Intersentia: Antwerp 2010, p. 69.

8 P. Taylor-Gooby, *New Risks, New Welfare. The transformation of the European Welfare State,* Oxford University Press: Oxford 2004, p. 2.

9 D. Levi-Faur, "The odyssey of the regulatory state. Episode one: the rescue of the welfare state" *Jerusalem Papers in Regulation & Governance*, Working paper No 39. 2011, p. 22.

10 A. Nentjes & E. Woerdman, "Instrumentalisation of the public interest in social security: an economic perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010; C.A de Kam & F. Nypels, *Afscheid van het paradijs: de herziening van de sociale zekerheid,* Amsterdam: Contact 1984.

11 P. Spicker, *How social security works. An introduction to benefits in Britain*, Bristol: The Policy Press 2011, p. 245.

tion was austerity: less public coverage and more repression for those relying on social security. The decrease of public coverage also meant a reshuffle of the rights and duties of employers and employees in labour law, creating new incentives that would prevent using public means.[12]

The second response was that of using "market type mechanisms" meant as a tool to organize public coverage more efficiently.[13] This development fits the school of New Public Management. Contracting out services and enhancing competition were thought to force agencies to act more efficiently.[14] What emerged is what one could call the "regulatory welfare state".[15]

Public interests in the regulatory welfare state

To explore the regulatory welfare state, it is necessary to understand how public and private responsibilities are balanced. The regulatory welfare state is based on the notion that the state is responsible for the provision of social security for as far as public interests are involved.[16] Public interests are those interests that go beyond the individual interests. In the hypothetical situation the market of supply and demand can serve these interests. Transactions will emerge, enlarging the welfare of the parties involved.[17]

The history of the welfare states shows that private transactions are unable to provide sufficient security for all, causing the state to interfere. The first public interest is therefore that social security has to provide *protection*; a decent stand-

12 A. Tollenaar, "Instrumentalisation of public interests: a legal perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state,* Antwerp: Intersentia 2010.

13 P. Taylor-Gooby, *New Risks, New Welfare. The transformation of the European Welfare State,* Oxford: Oxford University Press 2004, p. 3; J. de Ridder, "Instrumentalisation of public values in social security: a public administration perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

14 R. Böckman, "The Private Health Insurance: Demarketization of a Welfare Market?", *German Policy Studies* 2009 (1), p. 119.

15 G.J. Vonk, "Social Security as a Public Interest, a Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare state", *European Journal of Social Security* 2010 (1), p. 2-16.

16 B. Bozeman, *Public values and public interest. Counterbalancing economic individualism*, Washington: Georgetown University Press 2007; T.B. Jørgensen & B. Bozeman, "Public Values: An Inventory" *Administration & Society* 2007 (39), p. 354-381.

17 A. Nentjes & E. Woerdman, "Instrumentalisation of the public interest in social security: an economic perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

ard of living. This notion of protection is supported with two other public interests: *participation* and *reliability*. Public welfare supports its beneficiaries to participate, to earn an income and become independent from public support. In the early days of the public interference this notion was underlined in dogmatic pamphlets, such as the Rerum Novarum, in which the Catholic Church emphasised that the "man in the household" should be enabled to take his responsibility for his family. Reliability is the other side of the coin: if the citizen has a valid claim on support, it is important that this claim can be realized. This calls for specific regulation ensuring the strength of the supporting mechanisms, like the cover ratio of the insurance fund.[18]

These public interests form the kernel of the welfare state but do not prescribe the organisation of social security.[19] After all: protection, participation and reliability can be organized in either a public or a private environment, using public or private instruments. There are nevertheless two major restrictions that are constitutional or intrinsic to social security. One is the restriction that the welfare state has to aim for *solidarity* within a society. In Germany this is seen in article 20 of the constitution, which states that the Republic of Germany is a social federal state - this includes solidarity.[20] A second restriction is that it has to ensure *equality*; equal treatment of everyone in similar circumstances.

The last two public interests which guide the discussions on the regulatory welfare state are related to the institutional framework. The interests that come to mind are principles related to the *rule of law* and of *good governance*. The rule of law has a legal connotation and contains the general principle that public bodies have to apply and are restricted by legislation. Good governance has a wider meaning, and includes principles like transparency, effective, and efficient adjudication.[21]

---

18 M.H.D. van Leeuwen, "Trade Unions and the Provision of Welfare in the Netherlands, 1910-1960" *The Economic History Review* 1997 (50), p. 764-791; A. Knotter, B. Altena & D. Damsma, *Labour, social policy and the welfare state*, Amsterdam: Stichting beheer IIS 1997.

19 G.J. Vonk, "Social Security as a Public Interest: A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State", *European Journal of Social Security* 2010(12); G Esping-Andersen, "After the Golden Age? Welfare dilemmas in a global economy", in: G Esping-Andersen (ed), *Welfare states in transition: national adaptations in global economies*, Thousand Oaks: SAGE 1996, p. 1-30.

20 S. Muckel, *Sozialrecht*, München: C.H. Beck 2009, p. 28.

21 J. Graham, B. Amos & T. Plumptre, *Good Governance in the 21st Century,* Ottawa: Institute on Governance 2003, p. 3; D. Levi-Faur, "The odyssey of the regulatory state. Episode one: the rescue of the welfare state" *Jerusalem Papers in Regulation & Governance*, Working paper No 39. 2011, p. 22.

Regulatory welfare state: a tense relation between public and private regulation

The public interests of social security are flexible with regard to the design of the welfare state. One could think of statutory acts providing agencies with certain competences.[22] This mode of realising public interests in the welfare state is likely to provide legal certainty and equality in transparent legal procedures. The disadvantages of public regulation are also known: bureaucracies seem to lack the capabilities to respond to the individual needs of the citizens. Esping-Andersen furthermore points out the fact that public protection is often "frozen" in a past socio-economic order that no longer obtains nor is capable of responding to new risks.[23]

An alternative mode of regulation is that of privatising and market type mechanisms. Contracting out with private actors and enlarging the role of private parties are then the instruments used.[24] These instruments have their known threats as well, known as market failures.[25] Adverse selection, meaning that those with a higher risk of incapacity to work will not find access to the labour market, might harm interests like solidarity and equality.

As a concluding remark one could say that public regulation will give reason for more private (market type) instruments and private regulation will cause a public correction. This forms the expected pathology of the regulatory welfare state: a continuous struggle between two opposite spheres, resulting in an even more complex regulatory reality.

3. A model of public trust

The question is then how the citizen sees this complex regulatory reality. In other words, how does the regulatory welfare state affect public trust? Public trust is seen as trust of the citizen (the trustee) in the regulatory system and the actors within that system that have to make decisions and provide social security. In

22 A. Tollenaar, "Instrumentalisation of public interests: a legal perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state,* Antwerp: Intersentia 2010.

23 G Esping-Andersen, "After the Golden Age? Welfare dilemmas in a global economy", in: G Esping-Andersen (ed), *Welfare states in transition: national adaptations in global economies*, Thousand Oaks: SAGE 1996, p. 1-30.

24 J. de Ridder, "Instrumentalisation of public values in social security: a public administration perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

25 C.N. Teulings, A.L. Bovenberg & H.P. van Dalen, *De Calculus van het publieke belang*, The Hague: Ministry for Economic Affairs 2003.

the literature on public trust, one can distinguish four factors that are relevant to public trust.

The first factor is that of predictability. This is the approach Luhmann uses.[26] Everyone has expectations or beliefs on the way the government protects rights. Harming these expectations will negatively affect public trust. From this perspective one could derive the expectation that transparent norms on the exact entitlements may play an important role for public trust. After all, expectations and beliefs are mainly based on clear cut rules and regulations on the substantive rights and obligations.[27]

Clear rules and regulations alone are not sufficient for public trust. It is also a matter of institutionalised capability to realise these rights. This refers to what Craig Thomas (1998) calls "fiduciary trust".[28] Fiduciary trust refers to the confidence of the trustee that his rights and individual position is fully respected and taken into account. Fiduciary trust is a characteristic of individual relationships. For fiduciary trust, it is important that the actors in this relationship are aware of each other's competences and responsibilities. Fiduciary trust furthermore requires that there is a corrective mechanism if the other party in the relationship does not respect the interests of the trustee.[29] From this perspective two factors might play a role for public trust. Firstly, the extent to which the trusted actor has clear responsibilities. This would imply that the incentives and agenda have to be transparent. The second factor deals with the availability and complexity of procedures to correct the trusted actor.

The corrective mechanisms refer to a third perspective on trust: that of institutional-based trust. Some institutions enjoy a trust that is seldom questioned.[30] One may think of legal procedures or democratic decision-making. Institutions like these have a history-based positive effect on public trust. This becomes visible when the design of an institution is changed. When for example access in a legal procedure is made more difficult, this potentially has a negative effect on public trust. This results in the fourth factor of public trust: the extent to which procedures differ from trusted institutions like democratic procedures or known legal procedures.

---

26 N. Luhmann, *Trust and power,* Chichester: Wiley 1979.

27 R. Bachmann, *Trust and power as means of co-ordinating the internal relations of the organization – a conceptual framework*, Groningen: University of Groningen 2002.

28 Craig W. Thomas, "Maintaining and Restoring public trust in Government agencies and their employees", *Administration & Society* 1998 (30), p. 166-193.

29 Craig W. Thomas, "Maintaining and Restoring public trust in Government agencies and their employees", *Administration & Society* 1998 (30), p. 166-193.

30 Craig W. Thomas, "Maintaining and Restoring public trust in Government agencies and their employees", *Administration & Society* 1998 (30), p. 166-193.

The four identified factors form a descriptive model of public trust. The clarity of rules, the clarity of responsibilities, the availability of corrective mechanisms and the quality of these procedures are factors that potentially affect public trust.

The next step is to "fill" this model: what are the exact variables that are meant with clarity of rules, responsibilities, corrective mechanisms and procedures? To answer this question, systems of social security in two countries have been compared: Germany and the Netherlands. Both countries have a relatively high trust in the government and in the legal system,[31] and are comparable in the sense that both countries are mainly occupational welfare states, meaning that the coverage of social security aims to protect the income of the employee.[32]

The major distinction between the Netherlands and Germany is that in Dutch legislation the cause of sickness or disability is irrelevant and the coverage is extended to the so-called "risque social" instead of only the "risque professionel". In German law the cause of sickness or disability is a relevant factor for the type and amount of benefits. In Germany benefits are not only meant as an income protection, but also as a compensation of damages.[33] This distinction is relevant to understand the differences between the two states.

The comparison focuses on two elements of income security for employees who report illness or who become disabled. Particularly in this part of social security, one might find a mixture of public and private instruments, since it is founded on a private relationship between employer and employee. The two elements that are compared are firstly the distribution of responsibilities between the employer and the government (section 4) and secondly the assessment of medical facts (section 5).

4. Continued payment of salary and sickness benefits

What happens if the employee reports in sick? Is there an entitlement to continued payment of salary or a (public) benefits? The regulatory framework often

---

31 According to the Eurobarometer 50% of the citizens in The Netherlands and 48% of the citizens in Germany answered that they "tend to trust the national government", based on a survey in 2014. To compare: in Greece 16% tend to trust the government and in Belgium 43%. Trust in the legal system is 60% in Germany and 65% in the Netherlands (based on a survey in 2010). In the European Social Survey on 2012 these percentages are even higher: 70% for Germany and 80% for the Netherlands.

32 G. Bonoli, "Classifying Welfare States: a Two-dimension approach" *Journal of Social Policy* 1997 (26), p. 351-372; E. Immergut, "Between state and market: sickness benefit and social control", in: M. Rein & L. Rainwater (eds), *Public/private interplay in social protection: A comparative study,* N.Y.: Sharpe 1986, p. 57-98.

33 S. Klosse, *Menselijke schade: vergoeden of herstellen?,* Antwerp: Maklu 1989.

contains a combination of both. The result is a shared responsibility of both the state and the employer.[34]

Germany

The German Civil Code *(Burgerliches Gesetzbuch, BGB)* contains the principle "no work, no pay". This principle has an exception in article 326 II: if the employee is unable to work due to sickness, the employer is obliged to continue paying the wages for the first six weeks.[35] This right to continued payment of wages is regulated in the *Entgeltfortzahlunggesetz*. After six weeks of sickness the employee is entitled to the (public) statutory health insurance funds *(Krankenkassen)*.

The main goal of the *Entgeltfortzahlunggesetz* is to consolidate employees' income security when unable to work due to sickness. The act transfers the responsibility and liability for employees' income security to their employer. The cause of sickness is not relevant.[36] Only if the sickness is caused by an accident and a third party can be held liable for said accident, the employer has a right of recourse against the third party. The employee has to cooperate and to support the execution of this right.

The responsibility for continued payment during sickness forms a serious financial risk for employers with few employees. To cover this risk there is a public compensation scheme for these small companies. For employers with fewer than 30 employees the *Aufwendungsausgleichgesetz (AAG)* provides the opportunity to reclaim 80% to 100% of the *Entgeltfortzahlung* at the public *Krankenkasse*.

The *Entgeltfortzahlung* is an important transfer of income security of employees to the private sphere. The importance is underlined by the fact that about 90% of the income for sick and disabled employees rests upon the employers in the form of *Entgeltfortzahlung*. The remaining, 10% of the costs of income security is based on the public *Krankenversicherung*.[37]

The Netherlands

In the Netherlands, employees who are unable to work due to sickness, are entitled to sickness benefits, under the rules laid down in the sickness benefit act

---

34 A. Nentjes & E. Woerdman, "Instrumentalisation of the public interest in social security: an economic perspective", in: G.J. Vonk & A. Tollenaar (eds), *Social security as a public interest: A multidisciplinary inquiry into the foundations of the regulatory welfare state*, Antwerp: Intersentia 2010.

35 A. Junker, *Grundkurs Arbeitsrecht,* München: Beck 2009, p. 528.

36 J Schmitt, *Entgeltfortzahlungsgesetz und Aufwendungsausgleichgesetz*, München: Beck 2007, p. 2.

37 A. Junker, *Grundkurs Arbeitsrecht*, München: Beck 2009, p. 155.

(*Ziektewet, ZW)*. Under this act, the entitlement to sickness benefits only exists if there is no right to payment of wages (art. 29 ZW). Under the Civil Code (*Burgerlijk Wetboek, BW*) the employee has the right to continued payment of 70% of the last earned wages for the first two years (104 weeks) of sickness (art. 7:629 BW). In practice this percentage is often higher, depending on the agreements with trade unions in the collective labour agreements. In any case, the public safety net of the *Ziektewet* functions only as a safety net in case the employer is incapable of continuing to pay wages (for example due to bankruptcy).

It goes without saying that the obligation to continue paying wages form a huge risk for the employer. The employer can decide to take out insurance for this risk with a private insurance company. There is no public interference with this insurance, except for the fiscal incentive that the employer can deduct the contributions from corporate taxes.

The transfer of the risk of loss of income to the employer was initially believed to provide an incentive for the employer to invest in improving working conditions and reducing absenteeism.[38] The fact that the employer has to pay the bill was expected to form an incentive for the employer to carefully monitor the reasons for sickness and to ensure a quick reintegration of the employee. In addition, the legislation also contains an entitlement for the employee that the employer would take re-integrative measures to enable him to work. An employee can enforce this right in civil law proceedings.

Comparison

The obligation of continued payment of wages during sickness can serve many goals. One goal might be maintaining income security for the employee, which is, especially in the German situation, a relevant factor where the employer has to pay full salary for the first six weeks. Another goal is to lower the bureaucratic costs of assessing the claim of the sick employee. Since the employer is responsible, the claim has to be settled in the private relations between employee and employer first.

The obligation to continue paying wages in the Netherlands for two years forms an incentive for the employer to prevent sickness or disability. The private insurance market that covers this risk will even be stricter in enforcing these efforts, for example, in the form of higher premiums if the employer has many sick employees.

What does this comparison show concerning the model of public trust? The entitlements as such are rather clear: in Germany full salary during six weeks fol-

38 Explanatory Memorandum of the Wet Terugdringing Ziekteverzuim (Parliamentary Papers II, 1992-1993, 22899, nr. 3), p. 19.

lowed by Krankengeld, based on statutory acts. In the Netherlands the entitlement is at least 70% of the earned income, but this may be more depending on the collective labour agreement. It is however especially less clear regarding the right to re-integration what the entitlements of employees are. For this part the employer might feel an incentive to invest in changing working circumstances to enable the sick employee to work again, but the employer might also calculate costs and conclude that these investments are unprofitable.

In Germany the smaller companies do not feel the incentive that is related to the *Entgeltfortzahlung*. For this category the responsibilities are not clear. For larger companies it is just as in the Netherlands: the employer is fully responsible for income security for the employee, insofar as the employer has a clear responsibility to do what it takes to provide income security.

With regard to corrective mechanisms, the shared responsibility during the first phase of sickness causes in both countries high thresholds, since the rights have to be enforced using ordinary court procedures. In Germany this ends after six weeks; in the Netherlands the employee has to enforce their rights in ordinary court procedures during the first two years of sickness.

Finally, the question whether or not the private part of social security crowds out trusted institutions remains. In Germany the private part is rather limited and the roles of the employer and Krankenkasse are rather clear. For the employee this means that it is rather easy, or at least clear, as to how he or she has to enforce the entitlements. Compared to this, the Dutch situation is a more serious threat to public trust, since an employee is in a mixed situation with the employer. An employer might hire company doctors or insurance companies to assess on his behalf. For the employee this results in a rather unclear situation of who he has to address and which procedures he then can use. This design uses institutions that do not have a trusted reputation. It is actually on the contrary; private law procedures are often associated with an abuse of powers. The employee is a one-shotter who has to enforce his rights in a procedure against a repeat-player (the insurance company hired by the employer) while the procedure as such does not compensate this inequality.[39]

The next table summarizes the comparison on the four factors of public trust related to the first phase of continued payment of salary and sickness benefits.

[39] Marc Galanter, "Why the "haves" come out ahead: speculations on the limits of legal change", *Law and Society Review* 1974 (1), p. 165-230.

Table 1: Public trust in the first phase of sickness

	Germany	The Netherlands
Clear rules	Yes: full salary during six weeks	Partly: salary depends on collective labour agreement, re-integration is not regulated
Clear responsibilities	Partly: small employers receive compensation and don't feel an incentive	Yes: for the first two years the employer is responsible
Corrective mechanisms	Yes: ordinary procedures against the employer, administrative procedures after six	No: high thresholds since corrective mechanisms are part of labour law
Trusted institutions	Yes: the employee has to deal with his employer and the public agencies	No: employees deal with employer, insurance companies, company doctors; procedures are not clear

5. Assessing incapability of work

Entitlements to continued payment of wages or to public benefits are based on the question of whether or not the employee is "sick" and "incapable of work". These definitions need an assessment of medical facts by medical professionals. In this medical assessment, various public and private instruments seem relevant, such as the (contractual) relation between the medical professional and the employer or employee, and the rules applied when assessing medical facts.

Germany

The entitlement to *Entgeltfortzahlung* depends on "incapacity for work" *(arbeitsunfähigkeit)* that is caused by "sickness". When an employee reports sickness he is obliged to inform his employer of the expected length of his sickness (§ 5 EntgFG). If the sickness will be longer than three days, the employee has to provide a medical notice, written by a doctor that states the expected duration of the sickness.[40]

Any doctor can write medical notices. The only requirement is that the doctor is certified. When writing a medical notice, the doctor has to apply the guidelines

[40] W. Hunold, *Krankheit des Arbeitnehmers,* Freiburg: Rudolf Haufe 1994, p. 112; H. Vogelsang, *Entgeltfortzahlung,* München: C.H. Beck, 2003, p. 26.

laid down by the *Gemeinsame Bundesausschuss*, a professional association of doctors and medical practitioners. The authority to formulate these guidelines is laid down in § 92 of book 5 the social security act. The guidelines define incapacity for work as the situation where the sickness makes it impossible for the employee to do the job, or will worsen when doing the job.[41] The rules state that the doctor has to ask about the details of the job, the demands of the job and has to assess whether or not there is a causal relationship between the sickness and performing the job activities.[42] Furthermore, these rules state that the medical notice has to be based on a "medical assessment" (§ 4 paragraph, 1 *Richtlinien*). If a doctor does not obey the rules laid down in the guidelines, he runs the risk of being fined.[43]

If the employee fails to provide a medical notice the employer may refuse further payment (§ 7 EntgFG). If the employer doubts the quality of the medical notice, the employer has the option of informing the medical service of the statutory health insurances *(Krankenkassen).* This medical service then has to check whether or not the medical assessment by the doctor meets the criteria demanded (§ 275 Abs. 1 Nr. b SGB V).

The Netherlands

In the Netherlands incapability of work due to sickness occurs when the employee is physically not able to work, or work will harm his health. Once the employee reports ill, it is the employer who has to agree that the employee is truly "too ill to work". For this assessment the employer might ask the company doctor for advice. The Working Conditions Act obliges employers to contract a company doctor or company advisor, to supervise the company policy on absenteeism. This company doctor has access to all (medical) information necessary, including medical files. He can even call in the employee for a medical assessment. With regard to the company doctor the only requirement is that these professionals have a certificate (art. 14 Working Conditions Act). However, which rules they apply and how they assess whether or not the employee is truly ill and incapable for work, is not made explicit. The rules that are applied are often professional protocols, meant as general standards of the most common causes of incapability to work. These protocols are not binding nor provide entitlements to the employee.

If an employee does not cooperate with the medical assessment, or if the company doctor judges that the employee is not incapable of doing his job, the em-

41 H. Vogelsang, *Entgeltfortzahlung*, München: C.H. Beck 2003, p. 28.

42 *See*: § 2, par. 5 Richtlinien über die Beurteilung der Arbeitsunfähigkeit und die Maßnahmen zur stufenweisen Wiedereingliederung, of the Gemeinsame Bundesausschuss 01.12.2003 BAnz. Nr. 61 (S. 6501) vom, 27.03.2004.

43 W. Hunold, *Krankheit des Arbeitnehmers*, Freiburg: Rudolf Haufe 1994, p. 102.

ployer can impose a "pay freeze", meaning that the employee does not receive wages until he cooperates or returns to his job. If the employer imposes a "pay freeze", the employee has to start action for recovering the wages, stating that he is truly ill and incapable of work. In this procedure the employee must first apply for a so-called "expert review" by a medical advisor appointed by the employee insurance agency, the public body that is responsible for the payment of invalidity benefits (art. 7:629a BW). This expert review has high practical value. If the medical advisor judges that the employee is incapable of work due to sickness, the employee has a stronger position in the legal procedure to claim his wages. On the other hand, if the medical advisor concludes that the employee is not incapable of work due to sickness, the position of the employee in the procedure for recovering wages is very weak.

Dutch law does not contain specific requirements with regard to the authority to assess whether or not the employee is incapable of work. There are, for example, no specific requirements with regard to the expert appointed by the employee insurance agency who gives the "expert review". It is further unclear where the employee can address complaints regarding this expert review, since this review is not regarded a "decision" in the meaning of the General Administrative Law Act and is therefore immune for judicial review.[44]

Comparison

The assessment of medical facts is mainly publicly regulated in Germany, whereas in the Netherlands it is primarily a private matter between employee and employer. The medical notice in Germany is provided by general practitioners who act more or less as public agents. In the Netherlands the question of whether or not the employee is truly incapable for work is first of all a private dispute between employee and employer. The employee has to cooperate if the employer wishes to investigate the grounds of absenteeism and the employee runs the risk of losing wages due to the pay freeze. The "expert review" can be seen as an attempt to compensate this unequal relationship. It is debatable whether or not this requirement is truly a support for the employee. After all, with a negative expert review it becomes quite impossible to plead the case that the employee is really ill.

Seen from a perspective of public trust it is interesting to notice that the exact rules on who is incapable for work and who not is regulated quite differently in the Netherlands and Germany. In the Netherlands, it is up to the professional standards of the company doctor and the doctor of the public agency to assess the incapability to work. The protocols they use are not relevant in court procedures. The procedures used when developing these protocols are not regulated.

44 *See*: A.M.P. Rijpkema, *Toegang tot het recht bij ziekte en arbeidsongeschiktheid*, Deventer: Kluwer 2013.

Compared to this, the German *Richtlinien* seem to be the result of delegated rule-making. The legal basis is made explicit, giving a competence to promulgate these rules. In practice these rules will play a more important role since the assessment of incapability for work by the general practitioner has to be based on these rules.

Regarding the responsibilities, the picture is mixed as well. In Germany it is striking that the general practitioner can assess whether or not his client is incapable for work. For this assessment the general practitioner does not have to know anything about the actual working situation and whether or not the employer would be able to offer a different kind of work. In that sense the responsibilities are clearly demarcated. In the Netherlands, the responsibilities are concentrated with the employer; he has to agree on the incapability to work and can ask a company doctor for advice. This may provide the opportunity to make tailor-made decisions, meaning that the employer would be able to offer work that suits the specific handicaps that the employee faces.

The other side of the coin is that in this system the corrective mechanisms are not easy to use. In case of a dispute the procedure is quite burdensome for the employee. The expert review by the public agency provides only limited support, since this review cannot be questioned. Compared to this, the German system has clear corrective mechanisms; correspondingly also for an employer who thinks that the medical notice is inadequate.

The mixture of procedures in the Netherlands is also relevant for the last factor of trusted institutions. The expert review is an intervention meant to strengthen the position of the employee. This already shows that the original design, in which the employee and employer have to solve their issues together, has its problems and does not promote public trust. The expert review can be seen as an attempt to solve this issue, but it is then striking that this review cannot be questioned in administrative procedures. Compared to this, the German system contains administrative procedures that normally do promote public trust.

The next table contains a summary of this analysis.

Table 2: Public trust when assessing sickness

	Germany	The Netherlands
Clear rules	Yes: guidelines promulgated by the medical association	No: medical protocols with a vague status
Clear responsibilities	Yes: general practitioner has to assess incapability for work	No: the employer is fully responsible for agreeing on incapability for work.
Corrective mechanisms	Yes: Krankenkassen can intervene	Partly: there is a procedure (expert review) but the employee cannot fully challenge the assessments of this reviewer
Trusted institutions	Yes: administrative court procedures	No: mixed procedures, with expert review that cannot be challenged

6. Concluding remarks

What are the consequences of mixed public and private social security for public trust? With the observation that social security contains more and more private elements, this question seems very relevant. Public trust is described as a dependent variable in a model with four factors. These factors are clear rules and norms on substantive rights and obligations, clearly demarcated responsibilities, the availability of corrective mechanisms, and the use of institutions that have a trusted reputation. In a regulatory welfare state, it is likely that these factors are affected and therefore that public trust is endangered.

The comparison of the actual regulation of the social security in the Netherlands and Germany show many differences in the balance between public and private social security. The general tendency is that the public regulation is retreating, leaving room for private initiatives. With regard to the substantive rights on continued payment of salary when reporting sick, the employee in the Netherlands is depending on vague standards and protocols that do not have a legal effect. On the other hand, in the Dutch situation the employee and employer are able to work out solutions together and finding work that is still feasible with the experienced physical obstacles. This is aimed at preventing long-term absenteeism.

In this regard the German design is more clear, with clear distinctions between public and private responsibilities and clear rules on who is incapable for work

and who is not. The privatisation in Germany is mainly seen as an instrument to avoid too much bureaucracy. A short period of continued payment of wages, combined with the compensation scheme for smaller companies makes it less likely that the medical facts will be disputed. Therefore, there is no reason to compensate the weak position of the employee, and responsibilities are clearly distinguished.

The comparison in this contribution focuses only on two aspects, related to the income security of sick employees. With the model of public trust one might be able to fully assess the quality of a regulatory design in terms of promoting or harming public trust.

To conclude, if one compares the two systems of social security it seems more likely that public trust is better maintained in Germany. At least the score on the factors in our model seems more positive for the German system. The Dutch system contains more private elements, with new public corrective mechanisms. This system is therefore an example of the regulatory paradox: private instruments to replace failing public provision result in even more, but slightly different public interference, resulting in an even more complex regulatory welfare state.

Though the comparison shows a different pathology the tendency in both countries is similar. Recent German developments with institutionalised competition between statutory and private health insurance show also that in Germany the search for efficiency comes with regulatory complexity. It is therefore interesting to monitor the consequences with regard to public trust. Will solidarity indeed fade away? To answer that question (more) empirical data is needed. Or, as the German constitutional court judged in its decision on the reform of the health insurance stated: "Expectations of the legislator on the functioning of specific instruments can prove to be wrong. That should be a reason to correct the law."[45]

[45] BVerfG, 1 BvR 706/08 vom, 10.6.2009, Absatz-Nr. 170.

Crowding Out Administrative Justice

Jacobus de Ridder[*]

1. Introduction

A minor integrity incident that took place in the year 2011 at the Dutch ministry of defense, and which was blown out of proportion by the press, resulted in a full-fledged investigation of the integrity policies of the defense department. In the course of that investigation the defense department's Chief Administrative Officer (CAO) was questioned about his take on integrity issues. During that conversation the CAO picked up two cell phones. "This one is mine", he said, "and this other one is the government's phone. Everyone knows that I can use that second phone to call home to my wife to inform her that I will be late because of a meeting. Everyone knows that I can NOT use that phone to call my son who is South America to discuss his troubles over there". His point was that the norm was clear: "government issued cell phones can be used privately in an appropriate manner". In a way, he emphasized the importance of unwritten rules, or social norms. Still, the ethics rulebook at the ministry contained many pages. For this specific issue, the written rule was: "limited private usage of service telephones is allowed". Clearly this rule is ambiguous and open to interpretation. The bureaucratic reaction of choice in such a situation is to supplement the rules so that the ambiguity is eliminated. The department's CAO clearly was in favor of a different reaction: no additional rules because "everybody knows" how to behave; common sense should prevail. Unwittingly he expressed one of two specific views on the rules-or-customs divide; the tension between "more rules" (*regulation*) and more social norms (*socialization*).

This tension between juridification and socialization as two main forms of controlling behavior is the topic of this paper. The main thesis is that under certain circumstances, additional rules may drive out the intrinsic motivation in a public agency to administer justice: the crowding out effect of juridification. First we will discuss juridification and its crowding out effect from a theoretical point of view. Then we will illustrate the crowding out phenomenon with the integrity case mentioned above.

[*] Honorary, Professor of Comparative Public Management, University of Groningen.

2. Theories of bureaucratic behavior

2.1 The classical approach

The idea that rules should bind government and its officials and that rules are indispensable to guarantee a fair administration of justice is a basic assumption of the modern state. Restraining the use of power of the state through legal boundaries that purge arbitrary rule and promote equal treatment by public officials is the essence of both the continental Rechtsstaat and the Rule of Law governance program in common law countries. Over the past two hundred years, nation building developed parallel with more and more intricate systems of administrative law.

The Rechtsstaat model contains a core notion of social engineering, already suggested by Max Weber. It is the notion that an adequate civil bureaucracy is indispensable for the administration of justice in the Rechtsstaat. An adequate bureaucracy controls the behavior of its personnel, the civil servants. What are the ways and means for such control?

Our knowledge of the characteristics of the classical Rechtsstaat bureaucracy is primarily derived from its theoretical reconstruction made by Weber at the beginning of the 20th century. Weber could look back on a century of development and experience with the then modern rational way of organizing state affairs. His bureaucratic model was not a prescription but an empirical reconstruction, an important building block in his explanation of the rationalization of the state. Close to the core of his model was the position of the civil servant. What makes him tick? What are the mechanisms that make the bureaucrat apply the law *sine ire et studio*, that make him formulate decisions in a rational and lawful manner, without prejudice or arbitrariness and that have him thus produce administrative justice?

On the one hand, the model flaunts the obtrusive control instruments of organizational rules and hierarchy. They are the most obvious building blocks of a bureaucracy. Yet their significance in controlling behavior can easily be overstated. At least as important are the indirect or unobtrusive control mechanisms: the social conditions in the bureaucratic organization. One set of such conditions incorporated in Weber's model can be summed up as job security. The Weberian bureaucrat had tenure, was protected against arbitrary rule by his superiors and could look forward to a small but adequate pension.

Another set of conditions can be epitomized with what nowadays would be called "organizational culture". The classical bureaucrat has often been portrayed as a cog in a machine, an automaton without personal judgement or initiative. In Weber's reconstruction however, the bureaucrat is a highly trained professional with his own competencies, shaped by the organization he is part of. In the

discharge of his duties he is guided by the norms and values of the organization, its mores, its pride, its esprit de corps. He is socialized in the organization; the organization installs intrinsic motivation to do the right thing. Socialization goes a long way in explaining why the classical bureaucrat upheld the standards of the Rechtsstaat.

Still, there is a tendency in the practice of administration to emphasize rules over socialization. As mentioned before, rules are often inherently ambiguous. Just as "complete contracts" (that cover all possible future eventualities) are hard to come by, "complete regulation" that does justice to all possible relevant differences and exceptions is difficult, if not impossible, to achieve.[1] It is a bureaucratic reflex mechanism to address an apparent ambiguity in regulation with additional rules, in order to strengthen its effect on behavior. The problem with that reaction is that the additional rules most likely require interpretation too. That, in turn, may be an incentive to create new additional rules. Crozier, who labeled this phenomenon: "the vicious circle of the bureaucracy", attempted to show that "the more rules the better" is often not true.[2]

The idea of "the more rules the better" has been met with far more opposition than solely Crozier's. The classical criticism is threefold: First of all, the vicious circle is thought to be a threat for the effectiveness of administrative decision making. Fine tuning the rules leads to the opposite of what is intended; the resulting rigidity of the rule system prohibits the tailor-made solutions that the fine tuning was meant to facilitate. Professionals ("bureaucrats") who are to apply the rules in a just way, may find themselves unable to make the decision that fits best. A second perceived threat is that too many rules may undercut the legality of administrative decision making. Professionals who find rules to be a hindrance for making fitting decisions may be tempted to game the rule set, or ignore rules altogether.[3] A third type of criticism sees the threat of judicial decision-making replacing political decision-making. Since decision making becomes a matter of interpreting rules rather than making choices, the judge, rather than the elected official, would be calling the shots. Present day denunciation of detailed regulation in many ways echoes that of earlier critics. In the international literature of the past ten years,[4] one may find that detailed regulation is an obstacle for the

---

1 Trevor L. Brown, Matthew Potoski & David M. Van Slyke, "Trust and Contract Completeness in the Public Sector", *Local Government Studies* 33, 4, 2007: 607-623.

2 Michel Crozier, *The bureaucratic phenomenon*, London, 1964.

3 A well-documented example in the Dutch literature is the tendency of street bureaucrats charged with making building permits to strive for "a good permit", more or less ignoring the applicable rules. *See* M.V.C. Aalders, *Implementatiestijlen in ambtenarengroepen*, (Patterns of rule application) rapport van het onderzoek Patronen van regeltoepassing door ambtenaren. Amsterdam (UvA) 1984.

4 Gráinne de Búrca and Joanna Scott (eds.)*, Law and new governance in the EU and the US*, Oregon 2006; Jason. M. Solomon, "Law and governance in the 21st Century Regulatory State", *Texas Law Review*, 2008: 820-856.

administration of justice, for a trust-based contact between administration and administered,[5] or more generally, for public trust in administration.

Much of these critical appraisals circle around a more general matter: the tension between the individual case and the general rule. The solution to most of these issues is finding some kind of balance between the two, as Kagan already showed.[6] These days there seems to be a penchant for less rules (less "bureaucracy") and more Einzelfallgerechtigkeit, not only in the literature, but also in administrative reality. The Dutch legislator, for one, has recently deregulated most of the welfare state arrangements. Even though the debate about the tension between the single case and the general rule is important, this classical approach is not the one taken in this paper. What I want to do here is explore the effect of "more rules" from a different angle: that of the crowding out theory.

2.2 Juridification and crowding out

Administrative relations – both relations within the administration and relations between the administration and the administered – can be conceived of as *social* relations. Social relations are more or less sustainable sets of interactions. In more mundane words: administrators converse with citizens and with other administrators; they relate to each other in some way. Social relations are governed by social norms, implicit and unarticulated shared convictions about what is the right thing to do. At the same time, administrative relations can be regarded as *legal* relations, that is, relations that are founded in law. Legal relations are governed by explicit rules. Administrative relations thus can be modelled as a cord of two intertwined strings, the social and the legal strings. What happens between administrators or between administration and citizens can only partly be explained by the legal rules under which interaction takes place and an outcome, usually an administrative decision, is realized. Social norms and customs are equally important for understanding the behavior of the players in an administrative game.

By "the juridification of administrative relations" it is meant that the legal aspect of a relation is overly augmented by extending and refining the set of rules that governs the administrative relation. Rules and judges become more important in shaping what passes in the relationship. The actions, decisions and behavior of the participants are more and more lead by rules, while the importance of social norms diminishes. Eventually, juridification will reduce "administrative rela-

5 Ministry of the Interior and Kingdom Relations, Prettig contact met de overheid 2, The Hague 2010.

6 Robert A. Kagan, *Regulatory justice - Implementing a Wage-Price Freeze*, New York 1978.

tions" to legal relations and "administrative justice" to legal opportunism.[7] In the next sections it will be shown that juridification can be interpreted thus, that the social string of an administrative relation is *crowded out* by the legal string.

The concept of crowding out refers to an intriguing set of phenomena analyzed in the social sciences. Most generally the concept stands for unanticipated and often unwanted effects of an intervention in societal processes. Traditionally in macro-economics, "crowding out" is an effect of expansionary fiscal policy. The intervention of increased government spending is intended to boost demand in the economic cycle. Yet such an increase requires increased government borrowing, which raises interest rates to such a level that more and more private firms are not capable of borrowing anymore. The unintended and unwanted effect is that government policy pushes the private sector out of the financial market. It is but one category out of many that are labelled as crowding out, in which government actions are thought to curb private sector initiatives. A particular form of crowding out outside the realm of macroeconomics – the form that interests us in this paper – is called *motivational* crowding. It refers to the motivation of people to accomplish a task or do a job. The basic idea is that intrinsic motivation to do a good job can be crowded out by monetary rewards. An actor's behavior may reveal an altered amount of intrinsic motivation due to an external intervention such as contingent rewarding.[8] The intentions associated with the application of the tools of contingent rewarding (performance payment, bonus etc.) are to increase the quantity and quality of employee output. Yet it may have the unintended effect that the employee will *only* perform the activities explicitly rewarded, thus decreasing the intrinsic motivation for "doing a good job". The phenomenon of crowding out intrinsic motivation by external monetary rewards has been well researched and documented for a long time already.[9]

In public administration, the debate on the motivation of public employees arose as an upshot of the wave of New Public Management (NPM) that has dominated the field since the late nineteen eighties. A core element of this movement was the application of "market type mechanisms" in the running of public organizations.[10]

---

7 More extensively in: J. de Ridder, "Problematische kanten van toenemende juridificatie", in: J.W.M. Engels et. al. (eds), *De rechtsstaat herdacht,* W.E.J. Tjeenk Willink, 1989, p. 191-203.

8 Bruno S. Frey, Reto Jegen: "Motivation crowding theory", in: *Journal of Economic Surveys* 15 (2001); 589-611.

9 K.O. McGraw, "The detrimental effects of reward on performance: a literature review and a prediction model"; in: Mark R. Lepper and David Greene, *The Hidden Costs of Reward: New Perspectives on the Psychology of Human Motivation*, New York 1978. For a recent overview, *see*: Agnès Festré: "Theory and evidence in psychology and economics about motivation crowding out: a possible convergence?", in: *Journal of Economic Surveys* 29, 2 (2015); 339-356.

10 Christopher Pollitt and Geert Bouckaert, *Public management reform: a comparative analysis*, 2e ed., Oxford 2004.

Payment according to performance is one important tool in the NPM toolbox, to be used in many public service relations, from public-private partnerships to contract management within a public agency. Human resource management was no exception: employer-employee relations had to be cast in the same mold. Theorists of New Public Management deny the importance of social control and intrinsic motivation for the behavior of civil servants. They emphasize rewards and punishments. Take for instance the economist Julian Le Grand, an important adviser of the Blair administration in its quest for "reinventing government".[11] Le Grand argues that civil servants are no different from other employees with a healthy dose of egoism and opportunism. Civil servants are not the "knights of society" as compared to employees in other sectors, and the employees in other sectors are not "knaves", either. All of them need disciplining to make sure that public goods and services are delivered in an equitable manner and with the requisite quality, according to Le Grand. Market type mechanisms such as competition and pay-for-performance are the tools for disciplining the civil servant into doing the right thing. Intrinsic motivation thus was argued away as a factor that might influence administrative behavior.

Yet, as pointed out before, intrinsic motivation was one of the building blocks of classical bureaucratic theory. It did not need monetary incentives, just basic security, entirely in accordance with the first two levels of Maslow's hierarchy of needs. Beyond that, socialization, the grooming of the civil servant in the norms and values of the organization, was considered a prerequisite for adequate administrative behavior. Social norms thus are as indispensable as written rules for the administration of justice. In terms of LeGrand: the employees of the classic bureaucracy may not be knights by nature, but the organization is certainly doing its level best to *make* them knights, installing an intrinsic motivation to strive for administrative justice.[12]

We now hypothesize that social norms and the corresponding intrinsic motivation can be crowded out by rules, in just the same way as they can be crowded out by monetary incentives: more rules negatively affect the intrinsic motivation to achieve administrative justice.[13] If detailed rules dominate the decision making in concrete cases, the bureaucrat will feel compelled to make sure that the decision is judge proof. If compliance and judge-resistance are the prime standards for the

---

11 J. Le Grand, *Motivations, Agency and Public Policy, of Knights and Knaves, Pawns and Queens*, Oxford, 2003.

12 Modern organizational theory from before the NPM wave re-emphasized the importance of socialization in the management of organizations. The foundation for this resurrection is Herbert A. Simon, *Administrative Behavior: a Study of Decision-Making Processes in Administrative Organization* (2nd ed.), New York 1957. Even modern institutional economics implicitly recognizes the importance of social norms for organizational behavior when dubbing the risk of deviation from established rules and contracts a *moral* hazard.

13 Frey & Jegen (2001: 592) suggest that an increase in (internal) regulation has a similar crowding out effect as monetary incentives.

quality of a decision, the intrinsic motivation to come up with a just solution is accordingly reduced. More precisely, one might observe the result of two contradictory effects of an increase in the detail of regulation the bureaucrat is to apply. On the one hand, the increase in regulation is supposed to improve the administration of justice in decision making: the *compliance effect*. On the other hand, the increase of regulation may undermine the intrinsic motivation of the bureaucrat to strive for administrative justice: the *crowding out effect*. Generally, one might suppose both effects are active, thus an increase in regulation has two opposing effects on the decision-making performance of the bureaucrat.

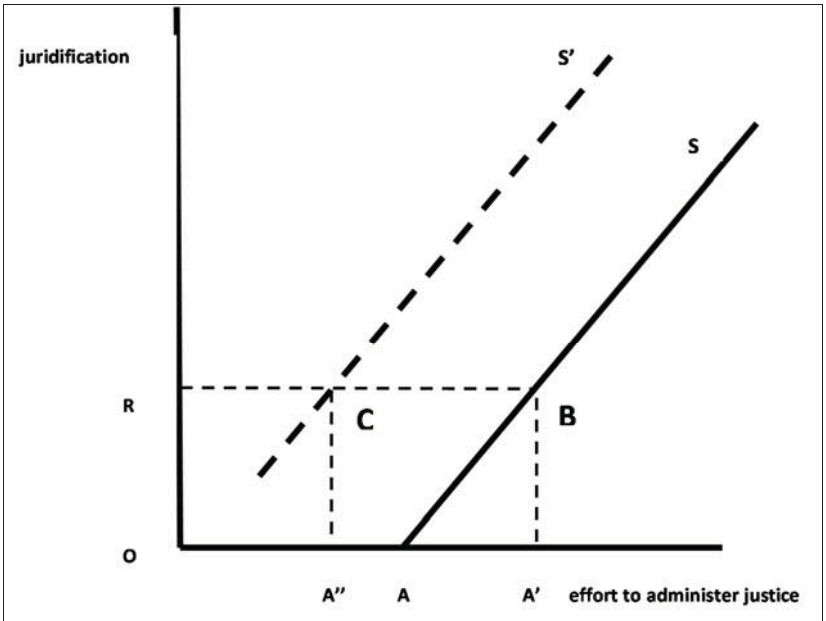


Figure 1 Net effect of compliance and crowding out (adapted from Frey and Jegen 2001)

Figure 1 portrays the interaction of the compliance effect and the crowding out effect.[14] In that graph, S is the curve delineating the relationship between the degree of regulation (juridification) and the amount of effort bureaucrats put in administrative justice. If the amount of regulation increases from O to R, the effort increases from A to A'. The crowding out effect is represented as a shift of the S curve to the left: S'. Because of that shift, induced by the increase in regulation, the effort is reduced from A to A''. Thus the net effect of the combination of the compliance effect and the crowding effect on effort in this example is negative.

[14] After Frey & Jegen 2001: 594.

Yet the net effect does not always have to be negative. From the evidence in the literature, one may conjecture that the effect of an increase in regulation meant to improve bureaucratic performance depends on the way the bureaucratic professional experiences those rules. Frey and Jegen[15] distinguish two possible psychological processes that play a role: impaired self-determination and impaired self-esteem. When an individual bureaucrat perceives the increase in regulation as a reduction of self-determination, intrinsic motivation is replaced by external control. Likewise, when the bureaucrat interprets an increase in regulation as a denunciation of personal motivation, competence and involvement, the intrinsic motivation to make an effort dwindles. From these general findings, two complementary hypotheses can be derived:[16]

- An increase in regulation crowds *out* intrinsic motivation if the professional perceives the (new) rules to be controlling and intrinsic motivation is reduced.
  Professional bureaucrats may experience the new rules as controlling, if self-esteem and self-determination are negatively affected. Regulation turns into juridification.

- An increase in regulation crowds *in* intrinsic motivation if the professional perceives the (new) rules to be supportive.
  The professional bureaucrats may feel that the new rules are supportive if the rules provide them with more opportunities to administer justice while nurturing their self-esteem.

Thus in this model there is a dynamic yet delicate balance between hard rules and soft social norms in the management of the behavior of bureaucrats. One specific aspect of administrative relations that demonstrates the delicate balance between rules and norms is "integrity".

3. The case of integrity in bureaucratic behavior

3.1 Integrity as behavioral control

Integrity in organizational behavior is usually referred to in the context of "ownership of the office": since employees do not own their office, they cannot freely dispose of its resources. Abuse of the office may range from private use of organizational assets such as a car or a telephone, to all-out corruption, providing favors for third parties in exchange for personal material rewards. However, abuse of office also covers the use of hierarchical authority in improper ways and

15 Frey & Jegen 2001: 594. The hypotheses in the original are about the crowding effects of monetary rewards. They are adapted here to fit the juridification phenomenon.

16 After Frey & Jegen 2001: 595.

inappropriate behavior towards fellow members in the organization. Organizational integrity is commonly defined as a personal trait of individual employees or bureaucrats; a disposition for compliance with internal rules. This is illustrated in the following example, taken from a random management manual:[17]

> *Integrity (or integer behavior) means that you practice your function adequately and accurately, taking into account your responsibilities and the applicable rules. If rules are lacking or if they are ambiguous, you make your assessments and decisions in an ethically acceptable way, on the basis of generally accepted social and ethical norms.*

According to this description, integrity is first and foremost the faithful discharge of organizational duties, in compliance with the standing rules in the organization. Yet there is also a recognition that not all that is expected from the good employee can be captured in rules. If a situation occurs for which no rules apply, the employee is, in a way, requested to invent what could have been the applicable rule. Certainly, controlling the behavior of the members of an organization cannot be done without rules and enforcement of those rules.[18] One could add, however, that in a well socialized organization, rules are primarily invoked for those who somehow evade the pressure of socialization in the organization and behave opportunistically. Formal sanctioning then is one element in behavioral control. To put it in a different way, rules and sanctions are a specialized form of social control. The larger part of behavioral control can be attributed to general social control, imbedded in organizational culture. The remaining social control takes the form of rule enforcement.[19] Thus organizational integrity can be seen as a special case of the general juridification dilemma.

Juridification imbalances may particularly show when integrity issues come up, because both formal and informal rules of proper conduct have been breached. The question then arises whether this constitutes a failure of the formal rules or a breakdown of social control. If the two juridification hypotheses cited in the previous section hold, one should find that the formal rules in place are not perceived as supportive by those behaving improperly – when measured against organization standards. More specifically, can integrity issues be attributed to the crowding out of social norms and intrinsic motivation? To trace possible crowding out effects in integrity issues, we now return to the case this paper started out with.

---

17 http://www.carrieretijger.nl/.

18 Charles Perrow, *Complex Organizations,* Glenview Ill. 1972, p. 23-30. Also: Herbert A. Simon, *Administrative Behavior: a Study of Decision-Making Processes in Administrative Organization* (2nd ed.), New York 1957.

19 For a review of the literature about this topic: Centrum voor Criminaliteitspreventie en veiligheid, *Handhaving en gedrag*, *achtergronden van regelnaleving*, (*Enforcement and behavior, explaining compliance*), Utrecht 2011.

3.2 A breach of integrity at the ministry of Defense

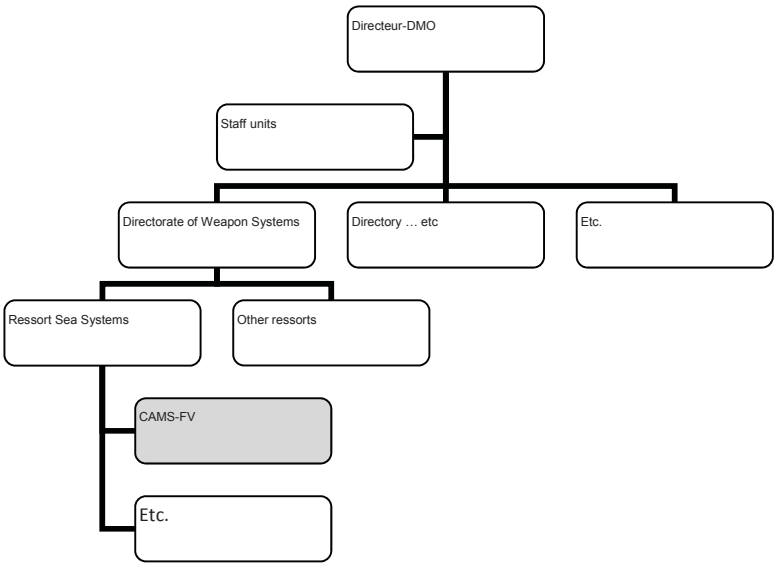
In March of 2011 one of the major newspapers published an article citing serious breaches of integrity that allegedly had taken place two years prior in the Centre for Automation of Mission-critical Systems – Force Vision (CAMS). CAMS is the software department of the Defense Material Organization (DMO). The publication resulted in parliamentary debate and an inquiry into the matter by an independent commission. The work of the Commission of Inquiry resulted in a report on which the following account is based.[20]

CAMS

The software department CAMS had been a unit within the Defense Material Organization (DMO) since 2005. CAMS developed specialized software for integrated commando systems aboard the Navy's frigates and submarines. CAMS was part of a larger conglomerate called Sea Systems, and that conglomerate again was part of the Directorate of Weapons Systems – one of the directorates of the Defense Material Organization. All of DMO accounted for 6000 employees. CAMS was headed by the director-CAMS, a military man with the rank of Navy Captain. The breaches of integrity took place in the section Internal Affairs of CAMS. CAMS staff consisted of 150 employees. Most of them were civilians who had been employed for long periods of time. Military personnel on the other hand were few and frequently rotating to other parts of the defense organization. The members of the civilian staff knew each other well and often maintained friendly relationships that extended into private life. All the persons involved in the integrity breaches were civilians.

20 *Rapport Commissie Integriteitszorg Defensie* (Report of the Committee for the investigation of Integrity Implementation at the Defense Ministry; Committee-De Veer); Parliamentary Papers 32 678, nr. 13, The Hague 2011. The author of this paper was a member of the Committee-De Veer.

Figure 2: Organogram of DMO



The incident

In November 2009, the Director-CAMS received a complaint according to which one of the employees of Internal Affairs, civilian X, had illicitly taken a TV monitor screen home. The Director directly approached civilian X, who defended himself by stating that he had taken the TV screen home for testing and that he would bring it back immediately. Director-CAMS formally reprimanded civilian X. A few weeks later, the Director received a second complaint, containing allegations against both civilian X and his superior. Now the Director ordered a so-called "Domestic Investigation" that, according to formal defense procedure, has to be conducted by two independent officers. This investigation concluded that the allegations could not be proven – with the exception of one violation of internal rules: unlawful private use of a service vehicle. The investigators advised to shore up the internal rules and procedures of Internal Affairs and to "address" the seriously disrupted labor relations at CAMS. Director-CAMS now formally reprimanded both civilian X and his chief and followed up on the first part of the advice only. The results of the investigation were communicated to both the accused and the complainant. The latter, civilian M, gave an extensive negative reaction. He requested an independent inquiry and threatened to activate the watchdog *Committee on Integrity in Government* if his request was turned down. Director-CAMS responded in writing, after conferring with his superiors, stating

that the Domestic Investigation had been conducted in a conscientious and thorough manner and that he saw no indication for reopening the case.

In April of 2010 civilian M formally lodged a complaint with the Director-DMO about the way the Director-CAMS had dealt with his complaints against his colleagues. The Director-DMO found sufficient reason to reopen the enquiry in the case and he charged two experienced former ranking officers with the job. These investigators established a number of breaches of integrity, such as the private use of a service telephone, unexplained absenteeism, eight trips in a service vehicle that could not be accounted for, improper conduct towards colleagues and a suspicion of the misappropriation of service assets. On the strength of this investigation, the Director-DMO took disciplinary action: civilian X and his chief were penalized with a punitive transfer. Civilian M received a formal letter affirming his complaints. However, in the meantime, the Director-CAMS was informed that civilian M himself had also committed serious breaches of integrity, such as private use of a service vehicle. This time the Director filed a declaration with the military police. Civilian M then sought recourse with the newspapers, threatening even the position of the minister of defense himself.

3.3 Analysis

One might wonder how such a tiny incident could grow out of proportion in such a way that it caused considerable political upheaval. Yet, that is not the question that concerns us here. The question to be answered now is whether these breaches of integrity can be attributed to an imbalance between formal rules and social norms. Were the rules governing the utilization of service assents perceived by the CAMS staff as supportive or controlling?

The rules in the case

The ministry of defense and the armed forces are well equipped with rule books on how to behave in myriads of different situations. In the area of financial control, or more generally, administrative management, the rules are extensive and detailed. On the topic of interpersonal behavior between members of the organization, the rules are sketchy at best. Yet, however detailed the regulation is, there is always room for additional interpretation. Take for instance the seemingly trivial question of the private use of the service telephone: is it allowed, and to what extent? The investigators of the Director DMO in the CAMS case thought that they established an illicit utilization of the service telephone. The applicable written rule was rather vague, however: “limited private use is allowed”. Certainly this is a rule that begs interpretation. The management might be tempted to extend the rule; this actually was one of the suggestions made by the investigators in the domestic inquiry. Thus, one might have stipulated what constitutes “private use” for instance. Another course of action would have been to simplify the rule (“private use is only allowed in evident emergencies”.) As a third possibility, the

management might take the position that the rule is not ambiguous at all: everyone knows that you can use the service phone to call home to say that you have to stay late at work, but that regular personal conversations are not allowed. This was actually the position of the CAO, quoted in the introduction of this paper. It implies that integrity has to be internalized and become part of the mindset of the employees.

More generally, the CAMPS case shows that organizational integrity, like any area of regulation, is a mixed bag, containing formal regulation as well as informal norms, enforcement as well as social control. Indeed, the Dutch ministry of defense puts a lot of time and energy in all sorts of "integrity training", in order to enable employees and servicemen to make the right choice in un- or under-regulated situations. The defense leadership thus shows an acute awareness of the importance of informal norms and socialization. Still, the rule-sets for integrity have the stamp of military discipline all over them, and the same is true for the social norms in which personnel are being trained.

The domain

The staff of CAMS was predominantly civilian. Most of them had worked with the unit for long time. CAMS' military management, on the contrary, changed every three years. Many of the employees were highly educated IT specialists. Their sets of social norms were far removed from military discipline and its rules and norms. Indeed, the reports based on the several "domestic inquiries" and other investigations conducted, paint a picture of a unit that in many ways operated outside the rules and norms that were the standard for the ministry of defense and the armed forces generally. The organizational integrity rules were embedded in military culture. Thus the extensive regulation of organizational integrity would likely be perceived as supportive in most of the defense ministry. Yet it is plausible that the civilian staff of CAMS perceived these rules, which were going against the grain of their own set of norms about how to behave properly, to be *controlling* rather than *supportive*. To put it in the terms of figure 1, in most of the military organization, the relationship between regulation and just behavior would be fairly stable and linear, in accordance with curve S. For CAMS however, curve S' would apply: the military regulation undermined rather than supported the intrinsic motivation of the civilians to do the right thing. Indeed, the empirical evidence shows that the integrity of behavior in the CAMS unit was all in all relatively low, indicating that intrinsic motivation was largely crowded out.

Enforcement of the rules was lacking, mostly due to the fact that the managing officers were passers-by, sitting out their three-year-term at CAMS while awaiting more rewarding (military) assignments. Strict enforcement would not have been able to make up for the crowding out effect either. On the contrary, it would most likely have had a perverse effect in the sense that it would have emphasized the

controlling character of the military rule set, thus reinforcing the crowding out. The records of the few instances in which disciplinary surveillance of the unit was temporarily increased all show that the attempts at enforcement were met with denunciation and had no impact whatsoever. It is unlikely that a more sustained effort of this kind would have garnered better results.

4. Conclusion

A perennial debate in both organizational theory and organizational practice revolves around the issue of the level of regulation of organizational behavior. This debate can be seen as a special case of the more general issue of juridification. Juridification is the process of excessively increasing the amount of regulation at the expense of social control. Organizations apply both rules and social norms for the advancement of integer behavior. There is a delicate balance to be struck between the two modes of organizational control. Juridification, the pathological strand of regulation, causes an imbalance by overemphasizing rules. This in turn may result in the crowding out of the intrinsic motivation to do the right thing. In the special case of organizational integrity, rules that do not support intrinsic convictions and preferences may crowd out a sense of integrity. The CAMS case shows that integrity rules that are supportive in one organization may well be counterproductive in another organization. The strict military culture clashed with the free spirited culture of scientists and developers. A famous account of such a brawl is Davis' book on the Los Alamos project that served to develop the atomic bomb during the second world war.[21] Originally, the Los Alamos laboratory was run as a military operation, under command of an army general. His comprehensive way of regulating the project thoroughly contravened with the norms and values of the high level scientists (amongst whom were a handful of Nobel laureates) that were to do the job. The solution in Los Alamos was to do away with military rules and to put a civilian physicist, Oppenheimer, at the helm of the project. Both the CAMS case and the Los Alamos story indicate that it depends on the context whether regulation is perceived as supportive or controlling. Supportive rules are rules that match the environment in which they are to operate.

21 Nuel P. Davis, *Lawrence and Oppenheimer*, New York: Simon & Schuster, 1968.

Mediation and the Psychology of Trust within Organizations

Annie Beaudin[*]

"The best way to find out if you can trust somebody is to trust them."
— Ernest Hemingway

Introduction

This article proposes a mediation process that might help public organizations enhance public trust by first increasing the levels of trust between their members. While literature about mediation emphasizes the importance of trust in the mediator and in the process, this article examines the relevance of trust between the parties during the mediation process in an organizational context. Based on a review of the literature on trust and organizational conflicts, the text argues that trust between parties is a key issue in organizational mediation and proposes a mediation process likely to increase both trust among organization members and public trust.

After a brief study of the importance of trust in an organization's performance, we will review the literature on the psychology of trust and on the concept of organizational conflict. We shall then draw conclusions concerning the mediation process and propose a method by which the public's trust in organizations can be enhanced.

1. On the importance of trust in an organization's performance

Literature has discussed at length the various practices that can be used to increase trust in public sector organizations.[1] The mediation process is one such practice that offers the possibility of restoring trust among the people who work within public organizations. In recent years, mediation processes have, for various reasons, been used more frequently by organizations.[2]

---

* Administrative Judge, Tribunal administratif du travail, LL.B., D.E.A. (Private Law), LL.M. (Dispute Prevention and Resolution).

1 R.C. NYHAN, "Changing the paradigm; Trust and Its Role in Public Sector Organizations", (2000) American Review of Public Administration, 30 (1) 87-109.

2 In Quebec, the increased use of mediation within organizations is related to an amendment of the *Act respecting labour standards* which added a chapter on psychological harassment. Since provision 81.19 establishes that "*Employers must take reasonable action to prevent psychological harassment and, whenever they become aware of such behaviour, to put a stop to it*", many have adopted a policy that includes the possibility of mediation.

An organization is defined as a group of people engaged in specialized and interdependent activities in order to reach a goal or to undertake a mission.[3] Today, organizations operate in a complex environment that affects the means put in place to increase productivity and strengthened organizational commitment.

Public organizations are not any different than private organizations in that respect, though one well-acknowledged difference between public and private organizations is the public expectations. Since they are part of the government, having been created by law for the purpose of accomplishing specific administrative activities, public organizations have to be accountable to both elected officials and the public.[4]

Effectiveness and accountability are a result of a public organization's performance. Public satisfaction, which leads to public trust, is mostly related to the perceived quality of the services provided by public organizations.[5] More generally, the ability of an organization to accomplish its mission, which serves public purposes, and to achieve its goals is an important aspect of public trust.

To achieve its goals, the organization requires the interaction of many people and teams who must work interdependently. This, in itself, requires a certain level of trust. Collaboration is not possible without trust.[6] Where there is trust among the members of an organization, collaboration becomes possible[7] and reaching the organizational goals is then easier.

Research[8] has shown the positive effects of trust on organizational performance and on organizational outcomes. Highly efficient and accountable public organizations usually have a high level of trust among their members.[9] So, in order to establish and maintain public trust, public organizations should focus on trust within their organizations.

---

3 H.F. GORTNER, J. MAHLER and J.B. NICHOLSON, La gestion des organisations publiques, 1994, Presses de l'Université du Québec, 587 p.

4 *Id*.; J.R. TOMPKINS, *Organization Theory and Public Management*, Wadsworth, Cengage Learning, 2005, 416.

5 H. DANAE FARD and A. ROSTAMY, "Promoting Public Trust in Public Organizations: Explaining the Role of Public Accountability", (2007) Public Organiz Rev (2007) 7:331–344.

6 T.R. TYLER, *Why people cooperate: the role of social motivations*, Princeton, Princeton University Press, 2011, p. 215; BALLIET, D. and VAN LANGE, P.A., "Trust, Conflict and Cooperation: a Meta-Analysis", (2013) 139 (5) *Psychological Bulletin* 1090-1112.

7 T.R. TYLER, *id.*

8 K.T. DIRKS and D.L. FERRIN, "Trust in Leadership: Meta-Analytic Findings and Implications for Research and Practice", (2002) Journal of Applied Psychology Vol. 87, No. 4, 611–628; R.C. NYHAN, op. cit. note 1.

9 S.M. PARK, "Toward the Trusted Public Organization: Untangling the Leadership, Motivation, and Trust Relationship in U.S. Federal Agencies", (2012) The American Review of Public Administration 42(5) 562–590.

Different practices have been put in place within organizations in order to maintain trust, restore trust and solve conflicts. For instance, the trust-based model has been suggested as a viable paradigm for increasing interpersonal trust, organizational commitment and productivity in the public sector.[10] Trust between the members of an organization also contributes to conflict prevention. On the contrary, when mistrust takes place, the situation can eventually develop into conflict. This article emphasizes the potential of mediation as a means of helping parties solve their conflict and restoring trust between them.

The use of mediation as a practice to solve conflicts within organizations has increased significantly in recent years.[11] Mediation is generally defined as the intervention of a third party, the mediator, in a negotiation or a conflict in order to assist the parties in reaching a mutually acceptable agreement to settle the issue in dispute.[12] Mediation presents many cost-reduction advantages in terms of time, emotional distress and money. It is so namely because in a mediation process, parties retain better control over the outcome.[13] Based on a generally accepted approach, the parties are responsible for and have control over the content and outcome of mediation, also called "substantive decisions". Thus, as opposed to a trial, where the outcome is unilaterally determined by an external authority, the parties are more likely to commit to any final agreement reached through mediation.

Mediation is also a more effective way of repairing relationships and a more acceptable approach to dispute resolution between parties. It has the potential to help increase trust between parties and, consequently, within a public organization. Authors have proposed various strategies to help the mediator increase trust between parties.[14] However, the literature on mediation has traditionally put an emphasis on trust in the mediator and trust in the process,[15] the logic being that trust between parties should increase by itself if trust in the mediator and in the process is high enough. Consequently, according to literature, the only situation where trust between the parties would have to be directly

---

10 *Id.*

11 In Quebec, as mentioned in note 2, the increases use of mediation is related to an amendment of the *Act respecting labour standards*.

12 MOORE, C.W. *The Mediation Process*, San Francisco, Jossey-Bass, 1996, 2e ed., 599 p.

13 O. SHAPIRA, "A Theory of Sharing Decision-Making in Mediation", (2013) 44 *McGeorge L. Rev.* 923.

14 MOORE, C.W., *op. cit.* note 12, p.194.

15 J. POITRAS, "What makes parties trust mediators?", (2009) 25(3) *Negotiation Journal*, 307; A. STIMEC and J. POITRAS, "Building trust with parties: Are mediators overdoing it?", (2009) 26(3) *Conflict Resolution Quarterly* 317; A.M. DAVIS and H. GADLIN, 1988, "Mediators Gain trust the old-fashioned way. We earn it", (1988) *Negociation Journal* 55; W.H. ROSS and C. WIELAND, "Effects of interpersonal trust and time pressure on managerial mediation strategy in a simulated organizational dispute", (1996) 81(3) *Journal of Applied Psychology* 228.

addressed is when the level of trust is too low to conduct the mediation process or to conclude an agreement.

This paper examines the hypothesis that trust between the parties should be addressed during the mediation process in public organizations. We propose different recommendations, including the measurement of the trust level at the beginning of the process to bring awareness of the dynamics of trust to the parties. We also suggest, based on the literature on trust and organizational conflict, that the mediation process should focus on helping the parties first solve their relationship conflict as opposed to their task conflict.

2. On the psychology of trust

2.1 Definition

Trust has been defined in many ways. One commonly accepted definition is the willingness to accept vulnerability based on positive expectations of intention or behaviour of another.[16] Furlong proposes a simple definition of trust: "having positive expectations about another's motives and intentions toward us where potential risk is involved".[17] Lewicki and Wiethoff[18] define trust in a similar way, as a personal belief and willingness to act based on another's words, actions and decisions. In that perspective, there is an expectation that the other will take us into account before choosing to act a certain way.

Expectations toward another, which is part of the definition of trust, will condition the cooperation with that person. When a person's expectations towards an organization are not fulfilled, there is a psychological contract breach, which is linked to the lowering of trust.[19] Kramer and Lewicki[20] talk about *Presumptive Trust* within organizations based on four categories of expectations:

> 1) identity-based expectations: essentially based on the perception of coherence between individuals and collective values. As a member of an

16 R.J. LEWICKI, "Trust and distrust" In The negotiator's fieldbook: The desk reference for the experienced negotiator, edited by A.K. Schneider and C. Honeyman. Washington, D.C.: American Bar Association.

17 G. FURLONG, *The conflict resolution toolbox: models & maps for analyzing, diagnosing and solving conflict?* John Wiley & Sons Canada, Ltd., 2005, p. 128.

18 R.J. LEWICKI and C. WIETHOFF, "Trust, Trust Development, and Trust Repair", in DEUTSCH, M. and P.T. COLEMAN, The Handbook of Conflict Resolution, San Francisco, Jossey Bass, 2000, 86.

19 BAL, P.M., De LANGE, A.H., JANSEN, P.G., & VAN DER VELDE, M.E., "Psychological contract breach and job attitudes: A meta-analysis of age as a moderator", (2008) Journal of Vocational Behavior, 72, 143–158.

20 R.M. KRAMER. and R.J. LEWICKI, "Repairing and Enhancing Trust" (2010) 4 (1) The Academy of Management Annals 245.

organization, a person will be associated with favorable characteristics such as honesty, cooperativeness and trustworthiness;

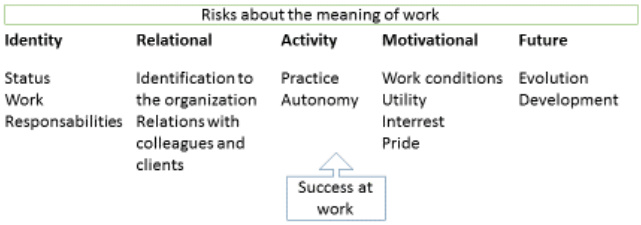
2) role-based expectations: information about roles gives knowledge that brings positive expectations about others occupying particular roles;

3) rule-based expectations: the organizational rules constitute codified norms for conduct that provide a formal enunciation of collective expectations about how members will behave;

4) leader-based expectations: the signals that the organizational leaders send are a source of presumptive trust. They have a large share of the credit for things that happen and do not happen inside their organizations.

If trust within organizations is related to expectations, it also has to do with risk, since the notion of trust includes the decision to take a risk. Karsenty[21] defines the risk members face within organizations in terms of two categories: 1) risks related to success at work; 2) risks related to the meaning of work. The first category has to do with the accomplishment of work. The other category can be further divided in five classifications of risks: identity (status, position, and responsibilities), relational (identification to the organization, relations with colleagues and clients); activity (practice, autonomy); motivational (work conditions, utility and interest in work, pride) and future (evolution and development).

Figure 1: Different categories of risks related to work according to Karsenty

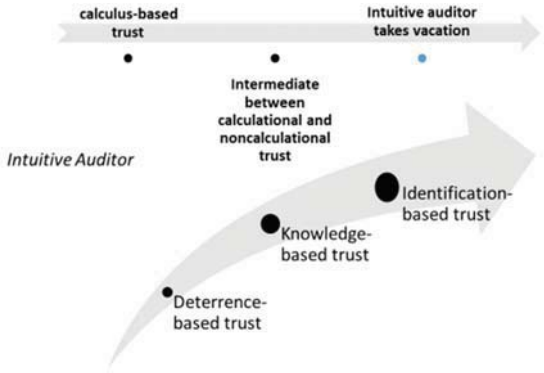


21 L. KARSENTY, « Comment appréhender la confiance au travail ? » in KARSENTY, L. (dir.), *La confiance au travail,* Toulouse, OCTARÈS Editions, 2013, p. 13.

With risk, comes the decision to take a risk. Trust can certainly be seen as a decision.[22] Sometimes, it is a conscious one but often, the decision to trust is a result of an intuitive process. Darley[23] explains the notion of "intuitive auditor" elaborated by Kramer[24] as part of the noncalculational trust theories which have an important role to play in relationships within organizations. He says that once there is an identification of goals between the interactors, "the internal auditor can "take vacation". However – and this is perhaps a friendly amendment to Kramer's concept- the auditor can quite unexpectedly get called back from vacation". In fact, new information might lead to a mental adjustment when there is evidence "that the noncalculational trust is not warranted".

So, based on Kramer's concept, using also the types of trust[25] that will be explained further and Sheppard and Tudrinsky's sequence of trust development in organizations,[26] Darley presents the different stages of trust. The evolution of trust shows that it goes from knowledge of the other's perspective to identification with the other's perspective, which "includes an empathetic identification with the other person's goals". [27]

Figure 2: Evolution of trust with the intuitive auditor as presented by Darley



22 The quotation in exergue from Hemingway reflects that aspect.

23 J.M. DARLEY, "Commitment, Trust, and Worker Effort Expenditure in Organizations", dans R.M. KRAMER, and K.S. COOK (Editors), *Trust and Distrust in Organizations: Dilemmas and Approaches*, New York, Russell Sage Foundation, 2004, p. 127.

24 R.M. KRAMER, "Divergent Realities and Convergent Disappointments in the Hierarchic Relation. Trust and the Intuitive Auditor at Work" in *Trust in Organizations: Frontiers of the Theory and Research,* edited by R.M. KRAMER and T.R. TYLER, 1996, Thousand Oaks, Cafifornia, Sage.

25 *Id.*, page 8.

26 B.H. SHEPPARD and M. TUCHINSKY, "Micro-OB and the network organization", in KRAMER, R.M. AND T.R.TYLER, (editors), *Trust in Organisations: Frontiers of Theory and Reseach,* Thousand Oaks, Sage, 140.

27 DARLEY, *op. cit.* note 23.

To summarize, trust has been recently defined as a serene feeling that comes from the relationship with an actor in a specific context with the expectation that that actor will take care of our interests.[28]

2.2 Characteristics

Trust is impalpable, intangible and invisible. It cannot be forced. It does not exist just because it is written in a contract. In fact, it can hardly be the subject of a contract. It does not respond to any automatism. Trust is not fixed, definite, nor permanent. It varies in time and usually takes a while to develop. It can appear spontaneously but can also disappear quickly. It is dynamic rather than static.[29]

Trust builds with circularity, reciprocity and mutuality. A person will be more willing to trust someone by whom she/he feels trusted.[30] There is a proportional relation between the perception of being trusted by the other and the level of trust in the other. We are more likely to take risks with those who take risks with us.

Trust is seen as a social lubricant that facilitates communication, contacts, exchanges and relationships. It palliates for the uncertainty in relationships. Trust builds with experience of the other and can vary according to the other's behavior.

2.3 Types of trust

Many authors have tried to classify trust in different types, based on its origin or on behaviors. Lewicki and Bunker[31] have identified three different dimensions of trust: calculus-based trust, identification-based (or identity-based) trust and knowledge-based trust. These dimensions of trust are different, but linked, and build on each other.

The first dimension describes a calculation process[32] by which one person evaluates if another is reliable or not. Calculus-based trust exists if the estimated consequences of not trusting exceed the potential gains due to trust.

When a person has enough information about another person, knowledge-based trust occurs. The understanding about the other allows one to predict that person's

---

28 L. KARSENTY, *op. cit.* note 21.

29 J. WU and D. LAWS, "Trust and Other-Anxiety in Negotiations: Dynamics Across Boundaries of Self", (2003) 19(4) *Negotiation Journal* 329.

30 G. LE CARDINAL, J.-F. GUYONNET and B. POUZOULLIC, *La dynamique de la confiance : construire la coopération dans les projets complexes*, 3rd Edition, 2008, 246 p.

31 LEWICKI, R.J. and B.B. BUNKER, "Developing and Maintaining Trust in Work Relationships", in R.M. KRAMER and T.R. TYLER, *Trust in Organizations: Frontiers of Theory and Research,* Thousand Oaks, Sage Publications, 114.

32 LE FLANCHEC, A., ROJOT, A. and C. VOYNNET FOURBOUL, « Rétablir la confiance dans l'entreprise par le recours à la médiation » (2006) 61(2) *RI/IR* 271.

behavior. Accurate prediction in connection with expectations depends on understanding, which develops from repeated interactions, communication, and building a relationship.

The identification-based trust is a more affective type of trust. It takes place when one person perceives the other as sharing the same interests or values. Identification-based trust involves a shift from extending the knowledge about another person to more personal identification. Some authors[33] assimilate identification-based trust to relational trust, which develops through experience of the other's reliability.

In an organizational context, trust will not necessarily become identification-based. The relationships within an organization are generally linked to low identification-based trust and high calculus-based trust.[34] Trust between union representatives and managers is usually more positive when based on calculus and can improve with regular exchanges that provide structured information.[35]

There are different types of trust within organizations:[36] trust in the relationship with the other, trust in the other's competence and trust in the other's collaboration. After interviewing workers, Mishra[37] identified four dimensions of trust related to leaders: competence, openness, support and reliability. Similar dimensions were enumerated with respect to high-trust organizations: competence, openness and honesty, caring for employees, reliability and identification. Karsenty[38] defines five categories of behaviors that determine trust:

- Competence: knowledge, technical and non-technical know-how, mastering of tools;
- Reliability: commitment, respect of promises, coherence between words and deeds;
- Frankness and honesty: facts reported without distortion;

---

33 D.J. McALLISTER, "Affect and Cognition Based Trust as Foundations for Interpersonal Cooperation in Organizations" (1995) 38(1) *Academy of Management Journal* 24.

34 J.-F. ROBERGE and R.J. LEWICKI, "Should We Trust Grand Bazaar Carpet Sellers (and Vice Versa)?" dans Venturing beyond the classroom, Saint Paul, Minn.: DRI Press, 2010, p.119.

35 HARRISSON, D., « Les représentations de la confiance entre gestionnaires et représentants syndicaux », (2003) 58 (1) *Relations Industrielles/Industrial Relations* 109.

36 G. LE CARDINAL, J.-F. GUYONNET and B. POUZOULLIC, *op. cit.*, note 30.

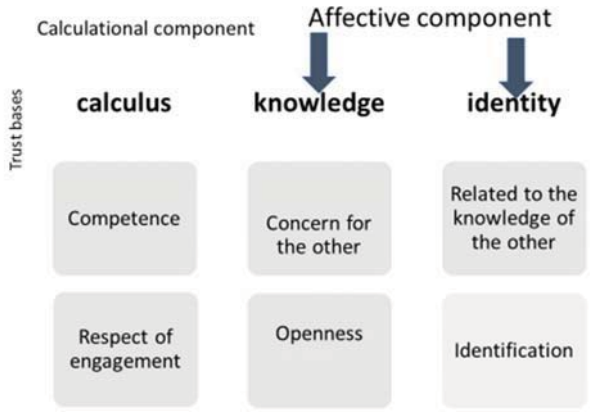
37 A.K. MISHRA, "Organizational responses to crisis: the centrality of trust", in R.M. KRAMER and T.R. TYLER, *Trust in Organizations: Frontiers of Theory and Research,* Thousand Oaks, Sage Publications, 261 p.

38 L. KARSENTY, *op. cit.,* note 21.

- Concern for the other person (or benevolence): demonstrated by listening, understanding, empathy, searching for compromise solutions;
- Identification to the other person: sharing the same values, beliefs, intentions, sensitivity and affinity.

After a review of various classifications, Gratacap and Le Flanchec[39] suggest that all the elements of trust within organizations could be reduced to two general parts: an affective part of trust, which includes openness, justice, availability and benevolence; and a calculational part related to competence, coherence and commitment. The following figure shows how this notion relates to the behaviors that influence trust.

Figure 3: Types of trust in connection with behaviors that influence trust in organizations



2.4 Measuring the level of trust

Trust is not easy to measure. One way would be to determine the maximum risk a person is willing to take on another.[40] Some have suggested that, in order to build trust, the latter should be measured regularly to create awareness of what is going on within the organization.[41] There are many tools that can help monitor trust levels. These take into account various aspects related to trust such as:

39 A. GRATACAP and A. LE FLANCHEC, *La confiance en gestion, un regard pluridisciplinaire*, Paris, Groupe De Boeck, 2011, 232 p.

40 G. LE CARDINAL, J.-F. GUYONNET and B. POUZOULLIC*, op. cit.* note 30.

41 P.S. SHOCKLEY-ZALABAK, S.P. MORREALE and M.Z. HACKAM*, Building the high-trust organization,* John Wiley & Sons, 2010, 256 p.

collaboration, flexibility, openness toward innovation, presence at work and loyalty.

The *Organizational Trust Index* is an example of such a tool. It is a questionnaire that examines five dimensions of trust: employees' concerns, openness and honesty, identification, reliability and competence. There are questions on commitment, coherence, competence to accomplish the organization's mission and calculus-based trust. For instance, some questions concern one's willingness to express oneself and listen to others, openness to others' concerns, participation in decisions about work and willingness to meet other people's needs. These questions are related to knowledge-based trust, while questions on the subject of values and connection to others can be linked to identification-based trust.

Other similar tools exist, such as the *Organization Trust Inventory*, which constitutes a scale for measuring the levels of trust between an employee and her/his supervisor and organization. The questionnaire includes questions concerning three types of trust. Questions about competence are linked to calculus-based trust, whereas questions related to reliability concern knowledge-based trust. There are also questions about the understanding of roles which have to do with identification-based trust.

Measuring trust levels is a way of addressing trust issues in organizations. Using a questionnaire to determine the level of trust could be a useful way of bringing awareness about trust during the mediation process. This has inspired our proposed strategy for the mediation process that will be explained after an overview of organizational conflict.

3. Organizational conflict

A public organization is a social unit of people and teams structured and conducted to pursue a public mission. Teams are created to perform tasks that are too complex for individuals. The accomplishment of complex tasks requires the involvement of many members of the organization. Members of an organization must work in interdependence, which means that two or more persons must interact in order to reach a goal and the outcome depends in part on the actions of each person.[42]

The members of the organization might have different preferences, views, interests, skills, knowledge and information.[43] The day-to-day functioning of the organization requires that its people share information and ideas as well as coordinate their tasks, but the differences between them in terms of preferences,

---

42 D. BALLIET and P.A. VAN LANGE, *op. cit.* note 6.

43 Henry MINTZBERG, Structure et dynamique des organisations, Paris, Éditions d'Organisation, Montréal: Agence d'ARC, 1982, 434 p.

views, interests, knowledge and information, even in perceptions or attitudes, might generate conflict.

Authors have defined conflict as "a process that begins when an individual or group perceives differences and opposition between itself and another individual or team about interests and resources, beliefs, values, or practices that matter to them".[44] The existing literature[45] mostly concerns two different perspectives of conflict: task conflict and relationship conflict.

Task conflict can be defined as different perceptions or disagreements among members related to task content, while relationship conflict refers to incompatibilities among members about personal issues which are not directly task-related.[46] These disagreements or differing perceptions include differences in viewpoints, ideas, and opinions. Task content includes the distribution of resources, the procedures and policies, and judgments and interpretation of facts.[47] It is primarily based on non-relational issues. Relationship or relational conflict, on the other hand, has to do with everything related to the relationship. It includes personality clashes, interpersonal styles, and interpersonal incompatibilities. It generally involves emotions and accusations.

Figure 4: Type of organizational conflicts

44 M.J. GELFAND, L. LESLIE and K. Keller, "On the etiology of conflict cultures in organizations", (2008) 28 *Research in Organizational Behavior* 137.

45 DECHURCH, L.A., MESMER-MAGNUS, J.R. and D. DOTY, "Moving Beyond Relationship and Task Conflict: Toward a Process- State Perspective", (2013) Journal of Applied Psychology Advance online publication doi:10.137/a0032896.

46 Amy McMILLAN, Hao Chen Orlando C. RICHARD and Shahid N. BHUIAN, (2012), "A mediation model of task conflict in vertical dyads", International Journal of Conflict Management, Vol. 23 Iss 3 pp. 307 – 332.

47 *Id.*

A recent meta-analysis[48] shows that relational conflicts have a negative impact on team performance and can lead to negative affective consequences. However, in the case of task conflicts, the consequences are usually less perilous and are even sometimes beneficial. In concluding their research review, the authors suggest that constructive controversy characterized by actively expressing ideas and openly discussing issues enhances team functioning. A collaborative process integrating team members' concerns also contributes to the effectiveness of a team. On the contrary, avoidance and competing processes impair effectiveness. That might explain why conflicts are often seen as a threat in an organization: they could be associated with instability.[49] Nyhan writes that "*when sufficient trust exists in an organization, conflict can be a positive force. […] Conflict is inevitable in most organizations, but that energy, properly channeled, leads to innovation and increased productivity*".

With the same perspective, some organizations see conflict as an opportunity to develop real collaboration,[50] which implies that they must confront the conflict rather than simply look at the symptoms. For instance, instead of focusing on the fact that teams are not working together, authors[51] suggest finding out the source of the lack of collaboration and treating it as a potential conflict to manage. In that perspective, conflict can be seen as an expression of differences, which has great value for finding creative solutions.

Despite the fact that most organizational conflicts include both task and relational conflicts, Perron suggests that, when there is a relational conflict, the task conflict should not be addressed.[52] If the parties are able to resolve the relational conflict, it is more likely that they will be able to solve the task conflict by themselves. In certain circumstances, the resolution of a relational conflict facilitates the resolution of the task conflict. It is the relational conflict that takes energy, is destructive, causes suffering at work and is a source of the development of psychosocial risks.[53]

That perspective suggests that the conflict resolution process should start by addressing the relational conflict so that parties can afterwards focus on content or task conflict. The resolution of the relational conflict requires a better understanding of the dynamics of the relationship, independent from any question of content.[54] During the process, the parties can develop new interactive working

48 DECHURCH, L.A., MESMER-MAGNUS, J.R. and D. DOTY, *op. cit.,* note 45.

49 R.C. NYHAN, op. cit. note 1.

50 J. WEISS and J. HUGUES, "Want collaboration? Accept and actively manage conflict", (2005) Harvard Business Review 93.

51 *Id.*

52 M. PERRON, « Promouvoir la confiance en entreprise par une démarche d'appui au dialogue social », in KARSENTY, L. (dir.), La confiance au travail, Toulouse, OCTARÈS Editions, 2013, p. 129.

53 *Id.*

54 *Id.*

conditions. For example, they can agree to communicate any relevant doubts in order to build trust. The resolution could mean acknowledging and accepting differences in personalities or interpersonal styles.

Once the relational conflict is resolved, the parties can focus on the task conflict, which is then easier to settle. The conflict resolution process could then be based on constructive controversy and collaboration in order to resolve the task conflict with the best possible outcomes. Once the relational conflict is resolved, the parties should actively express ideas and openly discuss issues.

4. Mediation and trust repair

There is definitively a relationship between conflict and trust. When individuals trust each other, they can usually overcome conflicts. When they don't trust each other, the trust must be repaired.[55] Different approaches in effective conflict management take trust into account. For instance, Duluc considers that awareness of the dynamics of trust leads to the development of trust.[56] Others postulate that acknowledging the lack of trust is the first step to enhancing trust.[57] Similarly, the awareness of trust between the parties with an appropriate vocabulary and knowledge of the depth and complexity of the trust dimension is likely to contribute to its development.[58]

When speaking about trust repair, Kramer and Lewicki[59] refer to "repairing damaged expectations". They explain that trust is repaired when the relationship substantively returns to a positive state. They consider that most of research abstracts the dynamics of trust repair at the organizational level and that, despite a few exceptions, most approaches do not necessarily focus on addressing emotional or behavioral elements.

Considering studies on trust violations in the workplace, Kramer and Lewicki state that explanations and apologies can have an impact on trust repair. Apologies will be more effective the sooner they occur, if perceived as sincere and expressed as "taking responsibility". More specific reparation, like financial compensation, can also play a role in restoring trust. The third major area of trust repair, according to these authors, is the creation of structural solutions. These arrangements could include rules, contracts, regulation processes, monitoring systems and various other controls, such as penalties or other sanctions, in case of trust violations.

---

55 KRAMER., R.M. and R.J. LEWICKI, *op. cit.,* note 20.

56 A. DULUC, *Leadership et confiance: développer le capital humain pour des organisations performantes,* 2e édition, Paris, Dunod, 2008, 252 p.

57 E.C. TOMLINSON and R.J. LEWICKI, "Managing Distrust in Intractable Conflicts", (2006) 24(2) *Conflict Resolution Quartely* 219.

58 J. WU and D. LAWS, *op. cit.,* note 29.

59 R.M. KRAMER. and R.J. LEWICKI, *op. cit.,* note 20.

Lewicki and Wiethoff [60] present actions and strategies to manage distrust depending on whether calculus-based trust or identification-based trust is affected. Strategies such as agreeing explicitly on expectations as to what is to be done, agreeing on procedures for monitoring actions, cultivating alternative ways to have one's needs met and increasing the other's awareness of how his own performance is perceived by others are related to managing calculus-based distrust. To build identification-based trust, parties should engage in a process that lets them share commonalities in terms of interests, goals, objectives, reactions, values and principles. For the parties, openly acknowledging their distrust and designing ways to keep these issues from interfering with their ability to work together can contribute to managing identification-based distrust.

Considering more specifically the literature on the measurement and the awareness of trust, this article suggests that better awareness of trust between the parties, based on the measurement of the level of trust between them, will help develop trust. This suggestion implies that the development of trust between parties will be addressed during organizational mediation. Before going further on that, the mediation process will be examined.

Although different approaches exist in mediation, the process generally includes four stages: 1) introduction to the process and collection of data about the dispute; 2) identification of the stakes and interests involved; 3) exploration of possible solutions; 4) selecting the solutions and making an agreement.

Moore identifies lack of trust as one of five problems that commonly create negative psychological dynamics during the mediation process. Trust is largely based on past experiences between the parties. To build trust during the mediation process, Moore suggests that the mediator assist the parties by encouraging them to undertake a variety of actions or gestures designed to increase credibility.[61] For instance, these include making consistently congruent statements, performing symbolic gestures that demonstrate good faith, avoiding threatening the other, demonstrating an understanding for the other side's concerns even if they are not shared.

Moore expounds two common approaches to address issues of trust:[62] one of these concerns attitudes and perception of attitudes while the other concerns the ideal working relationship between the parties and ways to improve and monitor it. Poitras and Raines[63] give strategies that can be used to deal with mistrust among parties: 1) focus on finding a solution; 2) explain the mediation process; 3) bridge

60 LEWICKI, R.J. and C. WIETHOFF, *op. cit.* note 18.
61 Moore*, op. cit.,* note12, p. 193.
62 *Id.*, p. 195.
63 J. POITRAS and S. RAINES*, Experts Mediators: Overcoming Mediation Challenges in Workplace, Family and Community Conflicts,* Plymouth, Jason Aronson, 2013, 184 p.

talks between parties; and 4) build trust in agreements. They describe the risks of using each strategy.

The first strategy goes from helping the parties focus on how to make the future better, rather than looking at the past, to conducting a cost/benefit analysis and highlighting their commonalities in order to help them realize that their positions are not as far apart as they believe. When focusing on finding a solution, though, the risk is that the underlying concerns about distrust may be ignored, which is especially problematic if trust is a serious issue at hand.

Explaining the mediation process to the parties includes telling them that the concerns of everyone will receive full consideration during the process, that there is no obligation to settle but that if they do, the result of mediation is enforceable under law. According to the authors, explaining the process is a low-risk strategy but is not enough in some cases.

Bridging talks between the parties is a strategy used to avoid having them confront each other, thus reinforcing the rules of the mediation process and creating a safe place for them to share information through caucus or joint sessions. Mediators can also bridge talks between the parties by encouraging them to share perspectives before exploring the issues and by helping them to depersonalize ideas and to focus on the message and not on the messenger. Exposing the risks of such strategies, Poitras and Raines write:

> When there is a low level of trust between disputants, they often feel more comfortable allowing the mediator to speak for them or conducting the mediation session in ways that avoid direct contact. However, this greater level of comfort can come at a cost to the goal of repairing relationships. When parties communicate directly and face-to-face, they can look into the other's eyes and size up his sincerity or lack thereof. If a party is truly remorseful for his past actions, an apology conveyed via the mediator will not carry the same weight as one delivered directly.[64]

The fourth strategy is to build trust by helping the parties reach an agreement in spite of their distrust. For example, this can take the form of provisions concerning a mechanism to monitor the implementation of the agreement or future maintenance meetings that can be called by any of the parties. The agreement could also include penalties in case any provisions of the agreement are not fulfilled. That fourth strategy takes into account the difficulty of rebuilding relational trust in the time allowed for mediation.

All of the above strategies are linked to one or more types of trust. Whereas focussing on commonalities is related to identity-based trust, penalties for noncompliance to a procedural trust agreement are related to calculus-based trust.

---

64 *Id.*

However, these strategies are useful for helping a mediator deal with distrust between the parties rather than for helping parties deal explicitly with the trust issue between them.

Other authors[65] have presented mediation as a way of acting on trust in organizations and of creating trust between parties. They studied the mechanisms by which the process of mediation can re-established trust among the parties when there is an organizational conflict involving a relational impasse. They were interested in determining if mediation would have similar effects on the different dimensions of trust. The change of behavior would provide information about the effects of mediation on trust. For instance, a change in tone, attitude, and participation of one of the parties would give an indication as to what is happening with trust.

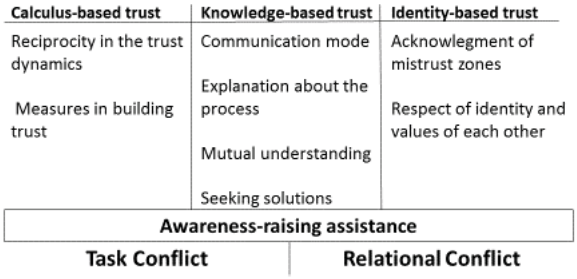
The authors found out that mediation has a positive impact on knowledge-based trust and calculus-based trust but not so much on identity-based trust, the impact on the latter being provisory and weaker. The intervention of the mediator should then vary depending on the type of trust involved.

For knowledge-based trust, the mediator could help the parties reflect, take a step back, enlarge their cognitive universe and extend their awareness. The strategies used should focus on the mode of communication, on establishing a structured process, on engendering openness and on seeking solutions. In order to build calculus-based trust, the mediator could ensure a secure context for the exchange and establish rules of dialogue between the parties. The mediator could also help the parties overcome their emotional blockages. The role of the mediator would then consist in introducing the concept of respect for the identity of each other, reminding the parties that everyone has their own legitimacy. The interventions in that context should focus on awareness, acknowledgement of the other and acceptance of various points of view, with the ultimate goal of creating openness toward the other's experience of the situation, which corresponds to a different but legitimate logic.

The results of that study are presented in figure 5.

65 LE FLANCHEC, A., ROJOT, A. and C. VOYNNET FOURBOUL*, op. cit,* note 32.

Figure 5: Strategies related to the types of trust and conflicts

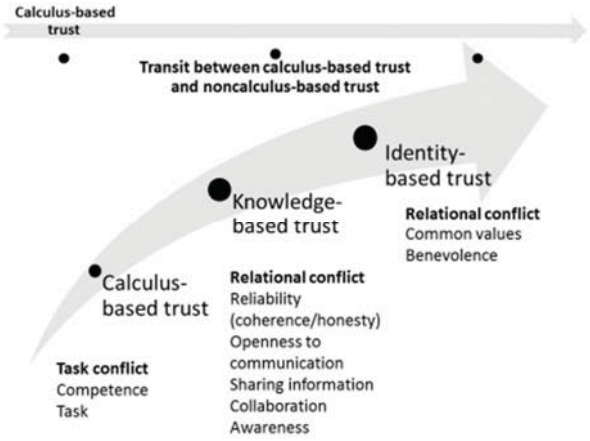


Taking into account the literature on organizations, trust and organizational conflict, we can draw some conclusions. Calculus-based trust is in fact the decision to trust based on the hope that the other will respond to our expectations in terms of their intentions, motivations, and competence. In an organizational context, this type of trust is related to competence and commitment. The task conflict can be associated to this type of trust.

Knowledge-based trust has to do with the experience of and with the other. It is based, in major part, on the aptitude of the other to merit trust, the other's trustworthiness. To be trusted, a person must act and behave in a way that engenders trust. When each party tries to be perceived the same way, trust will build in reciprocity and circularity. Within organizations, various behaviors are associated with trust: openness to communication, sharing of information, participation in decision-making and awareness of the dynamics of trust.

On the other hand, identity-based trust, which is the affective dimension of trust, is related to emotions, values, benevolence within the relationship, coherence and honesty. When this type of trust is involved, the purpose of mediation is to bring the parties to acknowledge and respect each other's freedom.

Figure 6: Evolution of trust according to Darley with different types of trust and conflicts



The literature[66] shows that awareness of the dynamics of trust may help develop it. There is support for the idea of measuring trust during the mediation process because of the importance of trust for organizational effectiveness and the resolution of conflicts. A questionnaire[67] was created in order to measure the level of trust before starting the mediation process. This questionnaire could be used during the process as well to evaluate the improvement of trust among the parties.

The mediator might use the results of the questionnaire to bring awareness about trust to the parties. They could thus acknowledge the dynamics of trust between them. The result sheet for identifying the different areas of trust involved helps orient the intervention.

We suggest using the questionnaire during the first meeting, which is usually individual, and then, at the first common meeting, sharing the results with the parties so they can become aware of the level of trust between them. That first common meeting could also serve the purpose of making the parties aware of the dynamics of trust. This could include an explanation of the reciprocity of trust, which is related to the perception of trustworthiness, the behaviors associated with trust both within and without the mediation process, and commitment during the mediation process.

66 A. DULUC, *op. cit.,* note 56; J. WU et D. LAWS*, op. cit.,* note 29, 329.

67 The Questionnaire has 35 questions about openness, communication, participation, taking risk, taking responsibility, coherence, identification and explicit statement about trust. The participants answer on a scale from 1 to 10 to each question. The result sheet identifies the questions related to each areas and the average result is calculated for each of them.

The next step in the mediation process would be addressing the relational conflict. As exposed before, once the relational conflict is resolved, the task or content conflict should be easier to solve. At the end of the mediation process, the parties would be asked to complete the questionnaire again in order to evaluate the changes.

The particularity of the proposed process is the use of the measurement of trust as a tool to bring awareness of trust to the parties. The first step would be to talk about the relational conflict and deal with that as an issue to solve. Once that conflict was resolved, the parties would be able to address the task conflict, if there is one, using the agreement about trust.

Figure 7: Proposed mediation process

Conclusion

This article described trust as key to the performance of public organizations. When public organizations perform well, public trust increases. To achieve its mission, a public organization must often tackle complex tasks. To do so, a sense of interaction and interdependence between various individuals and work teams is required. This implies a certain level of trust.

Trust exists between individuals when the relationship gives everyone a feeling of serenity due to the expectation that her or his interests will be taken into account and respected by the other party. However, when mistrust takes place, the situation can eventually evolve and create conflicts. In an organizational context, such conflicts are referred to as task conflicts, interest conflicts or content and relational conflicts.

There are various approaches to enhancing and repairing trust. Mediation, in helping parties resolve their conflicts, has the potential to restore the trust between them. People come to mediation in order to solve disagreements in a consensual way.

Trust between the parties is discussed in the literature on mediation. Authors have listed various strategies to help the mediator increase the level of trust between the parties, some of these dependent on the type of trust. However, that literature has traditionally put the accent on trust in the mediator and in the process, the idea being that trust between the parties should then increase by itself. The only situation where trust between the parties would have to be directly addressed is when the level of trust is too low to conduct the process or to reach an agreement.

On the other hand, the literature on trust suggests that the awareness of the dynamics of trust can help develop or restore trust. Literature about organizational conflicts also proposes different ideas such as that once the relationship conflict is solved, parties might be able to solve the task conflict.

This paper suggested that the awareness of trust between the parties, based on the measurement of the level of trust, will help develop trust. This proposition implies that the issue of trust between the parties would be addressed during the organizational mediation. The process proposed also insists that the mediation process should first focus on helping the parties solve the relational conflict. By solving the relational conflict, and thus repairing the trust between the parties, the task conflict, if there is one, would be easier to solve.

As such, by increasing the trust among an organization's members, and thus improving the organization's performance, the use of mediation within public organizations may very well contribute to enhancing public trust.

Tacit Authorization: A Legal Solution for Administrative Silence

Nicole G. Hoogstra[*]

This article discusses one of the current legal instruments to stimulate timely decision-making by administrative authorities, namely the "Lex silencio positivo" or the "Silence is Consent" rule. Tacit authorization prescribes that the license sought by the applicant will be granted automatically if decisions are not taken within prescribed time limits.

Timely decision-making is crucial in order to protect and affects adversely the public trust in the government. Furthermore, if decisions are not taken within prescribed time limits this often results in legal uncertainty for the applicant.

The idea of a system of fictitious decision-making is that it motivates administrative authorities to make a decision within the prescribed time limits. In the Netherlands, general provisions concerning tacit authorizations are included in division 4.1.3.3 of the General Administrative Law Act (GALA) and contains several instruments to safeguard the interests of parties. A system of tacit authorizations seems to terminate the legal uncertainty of an applicant and at the same time contributes to the public trust in the government. However, it is questionable whether or not a system of fictitious decision-making transfers the problems of legal uncertainty of an applicant to the society as a whole. The broad introduction of a system of tacit authorization has been severely criticized, because a fictitious approval might compromise precisely those public interests for which the licensing requirement was introduced. In order to protect the interests of parties the legislator designed several legal instruments.

1. Introduction

In the Netherlands, timely decision-making by administrative authorities is repeatedly considered to be a problem. Various studies indicate that administrative authorities are having a hard time responding to a variety of license applications within a set time limit.[1] Timely decision-making is crucial in order

* Lecturer and researcher (PhD candidate) at the Department of Constitutional Law, Administrative Law & Public Administration of the University of Groningen.

1 *See* for instance three research reports of the Evaluation committee of the General Administrative Law Act: *Toepassing en effecten van de Algemene wet bestuursrecht 1994–1996*, The Hague, 18 december 1996, p. 32 (Committee Polak), *Toepassing en effecten van de Awb 1997-2001,* The Hague: Boom Juridische uitgevers 2001, p. 20, (Committee Boukema) and *Toepassing en effecten van de Algemene wet bestuursrecht 2002-2006,* The Hague: Boom Juridische uitgevers 2006, p. 59 (Committee Ilsink). In

to protect both the democratic constitutional state and the credibility of the government.[2] Repeatedly exceeding the decision deadline affects adversely the public trust in the government. Citizens and businesses should be able to rely on the government when it comes to timely decision-making.[3] From an economic and practical point of view it is understandable that it frustrates applicants that they are bound by strict time deadlines – that must be considered to be final – while the government with impunity can breach the time limits. Furthermore, if decisions are not taken within prescribed time limits this often results in legal uncertainty for the applicant. The consequence of failing to make decisions in time is that an applicant is left in the dark regarding the start of planned activities. Without prior official authorization, it is prohibited to perform activities that require a license. Until a decision is made about granting a licensing application, the desired activities may not be carried out.

In the past few years, the legislator has invested in various legal instruments with the aim of contributing to a solution for the failure by the government to comply with time limits.[4] The intended purpose of the legal instruments is to stimulate timely decision making.[5] To achieve this goal, the objective of these instruments is to sanction the administrative authority in case decisions are not made within the prescribed time limit. This article focuses on one of these new legal instruments, namely the "*Lex silencio positivo"* or the "*Silence is Consent"* rule. This rule prescribes, that in a growing number of licensing systems, the license sought by the applicant will be granted automatically if decisions are not taken within prescribed time limits. In fact, the idea behind a system of tacit authorization is that it motivates administrative authorities to make a decision within the prescribed time limits. So, in an ideal scenario the instrument would

addition to this, *see* the Netherlands Court of Audit, "Beslistermijnen. Waar blijft de tijd?" *Parliamentary Papers II* 2003/04, 29 495, no. 1-2 and *Parliamentary Papers II* 2008/09, 29 495, no. 3-4. Furthermore, according to multiple annual reports of the National Ombudsman each year a large number of complaints relate to the length of the decision-making procedure. *See* for example Annual report 1994, *Parliamentary Papers II* 1994/95, 24 125, no. 1–2, p. 28, Annual report 1996, *Parliamentary Papers II* 1996/97, 25 275, no. 1–2, p. 19 and Annual report 1998, *Parliamentary Papers II* 1998/99, 26 445, no. 1–2, p. 21.

2 *Parliamentary Papers II* 2006/07, 30 844, no. 3, p. 6.

3 *Parliamentary Papers II* 2004/05, 29 515, no. 84, p. 39.

4 Non-legislative causes of failures in timely decision-making, such as insufficient employee competence, the workload being too high for government officials or the complexity of applications are not taken into consideration. However, the legislator does acknowledge the fact that finding a solution for the problem cannot be guaranteed with (only) legislation and regulation. *See* for example *Parliamentary Papers II* 2006/07, 30 844, no. 3, p. 6.

5 In this paper the term legislator is used for the legislature consisting of the Government and the States General.

never be used, since in this case the administrative authority would always decide before the strict deadline. However, the daily practice shows otherwise.[6]

At first sight, it seems that this system of tacit authorization terminates the legal uncertainty of an applicant and at the same time contributes to the public trust in the government. However, it can be questioned whether or not a system of fictitious decision-making transfers the problems of legal uncertainty of an applicant to the society as a whole. It should be noted that a system of fictitious decision-making implies that it is no longer guaranteed that a permit is the result of a substantive assessment of the application. This particular fact might affect adversely the public trust in the government when it comes to proper decision-making. By the introduction of the system of fictitious decision-making, these matters were taken into consideration. The legislator has tried to design a system of fictitious decision-making that entitles both the interests of the applicant and the interests of society. This leads to the research question which is the central theme of this article:

> How does the system of tacit authorization contribute to maintaining the public trust in the government by (finding a balance in) safeguarding the public interests, interests of third parties and the interests of the applicant?

To answer this research question, this article firstly describes the introduction of a system of fictitious approval in national administrative law in the Netherlands (section 2). It is discussed how the legislature has determined when and under what conditions tacit authorization will be granted. Subsequently, this article focuses on the severe criticism the system of fictitious approval had to face (section 3). That the legislator has taken notice of criticism and has introduced legal instruments to reduce possible negative effects of a system of tacit authorization is then examined (section 4). Finally, this article concludes with a summary and a few concluding remarks (section 5).

2. The broad introduction of the system of tacit authorization

Since December 2009, the General Administrative Law Act (in short: GALA) contains a special division with general rules on fictitious authorizations. This division is added to the GALA by the implementation of the Services Directive

6 Nevertheless, regarding the case law based on for example the Environmental law act (in short: ELA) this is not the case in practice. *See* for example District Court of Amsterdam 27 March 2012, ECLI:NL:RBAMS:2012:BW5007, JM 2012, 88 with annotation N.G. Hoogstra, District Court of Zeeland-West-Brabant 30 January 2013, ECLI:NL:RBZWB:2013:BZ0877, M & R 2013, 77 with annotation N.G. Hoogstra, Council of State 24 June 2015, ECLI:NL:RVS:2015:1986, JM 2015, 106 with annotation N.G. Hoogstra.

(2006/123/EC)[7] in the Netherlands and relates in principle to all administrative legislation.[8,9] It is worth mentioning that despite division 4.1.3.3 of the GALA existing only since a couple of years, tacit authorizations were not a new phenomenon in the Netherlands. For some licenses, special legislation already stipulates that failure on the part of the public administration to make a timely decision will result in a fictitious approval. A prime example of this system of tacit authorization based on national policy are former building permits. For a long time, these were granted tacitly under the Housing Act if no decision had been taken within the statutory time limit.[10] Division 4.1.3.3 has replaced these different arrangements of fictional approval in the special acts for one general optional scheme.[11]

> It is worth stating that specific acts can contain supplementary measures that deviate from the general scheme. An example is found in the Environmental law act (in short: ELA) which prescribes that division 4.1.3.3 of the GALA applies in cases of using the so-called standard decision-making procedure with the exception of article 4:20b(3) and article 4:20f of the GALA.[12] For these specific provisions, the ELA has its own scheme which will be discussed in more detail in section 4.

The main reason for the broad introduction of a system of tacit authorization is Article 13(4) of the European Services Directive[13] which obliges Member states to include a system of tacit authorization in their national legislation:

---

7 Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*PbEU* 2006, L 376/36).

8 In other words, this division is applicable to legislation within and outside the scope of the Services Directive.

9 The legislator has attempted to simplify complex licensing procedures. The result of this project is that various licensing systems are converted into general rules. In the remaining licensing systems, a strict deadline to make a decision is often included. *See Parliamentary Papers II* 2007/08, 29 515, no. 224.

10 Other former examples are the Monuments and Historic Buildings Act and the Mining Decree.

11 This division only applies when stated in a specific Act. For legislation within the scope of the Services Directive this is the standard based on article 28(1) of the Services Act. For legislation outside the scope of the Services Directive an explicit provision that division 4.1.3.3 of the GALA is applicable is required.

12 It is hardly surprising that a strict deadline for making an administrative decision is incorporated in the ELA, since this instrument did already apply to several licensing systems – for example the building permit based on the former Housing act – that now are included in the ELA.

13 One of the main reasons for the introduction of the European Services Directive was that the administrative licensing procedures that service providers had to follow in order to set up businesses in different member states were perceived as complicated and time-consuming. In other words, it has not always been easy for service providers to start their activities in other European counties, despite the idea of freedom of movement of services. The main goal of the Services Directive is to change this situation and to facilitate the free movement of services. In order to contribute to the free movement of services, the Services Directive contains several articles focusing on licensing

> Article 13(4) Services Directive: "Failing a response within the time period set or extended in accordance with paragraph 3, authorization shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties."

This rule prescribes that the license sought by an applicant will be granted automatically if decisions are not taken within prescribed time limits. However, the European Services Directive leaves room for member states to make "different arrangements". This indicates that exceptions to the basic rule of tacit authorization can be made for certain licensing systems if this can be justified "by overriding reasons relating to the public interest, including a legitimate interest of third parties". The concept of "overriding reasons relating to the public interest" has been developed by the Court of Justice in its case law on the articles 49 and 56 TFEU and may continue to evolve.[14]

> It is worth mentioning that during the legislative process at the European level a lot of criticism has been directed at the introduction of the system of tacit authorization.[15] It was even proposed to delete paragraph 4 of article 13 of the Services Directive because of the risk of evidentiary problems, such as danger to public health. Nevertheless, the instrument was included in the final version of the Services Directive and it had to be implemented in the national law of the member states by 28 December 2009.

In the Netherlands, the European Services Directive is mainly implemented in the Services Act.[16, 17] As already mentioned, apart from this Act a new division was added to the General Administrative Law Act (GALA), especially for the introduction of tacit authorizations.[18] It is worth mentioning that the Services Act itself does not contain any general rules regarding fictitious authorizations,

---

procedures. The idea behind these different provisions is that licensing procedures should not discourage service providers from setting up businesses in other member states. In other words, a licensing procedure should not be an (huge) obstacle for a service provider. *See* COM(2002) 441 (*The state of the internal market for services*), p. 19-20.

14 *See* also Article 4(8) and Recital 40 of the Services Directive.

15 European Parliament, Amendments 747-941, 2005, PE 360.092v02-00 (p. 3/142).

16 In Dutch: Dienstenwet.

17 This article pays no attention to questions if Article 13 (4) of the Services Directive is implemented in the right way in the Netherlands. *See* on this subject K.J. de Graaf & N.G. Hoogstra, Silence is Golden? Tacit Authorizations in the Netherlands, Germany and France, *REALaw* 2013-2, p. 7-34 (section 3.2).

18 In the Netherlands, this part of the implementation of the European Services Directive that has been most discussed. *See* U. Stelkens, W. Weiß & M. Mirschberger, "*The Implementation of the EU Services Directive. Transposition, Problems and Strategies*", The Hague: T.M.C. Asser Press 2012, p. 37.

however the Act simply refers to division 4.1.3.3 of the GALA, which (again) sets out general rules on this matter.

3. Critical observations with regard to safeguarding of interests

The introduction of a broad system of fictitious approvals has been severely criticized. In particular, the Council of State, in its advisory role, is not in favor of tacit authorizations and even recommended to withdraw this legal instrument from national administrative law in the Netherlands.[19]

The main point of criticism directed at this instrument is that it is very likely that the public interest and the interests of third parties are not taken into consideration. In addition, a tacit authorization places the applicant's interest above the public interest and the interests of third parties. In other words, public interests, as well as private interests of third parties, can be set aside in favor of the licensee. The exercise of activities requiring prior authorization must now be allowed without, as is customary, being tested for compatibility with the public interest. In a system of tacit authorization, activities contravening the public interest are all of a sudden allowed, which means that, as with the legal certainty of third parties, protection of this interest is no longer safeguarded without further regulation.

Fictitious approval can cause legal uncertainties, considering the fact that this type of permit does not comply with the procedural and substantive demands which normally apply to formal administrative decisions. Moreover, the Council of State, in its advisory role, notes that a tacit authorization is not based on an adequate balance of interests.[20] The interests of third parties are not properly being weighed up against other interests, either because a substantive assessment of the license application has not taken place or because this assessment has not resulted in an actual administrative decision.[21] In addition, the decision will not be properly motivated, especially because of the fact that there is not even a written decision. Normally, the administrative authority has to fulfill the obligation to provide reasons for the administrative decision that explain why the decision was taken.[22]

---

19 The Council of State has been reserved with regard to the introduction of a system of tacit authorization. *See Parliamentary Papers II* 2007/08, 29 515, no. 224, *Parliamentary Papers II* 2007/08, 31 579, no. 4, *Parliamentary Papers II* 2007/08, 32 844, no. 4 and *Parliamentary Papers II* 2009-2010, 32 454, no. 4.

20 The Council of State believes that a fictitious approval can have harmful effects for third parties or society as a whole. This is especially the case when the tacit authorization occurs with licensing systems regulated in the ELA, because these licensing systems do almost always affect the physical living environment, the interests of third parties and the public interest. *See Parliamentary Papers II* 2007/08, 32 844, no. 4, p. 9-10.

21 *See* article 1:3(2) of the GALA: "Administrative decision" means an order which is not of a general nature, including rejection of an application for such an order.

22 Article 3:46 of the GALA.

4. Protection of interests: instruments

4.1 Introduction

The legislator took notice of the criticism and acknowledged that tacit authorization might have harmful effects on the public interest and the interests of third parties. In order to protect these interests, the legislator introduced several legal instruments in the GALA.[23] These instruments will be discussed in this section. In addition, there will be attention drawn to the supplementary instruments from the ELA which are also included in the law in order to safeguard the public interests and the interests of third parties.

In this context, one of the first questions that arises is when a fictitious approval enters into force and how interested parties are given notice that authorization has been granted (section 4.2). Another relevant issue is which legal possibilities an administrative authority has to protect the interests of parties, after an authorization is granted tacitly (section 4.3). The third matter that is examined is how legal protection against tacit authorizations is regulated (section 4.4).

4.2 Notification and the entering into force of tacit authorizations

When division 4.1.3.3 of the GALA has been declared applicable to a certain licensing system, then tacit authorization can be granted if the statutory time limit has expired and the administrative authority has not responded to the application.[24] In case a statutory time limit is missing in a specific Act, a "reasonable time limit" of eight weeks will apply.[25] Since exceeding the strict deadline results in a fictitious approval, it is important that the both the applicant and third parties stay informed of the strict deadline. For that reason, it is strongly recommended that the competent administrative authority send an acknowledgment of receipt of the application as soon as possible, stating both the time limit for the response and the fact that tacit authorization will be granted if no response is sent within the given time limit.[26]

In case a tacit authorization is deemed to have been granted, this approval takes effect on the third day after the time limit has expired.[27] There is a reason why

---

23 The expectation of the legislator is that these instruments will only be used in exceptional cases. *Parliamentary Papers II* 2006/07, 30 844, no. 3, p. 36.

24 For example, there is a prescribed time limit of eight weeks for applications covered by the standard preparatory procedure as set out in Article 3.9(1) of the ELA. This time limit can only be extended once by the administrative authority for 6 weeks at most. So the time limit is fourteen weeks at most.

25 *See* also Article 31 of the Services Act and Article 4:14 of the GALA.

26 This is mandatory by applications for an environmental license. *See* Articles 3.8 and 3.9(1) of the ELA.

27 Article 4:20b(3) of the GALA.

there is "gap between the tacit authorization itself and the entry into force of this license. The legislator has chosen the third day after expiry of the time limit to ensure that a formal decision sent by the administrative authority on the last day of the time limit could be delivered by mail.

It is worth mentioning that due to formal decisions, a notice that the authorization has been granted tacitly based on the GALA is not required for the entry into force of the fictitious permit. It is remarkable that a notification, in which it is stated that a license has been tacitly granted, is not a condition in the GALA for entering into force. Normally, an administrative decision shall not take effect until it has been notified.[28] A benefit from the situation that a tacit authorization enters into force automatically is that the administrative authority has no influence on the moment the license takes effect.[29]

Notable is that Article 4:20b(3) of the GALA is not applied mutatis mutandis in the ELA.[30] According to the ELA, a fictitious permit needs to be notified before it can become effective. In addition, the licensee of a fictitious environment permit can only benefit from this license once the time limit for formally filing in a notice of objection has expired, or in case a notice of objection has been filed, after a decision on that objection has taken place.[31] In other words, the entering into force of a tacit environmental permit will be automatically suspended for a numbers of weeks.[32]

Nevertheless, in the events referred to in either the GALA 4 or the ELA the administrative authority is obliged to give notice of the fictitious authorization within two weeks of its entry into force or its emergence.[33] In addition, the administrative authority is required to give public notice that it is a fictitious approval instead of a formal (real) license.[34] With this public notification, third parties are informed of the fictitious approval. However, it is questionable whether public notification of tacit authorization does always take place. It has been discussed whether an administrative authority, unable of making a decision within

---

28 Article 3:40 of the GALA: "An order shall not take effect until it has been notified". Article 3:41 of the GALA: "Orders which are addressed to one or more interested parties shall be notified by being sent or issued to these, including the applicant".

29 *Parliamentary Papers II 2007/08*, 31579, no. 3, p. 129-130.

30 For the record, this means that a tacit authorization based on the ELA does not entry into force after three days after the time limit has expired.

31 Article 6.1(4) of the ELA.

32 Moreover, it is possible for the licensee of the fictitious permit to ask for a preliminary injunction in order to reverse the suspensive effect. *See* also C.M. Saris, "Tijdig beslissen. Het doel dichterbij met de Wet dwangsom en beroep bij niet tijdig beslissen en de verruiming van de lex silencio positivo?", *De Gemeentestem* 2008, nr. 30.

33 An interesting question might be how a (notice of) fictitious approval would look like, because of the absence of a written administrative decision.

34 Article 4:20c(2) of the GALA.

the prescribed time limit, would announce an issued fictitious license in time.[35] In other words, it would be highly likely that the administrative authority fails to give a notification within two weeks after the strict deadline, the expiration of which has led to a tacit authorization.

If the administrative authority fails on the duty of notification, there is a risk that the administrative authority has to pay a penalty.[36] This is the case when the applicant has asked for notification by a written notice of default and the administrative authority has not answered this request within two weeks.[37] The penalty payment can be € 1260 at most.[38] The exact size of the penalty payment depends on the amount of time it takes before the administrative authority notifies the tacit authorization. With this instrument, the administrative authority is once again sanctioned for the fact that a decision has not been made before a strict deadline. Secondly, it is also possible to force the administrative authority to send notice by filing an appeal with the administrative court, again, after a written notice of default has been issued and two weeks have passed.[39]

4.3 Authority to amend or revoke tacit authorizations

In order to safeguard interests after a license is granted tacitly are so-called standard conditions automatically attached to the fictitious approval. If a statutory provision or a policy guideline were to stipulate the standard conditions that are normally to be included in the permit, they apply by operation of law to tacit authorizations.[40] This particular regulation aims to equalize license conditions for substantive administrative decisions and fictitious decisions.[41]

---

35 J. Robbe, "De omgevingsvergunning van rechtswege", in: A.A.J. de Gier e.a. (red.), *Goed verdedigbaar, Vernieuwing van bestuursrecht en omgevingsrecht*, Deventer: Kluwer 2011, p. 477-490; J. Robbe, "De Awb en de omgevingsvergunning van rechtswege", *TO* 2012/3, p. 55-63.

36 Article 4:20d of the GALA.

37 Article 6:12 of the GALA.

38 *See* the rapport "Monitor Wet dwangsom" attachment by *Parliamentary Papers II* 2012/13, 29 934, no. 29.

39 Article 8:55f of the GALA.

40 By way of example, in the explanatory memorandum attached to this instrument, the case of a license that gives permission to set up a terrace is mentioned. Attached to this type of license, most municipalities in the Netherlands have a standard condition with regard to closing times. The same closing time applies in case of a fictitious terrace permit, irrespective of whether or not this is included in the license application (*Parliamentary Papers II* 2007/08, 31 579, no. 3, p. 133).

41 A standard condition is a rule which is included in a legal provision or a policy rule. However which exact rules can be seen as standard conditions is unclear. This has led to some debate in Dutch literature. *See* B. de Kam, "De vergunning van rechtswege en standaardvoorschriften", *De Gemeentestem* 2010, 107 and B.M. Kocken, "Lex silencio positivo. Stand van zaken", *Vastgoedrecht*, 2011-1, p. 5-11.

Besides standard conditions, the administrative authority has the power to either add conditions to the fictitious approval or to revoke the license if this is needed to avoid serious consequences for the public interest.[42] Both can be done within a time limit of six weeks after sending a notification of the tacit authorization.[43] The licensee is entitled to compensation if the administrative authority decides to amend or revoke a tacit authorization. Only the damage resulting from the amendment or revocation of the license is considered for compensation, not the damage which may arise after a license issued by right is granted.[44]

It is remarkable that (again) the ELA contains its own rules about the possibility to attach conditions to the authorization or to revoke it in case of serious consequences for the physical living environment.[45] Keep in mind that, as explained in the previous section, a tacit environmental license will only enter into force until the term to file in a notice of objection has expired, or if a notice of objection has been registered after a decision is made on this objection. Therefore, no detrimental consequences for the physical living environment will occur within at least six weeks after the license is announced. This gives the administrative authority the opportunity to examine if the fictitious license has detrimental consequences for the physical living environment and which measures might offer an adequate solution. Consequently, together with the announcement of the tacit license to the license applicant, the conditions attached to the tacit decision or the (partial) revocation of the license can also be announced.

It is interesting to note that the wordings used in the ELA are different from the terminology used the GALA. The scope of this regulation in the ELA appears to be more restrictive, since "*serious consequences for the physical living environment"* is a more restricted concept than "*serious consequences for the public interest*", which is used in the GALA. In this context, it is worth pointing out that the ELA includes a quite rigorous obligation for the administrative authority to amend or to revoke the fictitious approval, whereas the GALA only stipulates the competence to do so. Furthermore, in the ELA, the administrative authority is not subject to a strict period of time in which conditions need to be attached to the license or in which the license has to be revoked. Naturally it would be best if the administrative authority takes measures within a short period of time in light of the serious detrimental consequences that the tacit authorization might have.

42 Article 4:20f of the GALA.
43 Notification in the sense of Article 4:20c of the GALA.
44 Article 4:20f(3) of the GALA.
45 Article 2.31 and 2.33 of the ELA.

4.4 Legal protection in case of tacit authorizations

A fictitious authorization can be legally challenged the same way a formal (real) decision on an application is challenged.[46] This generally means that first an objection shall be made by submitting a notice of objection to the administrative authority which "made" the fictitious approval.[47] Next, the fictitious approval can be challenged at the district court and the decision can be appealed at the Administrative Jurisdiction Division of the Council of State.[48]

The six-week period during which an appeal can be lodged against a tacit authorization begins when notice is given of the authorization.[49] As explained earlier there can be a substantial difference between the moment the tacit authorization takes effect and the moment an administrative authority gives notice of this license.[50] This means that third parties have to wait until notice is given before they can officially object against the tacit authorization.

Another issue – which automatically occurs in case of a fictitious license – is that there is no written document in which the reasons for the decision are stated. It is assumed that it is not really possible to check for compliance with procedural requirements, such as the requirement that sound reasons are given; that would mean that any legal action would lead to a successful appeal which could hardly have been the intention of the legislature.[51] If the administrative court completely or partially annuls the tacit authorization, the authority must make a new decision. Failure to comply with the administrative court's order to make a new decision cannot lead to another tacit authorization.[52]

5. Summary and concluding remarks

In this article, the introduction of a broad system of tacit authorization in the Netherlands is analyzed. The objective of tacit authorization is to stimulate timely decision making by administrative authorities; it implies that if the administrative authority fails to respond to the license application within the set time limit, the license that is being sought by the applicant is automatically granted.

---

46 Although theoretically a tacit authorization cannot been seen as an "order" (defined in Article 1:3(1) of the GALA as a written decision of an administrative authority constituting a public law act), Article 4:20b(2) simply states that it is regarded as an order.

47 Article 6:4 of the GALA.

48 Article 8:1 and 8:104 of the GALA.

49 Article 6:8 of the GALA: "The time limit shall start on the day after that on which the order is notified in the prescribed manner".

50 *See* in detail section 4.2.

51 *See* also M.I.P. Buteijn, "Lex silencio positivo: spreken is zilver, zwijgen is goud…of niet", *Journaal Bestuursrecht* 2009, 15, p. 238.

52 *Parliamentary Papers II* 2009/10, 32 454, no. 3, p. 4.

Various studies show that administrative authorities are having a hard time responding to a variety of license applications within the set time limit. Timely decision-making is crucial in order to protect both the democratic constitutional state and the credibility of the government. Furthermore, if decisions are not taken within prescribed time limits, then this often results in legal uncertainty for the applicant. The legislator tries to solve these problems caused by exceeding the set time limit with the introduction of a system of tacit authorizations in a growing number of licensing systems. The question is whether or not the solution of a system of tacit authorization transfers the problems of legal uncertainty of an applicant to the society as a whole. This particular fact might affect adversely the public trust in the government when it comes to proper decision-making. This leads to the research question how the system of tacit authorization contributes to maintaining the public trust in the government by (finding a balance in) safeguarding the public interests, interests of third parties and the interests of the applicant.

Since December 2009, general provisions concerning fictitious approvals are included in division 4.1.3.3 of the GALA. The main reason for the broad introduction of a system of tacit authorization is Article 13(4) of the European Services Directive which obliges Member states to include a system of tacit authorization in their national legislation.

In the Netherlands, the introduction of a system of tacit authorization has been severely criticized. One of the main points of criticism directed at this instrument is that public interests, as well as private interests of third parties, can be set aside in favor of the licensee. In addition, it was suggested that a system of tacit authorization would cause legal uncertainties for the applicant as well as for third parties, considering the fact that this type of permit does not comply with the procedural and substantive demands which normally apply to formal administrative decisions.

The legislator acknowledged that a system of tacit authorization might have negative effects for the public interest and the interests of third parties. In order to protect these interests, the legislator has included special provisions on notification and entry into force in the GALA in order to ensure that parties are informed about the fictitious approval. Next, a fictitious authorization can be legally challenged the same way a formal decision on an application is challenged. Essentially, negative consequences are restricted to those cases where no legal instruments are used against tacit authorization. In those cases, the administrative authority has the power to amend or revoke a tacit authorization if this is needed to avoid serious consequences for the public interest. Moreover, so-called standard conditions are normally to be included in a license also apply to tacit authorizations.

However, the question remains as to what extent a system of tacit authorization contributes to safeguarding the interests of parties and maintains the public trust in the government. The fact is that the applicant automatically obtains a license after the set time limit exceeds. An applicant is no longer left in the dark with regards to the start of planned activities. Nevertheless, it is doubtful whether the applicant can derive sufficient legal certainty from a fictitious approval, since there is no (written) documentation of the arguments in support of the decision. Moreover, because of the safeguards introduced by the legislator, the applicant cannot simply rely on the fictitious approval. At the same time, despite these safeguards, it cannot be guaranteed that the fictitious approval has detrimental consequences for the public interests and the interests of third parties. As a result, it cannot be discounted that a system of fictitious decision-making transfers the problems of legal uncertainty of an applicant to the society as a whole.

In conclusion, the current system of tacit authorization has both positive and negative aspects, and as a result of which it remains questionable whether it will affect the public trust in the government. In the end, the real impact of a system of fictitious decision-making depends on the use of the instrument in practice, which could be developed in future research.

The *European Citizens' Initiative*'s Role in Having the Grass Roots Associations Connect to the European Public Sphere

Nicolle Zeegers[*]

Introduction

The *European Citizens' Initiative* (ECI) is meant to give citizens an instrument to call on the European Commission to propose legislation on matters where the Commission has the competence to do so.[1] The ECI is labelled as an instrument for "direct political participation" of citizens in the EU and would provide EU citizens with a form of "direct democracy" as a complement to representative government. With the ECI citizens can try having an issue put on the political agenda of the EU directly by themselves, instead of being dependent on political parties and representative democratic institutions.

In order to submit an ECI to the European Commission, the organizers in the time of one year have to collect one million eligible signatures coming from at least seven Member States.[2] Once submitted, the ECI is a formal demand to the Commission to propose legislation. The Commission will invite the organizing committee to explain the Initiative and a public hearing at the European Parliament will be organized. The Commission is obliged, within three months, to communicate its legal and political conclusions on a Citizens' Initiative as well as the action it intends to take and the reasons for doing this.

The ECI seems to have little to offer in terms of direct access to the EU agenda. The European Commission, having the monopoly of legislative initiative, indeed is obliged to give an answer to the demand that is made in each submitted initiative. However, it retains full control over whether and how to turn such demand into an agenda item. In addition, although not in their formal role, also

---

* Assistant Professor in Political Science at the Faculty of Law, University of Groningen.

1 In article 1 of Regulation (EU) No 211/2011 this is formulated as follows: *"'citizens' initiative" means an initiative submitted to the Commission in accordance with this Regulation, inviting this commission, within the framework of its powers, to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing the Treaties'* The Regulation, containing the rules and procedures governing the ECI, was adopted by the EP and the Council of the EU on 16 February 2011.The Citizen's Initiatives could be launched from April 1, 2012.

2 In addition, a minimum number of signatures has to come from each member state which equals the member states number of MEP's multiplied by 750.

the European Council and the Council tend to put their stamp on this first phase of decision making in which law proposals are initiated and, compared to theirs, the pressure of ECIs on the Commission will carry less weight.[3]

But what about stimulating public trust? The 2010 report of *Statistics Netherlands* expects "networks where common values are shared" to have positive effects on citizens' trust in each other as well as in the governmental institutions that formulate public law.[4] Also, according to Putnam and more recent research concerning citizen participation in policy making, the partaking of citizens in such networks is positively correlated to trust in each other and in the community.[5] Because the success of ECIs is dependent on organizing the collection of signatures well and connecting as many individuals and groups as possible to the ECI's cause, it can be regarded as an instrument for creating new policy networks or expanding existing policy networks at the EU level.[6] So, through its capacity to mobilize citizens into networks the ECI may very well foster public trust.

Because of the "democratic deficit" the European Union has a clear interest in increasing citizens' trust in and engagement with each other across the Member States. In the context of the creation of the ECI, political science scholars have debated the role interest groups (could) play in this process. This debate will be summarized in the first section of this article in order to make clear that a stronger connection between existing EU interest groups and grassroots associations in the member countries is considered to be a necessary condition for involving citizens in the EU as a political community and stimulating their trust in each other. Because this connection is seen as a necessary condition, in the remainder of the article the hypothesis will be explored of whether ECIs produce such connections. This will be done by looking into what kind of interest groups have been involved in the sixteen ECIs that were closed before May 2014.

---

3 *See* Vogiatzis who states that the monopoly of legislative initiative of the EC comes down to its proposal of bills "that are likely to be accepted at the level of the European Parliament and the Council", Vogiatzis, N. Is the *European Citizens' Initiative* a serious threat for the common method? *European Journal of Legal studies*, Volume 6, Issue 1 (2013), p. 91-107.

4 As *Statistics Netherlands* admits, the exact causal relation here is difficult to establish; CBS (2010) *De Nederlandse samenleving*. The Hague: Centraal Bureau voor de Statistiek, p. 179.

5 Bovens, M. and A.Wille (2010) The education gap in participation and its political consequences, *Acta Politica*, Vol. 45,4, 393-422.; Putnam, R, (2000), *Bowling alone: The Collapse and Revival of American Community*. New York: Simon & Schuster.

6 Policy network is the term used in political science to describe the interactions between actors within and outside the political system's institutions that are directed at the exchange of information and also include taking part in the writing of and bargaining over policy proposals, in short in policy making, Heywood, A. (2013), *Politics*, Basingstoke/ New York: Palgrave, p. 358; Rhodes, R. A. W. (1996), The New Governance: Governing without Government. *Political Studies*, 44, 4, pp. 652–667.

1. Theories concerning citizen interest groups as the missing connection for EU's democratic legitimacy

On the occasion of the EU setting up the ECI, political science scholars debated the role interest groups could play with respect to this instrument as well as strengthening the link between citizens and the European Union more generally.

Chalmers sees a predominantly positive role for interest groups.[7] The first reason mentioned by this author is the long-time engagement between interest groups and the EU based on the mutual benefit that results from their collaboration. EU decision makers need interest groups, who are experts in their fields, to fill in their lack of knowledge and information. Interest groups in return for this knowledge and information are given a voice or even influence in policy making. Such long-time engagement indeed can be witnessed in the vast number of business, labour and professional groups that already in the early nineties had found their way to Brussels and/or even had gained insider access to EU decision making. At that point in time, environmental, consumer, women and other social interest groups made themselves heard. In the light of the pluralism of interest representation that is required for democratic legitimacy, these groups convinced EU decision makers that they should be consulted in addition to the business groups, unions and professional groups that usually were involved. Since the 1992 summit in Maastricht the EU therefore has stimulated such citizen interest groups by funding in addition to involving them in dialogues with the European Commission and inviting them to hearings in the European Parliament.

The second reason Chalmers gives for the positive role interest groups can play revolves around the idea of input legitimacy. By input legitimacy it is meant that political systems should provide a channel for citizens to make their views known and have chances to shape its policy in a way that expresses their collective interests. Output legitimacy refers to the extent to which a political system is able to respond to the needs of its members. Whereas until recently the EU did well with respect to the output legitimacy, the economic and financial crisis severely deteriorated this legitimacy. The attention now has shifted to the EU's input legitimacy, where weakness has existed already from the beginning, but makes itself felt now stronger than before. Chalmers sees interest groups as providing an extra channel for citizens' input, a channel that possibly is more attractive than European parliament elections, considering the consistently low voter-turnout rates. Interest groups in some cases may offer better opportunities than the one vote that is counted in elections because interest group representatives can take the intensity of citizen preferences on certain issues into account. In addition, such groups provide arenas for discussion on EU issues. Chalmers even believes interest groups work to generate a sense of trust, or so called social capital,

7 Chalmers, A.W. (2011) Direct Democracy for the EU: A place for Interest Groups in the European Citizens' Initiative. Working paper FG 1, 2011/05, December SWP Berlin.

between members.[8] Here the optimism of the Commission's *White Paper on Governance* on citizen interest groups reverberates.[9] In this white paper, citizen interest groups are more or less assigned with giving citizens the feeling that their contribution matters and encouraging them to participate in policy formulation of the EU.[10]

Other scholars agree with the importance of input legitimacy for the EU but clearly consider it as a requirement still to be fulfilled. With respect to the importance of input legitimacy, they claim that the majority principle in a polity can only be democratically legitimate if its constituents are able to recognize each other as members of that polity. Making citizens *feel able* to influence the choices of the EU decision makers is therefore regarded as a crucial part of such legitimacy.[11] However, they are less optimistic than Chalmers about whether interest groups could make this happen. According to Sudbery,

NGOs prioritize the optimization of their influence on the outcomes over encouraging their members to participate in the formulation of standpoints. The author concluded this from interviews with NGO members about their role in the development of the mentioned white paper.[12] Bouza Garcia did research into the way in which citizen interest groups in the last two decennia have tried to secure a role in the EU's policy making process more generally.[13] His conclusion is similar: the focus of citizen interest groups at the EU level is on advocacy with the institutions, and the mobilization of activists and grass roots members only has a modest place in their collective action register. According to Bouza Garcia, these groups choose insider access to the political agenda as the strategy to exert influence on EU decision making instead of the involvement of "ordinary" citizens in their activities and plans. This goes at the expense of the participation of such citizens in European politics.

---

8 Chalmers, 2011, p. 4.

9 White Paper on Governance (2001) COM(2001) 428 final - Official Journal C 287 of 12.10.2001.

10 *Id*.

11 Barber, B. (2003) Strong democracy. Participatory politics for a new age. Berkeley and Los Angeles: University of California Press; Weiler, J. (1991) Problems of Legitimacy in Post 1992 Europe, *Aussenwirtschaft*, Vol. 46, nr. ¾, p. 411-437; Sudbery, I. (2003) Bridging the Legitimacy Gap in the EU: Can Civil Society Help to Bring the Union Closer to Its Citizens? *Collegium*, No. 26, Spring 2003, 83.

12 Sudbery 2003.

13 Bouza Garcia, L. (2012) Anticipating the Attitudes of European Civil Society Organizations to the European Citizens' Initiative (ECI): Which public Sphere may it Promote? Bruges Political Research Papers, No 24, February 2012, pp. 23- 51, p. 39; Bouza Garcia, L. (2015) *Participatory Democracy and Civil Society in the EU. Agenda-Setting and Institutionalization*. Houndmills, Basingstoke, Hampshire and New York: Palgrave MacMillan.

The European Citizen's Initiative could possibly bring a change in these mechanisms as it offers citizens and citizen groups from outside the Brussels bubble the opportunity of contributing to EU agenda setting.[14] A concerted effort for EU agenda setting would consist in either citizens (groups) starting from grass roots to associate themselves around the issue they would like to be put on the European agenda or already existing grass roots groups forming coalitions with the Brussels based citizens interest groups, such as Social Platform or Amnesty International Europe.[15] The latter kind of organizations are expected after all to make use of the ECI as an extra channel for furthering their causes. In order to do this, these Brussels based organizations would need the support of many citizens living across at least seven member states in order to launch an ECI successfully. This is the reason why they are likely to create connections with grass roots associations in ECI signature collection campaigns. Therefore, the ECI can be expected to create grass roots activism as well as to create links between the existing Brussels-based citizen interest groups and grass roots associations. The following hypothesis will be tested in this article:

> The ECI will stimulate:
> a) the creation of grass roots associations directed at European policy making
> b) the creation of connections between Brussels orientated citizen organizations (professional advocacy groups) and grass roots associations.

2. Approach taken to test the hypothesis

In order to test the hypothesis, a clear definition of grass roots association is needed by which a distinction can be made between associations that are either grass roots or not. Different definitions of grass roots exist. Grass roots advocacy for instance is described as a political strategy of companies and political parties to influence public debates and policy through first harnessing the ideas and thoughts of their employees or members.[16] However, for the academic purpose of this article the more neutral definition of grass roots association by sociologist David Horton Smith has been taken as reference point. According to him, grass roots associations are "locally based, significantly autonomous, volunteer-run, formal non-profit groups, that manifest substantial voluntary altruism and use the associational form of organization".[17]

---

14 Or at least make a contributions to the public debates at the EU level.
15 A definition of grass roots association will be given in section 2.
16 *See* http://www.votility.com, last visited on 19 June 2015.
17 Smith, D.H. (2000) *Grassroots associations*. Thousand Oaks, CA: Sage, 7.

Altruism is described by Smith as the tendency or disposition of an individual or group to provide a significant service to another individual or group.[18] He explicitly wants to stay away from making altruism too virtuous and he stresses that altruism is not identical to philanthropy and instead considers altruism to be widespread among human beings and forming a normal and integral part of life since human beings are social animals.

In the following, I will elaborate on the three criteria derived from Smith's definition of grass roots associations that have been applied in this article. This elaboration is needed because the ingredients of this description by themselves do not provide for clear-cut dividing lines, but instead are more a matter of gradation. The first criterion to be discussed in this context is: grass roots meaning groups that are volunteer-run. There are many well-known formal non-profit groups that have paid-staff as well as volunteers, Amnesty International for example. Smith acknowledges that distinguishing grass roots associations from paid staff voluntary groups is "a matter of gradation rather than a hard-and-fast cutting point on the all volunteers versus all paid dimension".[19] His suggestion is to make the cutting-point where 50% of the analytical members of the group are unremunerated, analytical members being "regular service-providing affiliates" of the groups (2000,). This suggestion has been followed in this article.

The second criterion to be fulfilled in order to categorize voluntary groups as grass roots is that they should be significantly autonomous. The adjective "significantly" already makes clear that this criterion which concerns the relation between the voluntary group to other groups, either business, government or hierarchical organized religion, does not provide a clear-cut dividing line but is a matter of degree. This can be described as a scale representing total autonomy on the one side and totally being controlled by another person or group on the other side, and the actions of voluntary groups involved in ECIs finding themselves somewhere between these two opposites. So again the question is where on this scale the cutting-line has been drawn in order to categorize voluntary groups as acting significantly autonomous. The approach chosen is not to include those voluntary groups that in the ECI signature collection campaign manifestly made use of vested hierarchical relations in order to organize support for their cause. In the case of the ECI *One of Us* for instance two Catholic popes have subsequently asked their faithful to support and sign the initiative.[20] In addition, Catholic Bishops in various countries did likewise and signatures were often collected in

---

18 Smith sees providing significant services to other people as something people are usually inclined to do in their jobs, families as well as in other associations they are involved in The adjective "voluntary" he has added to altruism in his definition of grass roots association in order to distinguish the altruism displayed in the latter associations from the altruism displayed in the workplace and family. Smith, D.H. (1981) Altruism, volunteers and voluntarism, *Journal of Voluntary Action Research* 10 (1).

19 *Supra*, n 17, p. 28 and 30.

20 Pope Benedict who resigned on 28 February 2013 and his successor Pope Francis.

churches. This is why the supporting pro-life organizations in this context have not been categorized as significantly autonomous. The last criterion, that grass roots associations should be locally based in this research has been operationalized as not being Brussels or Strasbourg based.

Organizations can be involved in an ECI in two ways.[21] Firstly, as the organization the Citizens' Committee's members are affiliated with. The Citizens' Committee is a committee of seven EU citizens that organizes the initiative and manages the procedure through the whole process from initiation to receiving a conclusion from the European Commission.[22] The members of such committee must be *natural* persons.[23] However, this does not exclude the possibility of these members being connected to relevant pre-existing associations. So in addition to the new association formed with the other committee members, also other, pre-existing associations, may be involved at this point. These associations can be either Brussels based European organizations, grass roots or other associations. Therefore, the interest associations that are connected to the Citizens' Committee members have been traced and categorized as grass roots or not (see table 2).

A second way in which organizations are involved in an ECI is as supporting groups.[24] The support of the group to the ECI can be either a financial contribution and/or a public expression of them supporting the ECI.[25] These organizations have also been categorized in terms of grass roots or non-grass roots.

3. Analysis of the officially registered ECIs closed within the first two years

At the end of April 2014, sixteen of the then twenty-four registered ECIs were not open for support anymore.[26] These ECIs are presented in the table below in order of the status reached in the signature collection campaign.

---

21 I would like to thank Wessel de Weijer for his contribution to this part of the research.

22 These must be EU citizens who have a right to vote and who each live in a different country.

23 *See* Article 2(3) of the *Regulation (EU) No 211/2011*.

24 According to Article 2(3) of the *Regulation (EU) No 211/2011*, organizations are entitled to promote or sponsor an ECI if they do so with full transparency.

25 An official ECI website exists on which the following information is provided: A short description of the subject of the initiative, provisions of the treaties considered relevant by the organisers, the members of the citizens' committee, the website and a list of the sources of funding and support. NGO's in contradiction to business like to make their lobby activities public (Joost Berkhout in Volkskrant 16 May 2015).

26 Each of these sixteen initiatives is presented in the appendix with the last column indicating the number of signatures gathered.

Table 1: All ECIs closed before 1 May 2014

European Citizens' Initiatives closed/withdrawn before 1 May 2014	
Submitted ECIs	
1. Right 2 Water	2. Stop vivisection
3. One of Us	
Not submitted ECIs	
4. Let me Vote	5. 30 km/h
6. Central Online Collection	7. Suspension EU Climate and Energy Package
8. Responsible waste incineration	9. High Quality European Education for all
10. Fraternité 2020	11. Unconditional Basis Income
12. Single Communication Tariff Act	13. End Ecocide
Withdrawn ECIs	
14. Dairy Cow Welfare	15. End EU-Switzerland Agreement on Free Movement of People
16. Turn me off	

Number 1 to 3, *Right 2 Water*, *One of us* and S*top vivisection,* have reached the signature collection thresholds and therefore could and have been submitted to the European Commission. The other thirteen did not reach this threshold. These ECIs therefore could not be submitted to the Commission. Different to the ECIs numbered 4 to 13, the ECIs numbered 14 to 16 were even withdrawn before the end date for gathering signatures had been arrived. In the case of *End EU-Switzerland Agreement on Free Movement of People,* a signature collection campaign had not even been started, so the initiators must have had other motives for registering it. With respect to the other two withdrawn initiatives, the reasons for withdrawal are not clear. As these three initiatives were withdrawn shortly before the deadline, the forming of, or connecting with existing, grass roots associations already had taken place and therefore they are taken into account in the test of the central hypothesis.[27]

[27] Among the other nine cases there are also initiatives that at some point in time were withdrawn but that subsequently have been resubmitted.

The light grey cells in the table below indicate the ECIs that of themselves exist in grass roots activism directed at the EU. Whereas the organization of ECIs in the table with white cells did involve already existing European citizen organizations, members of the European Parliament or political (groups of) parties in the European Parliament, the ECIs with the light grey cells, such as *Central Online Collection* and *Responsible waste incineration,* were organized without the direct involvement of such formal organizations.

Table 2: ECIs organized from grass roots

European Citizens' Initiatives	Grass roots association by itself
Submitted ECIs	
1. Right 2 Water	
2. Stop vivisection	
3. One of Us	
Not submitted ECIs	
4. Let me Vote	
5. 30 km/h	
6. Central Online Collection	
7. Suspension EU Climate and Energy Package	
8. Responsible waste incineration	
9. High Quality European Education for all	
10. Fraternité 2020	
11. Unconditional Basis Income	
12. Single Communication Tariff Act	
13. End Ecocide	
Withdrawn ECIs	
14. Dairy Cow Welfare	
15. End EU-Switzerland Agreement on Free Movement of People	
16. Turn me off	

The ECIs that were initiated by persons belonging to European formal organizations still might have been important in creating links between the EU and grass roots associations, namely by drawing grass roots organizations into their policy network.[28] In table 3 it is indicated per ECI whether such is the case

[28] Policy network denotes the network of the interactions between actors within and outside the EUs institutions that are directed at the exchange of information and also

at the level of the Citizen's Committee (second column) and/or the level of supporting groups (third column). The dark grey cells stand for the classification as grass roots (according to the criteria elaborated on in section 2). In the case of white cells the groups involved in the ECIs could not be classified as such.

Table 3: ECIs characterized by grass roots association

European Citizens' Initiatives	**Links to grassroots associations**	
	Citizens' Committee	Supporters
Submitted ECIs		
1. Right 2 Water		
2. Stop vivisection		
3. One of Us		
Not submitted ECIs		
4. Let me Vote		
5. 30 km/h		
6. Central Online Collection		
7. Suspension EU Climate and Energy Package		
8. Responsible waste incineration		
9. High Quality European Education for all		
10. Fraternité 2020		
11. Unconditional Basis Income		
12. Single Communication Tariff Act		
13. End Ecocide		
Withdrawn ECIs		
14. Dairy Cow Welfare		
15. End EU-Switzerland Agreement on Free Movement of People		No signature collection campaign
16. Turn me off		

include taking part in the writing of and bargaining over policy proposals, in short in policy making (Heywood, 2013, p. 358; Rhodes, 1996).

What can be concluded from these tables with respect to the central hypothesis? The light grey cells in table 2 as well as table 3 show that five out of sixteen signature collection campaigns were organized by grass roots association alone. In addition, the dark grey cells should also be taken into account as positives, as the hypothesis also concerned the creation of connections between Brussels based European organisations and grass roots organizations. The total proportion of grey cells in table 3 shows that in a majority of the ECIs organised in the first two years, grass roots associations have been involved, either in the initiation or in the supporting phase, or in both phases.

The table also shows that the ECIs that have reached the signature threshold (submitted ECIs) to a lesser extent involved grass roots association already from the start than the ECIs that did not reach it. This is consistent with the expectation that, considering the requirements in terms of knowledge of the EU policy process as well as the number of signatures to be gathered, ECIs are most likely to be successfully used by an already well organized civil society.[29]

In any case, success must be put in perspective, as for the organizers of submitted ECIs there is still a long way to go if they want to have their issue on the agenda of the policy makers, as it is up to the Commission how to respond.[30] As the organizers of *One of us* have experienced, the response can be not to act on an ECI at all.[31] Actually, even in the case of *Right2Water* where the Commission did commit itself to measures directed at the ECIs objective, none had the character of a legislative initiative. Notwithstanding the lukewarm responses of the Commission at first instance, the ECI campaigns in future still can turn out to be worthwhile, as the co-legislatures can call upon the Commission to act or to act more ambitiously. However, the current track record of the Commission's Communications may not have been very motivating for new ECIs to be organized and the statistics of the proposed ECIs per year seem to witness a strong decline in the number of ECIs registered.[32]

---

29 Bouza Garcia, L. (2015) *Participatory Democracy and Civil Society in the EU. Agenda-Setting and Institutionalization*. Houndmills, Basingstoke, Hampshire and New York: Palgrave MacMillan, p. 134.

30 The Commission is required to reply within three months and explain its political and legal conclusions, including the actions it intends to take. However, as Bouza Garcia (2015, p. 133) puts it the commission is not bound by the proposal and is free to accept, reject or modify it.

31 The organizers are seeking annulment of the Commissions Communication before the European Court of Justice.

32 In addition, almost 40 percent of the proposed ECI's has been declared legally inadmissible by the Commission, which must be experienced as another barrier by potential initiators.

Proposed ECIs per year		Registered	Rejected
2012 (April - Dec)	23	16	7 (30 %)
2013	17	9	8 (47 %)
2014	10	5	5 (50 %)
2015 (by 15 Feb)	1	1	0 (0 %)
total	**51**	**31**	**20 (39 %)**

Source: European Commission

For the 16 ECIs addressed in this research, in which signature campaigns were closed before 1 April 2014, the hypothesis is confirmed: grass roots associations directed at European policy making have been stimulated either directly, or via connections between Brussels-orientated citizen organisations (professional advocacy groups) and grass roots associations in member countries.

4. Discussion concerning the mobilizing effects of ECIs

Bouza Garcia and Greenwood also have studied ECI signature collection campaigns (official and pioneering experiments).[33] They expected the ECIs to draw different actors in the agenda-setting arena and also to increase the diversity in issues addressed in this arena. The positive evidence the authors found with regard to the latter are the contentious issues introduced by ECIs, such as Stop vivisection, One of Us and Criminalize ecocide.[34] These ECIs have stimulated debate and deliberation that go far beyond institutionalized discussions in the "Brussels bubble".[35] From the 21 registered ECI's, according to Bouza Garcia and Greenwood (2014), 6 are qualified as contentious. The inward looking communication between the EU institutions and professionalized EU lobbyists according to these authors has been opened up. The European public sphere has been expanded by addressing issues in public that can be considered contentious in the sense of challenging the boundaries of the scope of EU treaties or the fundamental direction the European Commission has taken.

Bouza Garcia and Greenwood also point at the new actors that together with such new topics have entered the sphere of EU politics: another set of activists than the professionalized EU lobbyists usually involved in consultations by the European

33 Bouza Garcia, L. and J. Greenwood (2014) The European Citizens' Initiative: A new sphere of EU politics? *Interest Groups and Advocacy, Vol. 3, 3, 246-267* and Bouza Garcia (2015).

34 Bouza Garcia and Greenwood, 2014, *id*., p. 252; Bouza Garcia, 2015, *id*., p. 136.

35 *Id*., p. 265 and p. 253-257 table 1, 2 and 3.

Commission. The research addressed in this article confirms the entrance of a different set of actors in the EU sphere of politics, not only in those addressing contentious issues, but in 80 % of all the ECIs that were open for signature collection until 1 May 2014. This finding is based on systematically tracing the associations involved in the sixteen ECIs and categorizing these associations in terms of grass roots or non-grass roots. From these findings it can be inferred that the ECI in its first two years has widened EU public debate and opened it up for a more general public where in earlier days, before the existence of the ECI as instrument, specialized actors had participated almost exclusively.

5. Relevance for public trust

With respect to public trust it is important that engaging new actors and issues in EU policy networks would not only be a short lived but a long lasting effect of the ECI. In order to stimulate trust of citizens in the institutions of the European Union, the European Commission and the other institutions should be committed to the creation of long lasting relationships with different groups of citizens. The recent decline in the number of ECIs proposed is a sign that without organisational and procedural improvements, the ECI will not work out as the early enthusiasm of grass roots activists promised. Much will depend on the European Commission's reaction to the observed shortcomings in the implementation of the ECI regulation.[36] In addition to improvements to the (online) collection and verification of signatures, organizational and/or financial support for the initiators of ECIs, political science scholars recommend improvements of a more political character. According to Bouza Garcia, for example, the Commission could have to accept all successful initiatives.[37] We can have a closer look at what this would entail by addressing the example of *One of Us. One of Us* is an ECI which proposed to put a ban on all human embryo research. The Commission indeed has simply refused this, although the initiators succeeded in gathering almost 2 million signatures.[38] The reason given by the Commission for this refusal is that member states and the EP only recently, after long lasting debates, had decided to fund human embryonic stem cell research under very strict conditions.[39] In the preceding policy-making process the objections of states that are principally against any use of human embryos were taken amply into consideration and had

---

36 *See Report from the Commission to the European Parliament and the Council. Report on the application of Regulation (EU) No 211/2011 on the citizens' initiative*. Brussels 31.3.2015 COM (2015) 145 final; European Parliamentary Research Service, *Implementation of the ECI. The experience of the first three years,* February 2015 and DG Internal Policies, *ECI-First lessons of implementation,* May 2014.

37 Bouza Garcia 2012.

38 European Citizens' Initiative: European Commission replies to "One of us", press release, 28 May 2014, Brussels.

39 *See* section 3 of Article 19 of the *Regulation of the European Parliament and the Council establishing Horizon 2020* - the *framework programme for research and innovation (2014-2020) and repealing decision No 1982/2006/EC*. Strasbourg, 11 December 2013 PE-CONS 67/1/13 REV 1.

led to more strict conditions than the Commission initially proposed.[40] This puts the refusal of the Commission to put the issue on the agenda and start the debate all over again in perspective. Obliging the Commission to accept every successful initiative would be a bridge until an important downside becomes evident: Political actors who do not get what they want out of the conventional EU decision making process would be stimulated to seize the ECI as an opportunity to immediately start the process all over again without any change in the circumstances. Thus encouraging this route would not be the way. However, more commitment of the Commission to the organization of ECIs, for example by being less strict in the registration of initiatives and giving more support in formulating and organizing the initiative, including the signature campaign, would indeed be advisable. In addition, to make sure that the dialogue with citizens is kept alive, every successful initiative must be taken at least very seriously, primarily those challenging the direction of EU policy.

40 *See* my contribution in B. van Klink, van Beers and L. Poort (eds.) Symbolic Dimensions of Biolaw, 2016.

Appendix: Table with the ECIs, their cause, the individuals and organizations in its Citizen's Committee and its supporting organizations and the number of signatures

Initiative	**Characterisation Citizens' Committee**	**Supporting organisations** (€ number indicating amount if financial)	**Number of signatures**
Successful in reaching signature collection thresholds			
1. "Right 2 Water" Campaign against water privatization	Public Service Trade Unions representatives connected to the European Federation of Public Service Unions (EPSU)	EPSU (€100.000) European umbrella organizations National trade unions National branches of social movements such as ATTAC[41] Social Platform	1.659.543 (Official EU website)

41 ATTAC (Association pour la Taxation des Transactions financière et l'Aide aux Citoyens) was founded in France in December 1998 after the publication in the Monde Diplomatique of an editorial entitled "Désarmer les marchés" (Disarm the markets). This Association for the Taxation of financial Transactions and Aid to Citizens opposes neo-liberal globalization and aims to develop social, ecological, and democratic alternatives so as to guarantee fundamental rights for all.

2. *"Stop vivisection"* Call to abrogate directive 2010/63/EU on the protection of animals used for scientific purposes and to present a new proposal that does away with animal experimentation and instead makes compulsory the use - in biomedical and toxicological research - of data directly relevant for the human species.	An Italian MEP together with three scientists and Italian activists	Italian anti-vivisection organizations and parties (€14.501). Animal protection groups, animal rights groups, vegan groups, ecologists	1.173.130 (Official EU website)
3. *"One of us"* Seeking an end to EU funding of activities involving destruction of human embryo	Pro-Life activists[42] from different European countries and Patrick G. Puppinck, director of ECLJ.[43] Campaign address in Belgian Jesuit Office	Italian Organization (€50.000)	1.721.626 (Official EU website)
Not successful in reaching signature collection thresholds			

42 Josephine Quintavalle (Great Brittain), Manfred Liebner (Ja Zum Leben, Germany) Filippo Vari (Movimento per la vita, Italy), Jakub Baltroszewicz, Edith Frivaldsky en Alicia Latorre.

43 The European Center for Law and Justice (ECLJ) is an international NGO dedicated to the promotion and protection of human rights in Europe and worldwide and advocates in particular the protection of religious freedoms and the dignity of the person with the ECHR and the other mechanisms afforded by the UN, the Council of Europe, the EP, the Organization for Security and Cooperation in Europe (OSCE) and others.

4. "Let me vote" Extend voting rights of EU citizens living in other member states	President of *EuroNews Website* and members of *Europeens Sans Frontieres*	No financial support declared European organizations such as Union of European Federalists, Europeans without borders, European Alternatives. Democracy International	3.604
5. "30 km/h" Setting a default speed limit for urban area's	Heike Aghte (founder of EUGENT[44]) together with persons that are working for/member of European and national cycling organizations.[45]	German pedestrian, cyclist and green organizations and individuals (€12.050)	44.291
6. "Central Online Collection" Improving ICT infrastructure support for ECIs	Jörg Mitzlaff (cofounder of *OpenPetition*[46]) together with other software specialists and sustainable society experts	No donations mentioned.[47] OpenPetition	?

44 EUGENT is the European Association for Deceleration a German organization.

45 Martti Tulenheimo is working for the European Cyclists federation, an organization consisting of national organizations who represent the interests of cyclists. Anez Bertoncelj is a member of the Ljubljana Cycling Network, Rod King is a member of the UK organization "20's plenty for us".

46 OpenPetition is a German website where everyone can set up their own petition and collect online signatures, *see www.openpetition.de*.

47 The initiator sees insufficient funding as reason for failing to gather enough signatures using the existing online collection system. *An ECI that works! Learning from the first two years of the Europeans Citizens' Initiative*, page 67, sub 14, *see* "editors summary".

7. *"Suspension EU Climate and Energy Package"* This initiative wants the EU to radically change existing policy in the area mentioned, for economic reasons not to spend money for unilateral action on the climate and in order to increase energy security make fuel and energy cheaper and allow member states to use their own natural energy resources in order.	Luwik Dorn (Polish conservative political party) together with members of the UK Independence Party, the Danish Peoples Party, the Austrian BZÖ and the Lithuanian Electoral Action of Poles.	Europe of Freedom and Democracy party.[48] (€2.500)[49]	?
8. "Responsible waste incineration" Pointing at the environmental impact of waste incineration	Gaël Drillon together with spare time young campaigners living in or near Clermont Ferrand.	d'Idées pour Beaumont[50] Association pour l'évaluation des politiques publiques avec le citoyen (dE2p)[51]	754

48 The Europe of Freedom and Democracy party was a right-wing Eurosceptic political group in the European Parliament consisting of ten political parties – the largest being the UK Independence Party (UKIP) with eleven seats and the Italian Lega Nord with nine seats. On 24 June 2014 EFD group became Europe of Freedom and Direct Democracy (EFDD) for the 8th European Parliament, with the continuing membership of just two of the eleven political parties that formed EFD.

49 There is no online collection system for signatures on its website which is a sign that they were not seriously focused at collecting the number of signatures needed for submittal to the EC.

50 The *d'Idées pour Beaumont* is a local organization that provides news for the Beaumont area. The official website can be found here: http://www.idees-beaumont.org.

51 The *Association pour l'évaluation des politiques publiques avec le citoyen* is a website where (French) citizens can discuss (French) politics. In January 2014 this website has been lifted.

9. *"High Quality European Education for all"* Establish a stakeholder platform to formulate a European policy on school education	Anna Gorey, president of the interparents organization[52] and active for other organizations concerning educational and socio-cultural facilities for (children of) families working in Brussels together with other individuals connected to such organizations.	The European Parents Association (EPA) [53] and national parents organizations.[54] (€3000) Parents organizations of six European schools (€6000) Groupe Unitaire pour le Dévelopement des Écoles Européennes (GUDEE). [55] European trade unions[56] Movement towards a European Education Trust (MEET) This is established for the campaign	?
10. *"Fraternité 2020"* 3 percent of EU budget to expand exchange programmes and improve the current ones (Erasmus and European Voluntary Service).	Lucca Copetti and other (post) students who met each other at the Convention of Young European Citizens[57] in Cluny.	Four national organizations in the area of culture and science.[58] (€7000) List of PhD students, researchers, professors or other people linked to universities.[59] International student and academic organizations such as AEGEE-Europe and the Erasmus Student Network.	71.057 [60]

11. *"Unconditional Basis Income"* Asks to encourage EU member states to explore cooperation to improve social security	Activists in national organizations linked to Basic Income Earth Networks (BIEN) and ATTAC.[61]	BIEN (€1080) Individual donors (€1080) Transnational social movement linked to Occupy.	285.042[62]
12. *"Single Communication Tariff Act"* End cross-border roaming charges	Post-student activists coming from universities in the UK and France.	Individual donors Les Jeunes Européens.[63]	145.000[64]

52 The interparents organization aims to "*represent all the parents of all pupils in the European Schools in the Board of Governors, its Committees and Working Groups*." website; http://interparents.eu/aboutus.php.

53 The EPA "*gathers the parents associations in Europe which together represent more than 150 million parents. EPA works in partnership both to represent and give to parents a powerful voice in the development of education policies and decisions at European level.*"

54 The Parents organization of Luxembourg (EEL) and the Parents organization of Britain (CESPA).

55 This organization represents parents organizations and students of European Schools. Official website here: http://gudee.eu/revue.htm.

56 Confédération Européenne des Syndicats Indépendants (CESI) and Union for Unity (U4U).

57 The Convention s is a summer school for young EU-students who, according to the website, "*come together to share their thoughts, ideas and perceptions of Europe and discuss their hopes, fears and solutions for the future.*" http://www.europe.net/pdf/Young_European_Citizens_Convention_2014.pdf.

58 For example the Allianz Kulturstiftung, l'École Supérieure des Sciences Commerciales d'Angers (ESSCA), and Fondation Hippocrène.

59 http://en.fraternite2020.eu/citizens.html.

60 Simona Pronckutė (November 1, 2013). "European Citizens Initiatives – one year of challenges". EuropeanPublicAffairs.eu. Retrieved August 21, 2014.

61 Such as Klaus Sambor active in the Austrian organization and Ronald Blaschke in the German organization. Also Belgian, Dutch, French and Danish affiliates of BIEN are in the CC.

62 Bouza Garcia, 2015.

63 *Les Jeunes Européens* is an association of young Europeans who want to act in favour of European integration and a federal Europe based on political pluralism, tolerance and openness. http://www.jeunes-europeens.org.

64 Bouza Garcia, 2015.

13. *"End Ecocide"* Invitation to adopt legislation to prohibit, prevent and pre-empt *Ecocide*, the extensive damage, destruction to or loss of ecosystems.	Young post-student activists. Cross border movers	Individual donors 3324,- Many environmental and alter-globalization groups, such as ATTAC.[65]	135.693 [66]
Withdrawn initiatives			
14. "Dairy Cow Welfare" Withdrawn 20-07-2012 Call for a EU Directive that guarantees improved animal welfare for dairy cows.	Industry NGO collaboration	Ben & Jerry (€ 90.834) World Society for the Protection of animals (€ 181.878 Compassion in world farming (€ 72.755). Animal protection organizations	293.511[67]

65 *See* note 10.
66 Bouza Garcia, 2015.
67 Bouza Garcia, 2015.

15. *"End EU-Switzerland Agreement on Free Movement of People"* Withdrawn 4-2-2013 Call to terminate the Agreement on freedom of movement (signed on 21 June 1999) between the Swiss Confederation, on the one hand, and the European Community and its Member States, on the other hand. The agreement should be terminated, according to the initiators, because of the breach of contract caused by the Swiss Confederation and the Member States, and for lack of jurisdiction to ensure the legal protection of Union citizens or businesses.	Michael Wang, Boris Steffen and other persons who feel themselves affected by the restrictions on free movement of persons into Switzerland announced by the Swiss Confederation.	Two individuals (€ 50.000) **No signature collection campaign.**	No signature campaign has taken place
16. *"Turn me off"* Withdrawn on 22-04-2014 Asks to prohibit empty offices and shops from leaving their lights switched on	A group of (French) students in European Affairs		?

The Influence of Economic Agents in the Lawmaking Process of Environmental Laws: The Case of Waste Electrical and Electronic Equipment (WEEE) Legislation in Europe

Heyd Más[*]

1. Introduction

During more than thirty years, there have been remarkable developments in the scope of environmental regulation in Europe. The concern for an environmental policy on the rapidly developing society arose as the First Environmental Action Program of the European Community, which was adopted in July 1973. Among other issues brought by the program, tackling the waste management issue was soon recognized as representing a great share of the environmental policy's success for the European countries, which led to the coming into force of the Waste Framework Directive in 1975[1] for addressing the matters related to waste production, prevention and management. The European environmental policy has evolved significantly since then. In 1987, when the United Nations World Commission on Environment and Development released the report Our Common Future,[2] economic, social and environmentally sustainable development was officially introduced worldwide as a major challenge to be pursued and achieved.

Almost as remarkable has been the influence of economic agents exerted on the process of national lawmaking to implement European Directives regarding environmental topics, and it was no different in the case of the transposition and implementation of the Waste Electrical and Electronic Equipment Directives (WEEE Directives). Throughout these processes a number of consultations and working group meetings took place with the involvement of public authorities and

---

[*] Scholarship PhD Candidate of BABEL project (European Commission Action 2 Programme) at the Department of Constitutional Law, Administrative Law and Public Administration at the University of Groningen.

1 75/442/EEC. Council Directive of 15 July 1975 on waste. Considerably amended in 1991 (Directive 91/156/EEC), reaching its most recent revised version in 2008 (Directive 2008/98/EC).

2 World Commission on Environment and Development, "Chapter 2: Towards Sustainable Development" in *Our Common Future* <www.un-documents.net/k-001303.htm> accessed 5 March 2014. Usually referred as the 'Brundtland Report' as a homage to the commission's chairperson, then the Prime Minister of Norway Gro Harlem Brundtland.

industry representatives both at the national level and at the Council Working Party on the Environment (WPE).

The market economy[3] applied in most societies nowadays is understood as performing by having its decisions based on the behaviour and interactions[4] of the coexisting forces of "supply" and "demand". For the purpose of this article, "supply" is here represented by the producers and importers of electric and electronic equipment (EEE) which have the legal responsibility[5] of organizing and financing the take-back system of end-of-life household EEE collection, treatment, recycling and reuse in a safe manner for human health and the environment. Still in the same context, "demand" stands for consumers of EEE, more specifically, private household consumers, the final users of EEE and, later on, the ones expected to return their end-of-life EEE to allow for the entire take-back system for WEEE to perform successfully.

Within the process of creating regulations for proper management of e-waste, the involvement of economic agents has visibly contributed to a design of rules that come closer to the expectations and possibilities of those to which it applies, allowing for the provisions to be perceived with greater acceptance and become, therefore, more likely to be complied with. At the same time, however, such influence over the legislator should be questioned. In that sense, it is relevant to consider: To what extent should the legislator allow themselves to be influenced by information provided by the very actors it means to regulate? And, above all, who are the actors actually considered to provide them with information? Does it take into account all angles? In order to allow for the legislator to obtain a real understanding of the dynamics to be regulated, one would assume that all players should be invited to participate at the discussion table. This is a concern that rises from the fact that "the economy" influencing laws – on several noticeable occasions – is mostly represented by those whose (powerful) interests are strongly organized – the "supply-side".

---

3 *See* G Hoffman, "Market Economy: Economy in which fundamentals of supply also demand provide signals regarding resource utilization" in *Comparing Economic Systems in the Twenty-First Century*, ed. PR Gregory and RC Stuart (Boston: Houghton Mifflin, 2004) 538.

4 *See* T Gorman, "The Complete Idiots Guide to Economics" (Alpha Books, 2003), 9. "In a market economy, the private-sector businesses and consumers decide what they will produce and purchase, with little government intervention [...] In a command economy, also known as a planned economy, the government largely determines what is produced and in what amounts. In a mixed economy, both market forces and government decisions determine which goods and services are produced and how they are distributed."

5 2002/96/EC European Directive on Waste Electrical and Electronical Equipment (WEEE) of 27 January 2003. Article 8(1) "Member States shall ensure that, by 13 August 2005, producers provide at least for the financing of the collection, treatment, recovery and environmentally sound disposal of WEEE from private households deposited at collection facilities".

In an ideal situation, legislation should consider and disclose both sides – supply and demand – in a harmonic way. Instead, the major influence applied by highly organized corporations and their powerful lobbies are heard far clearer and taken into account far deeper than the one produced by consumers. The main stakeholders involved in these dynamics – producers, distributors, treatment operators, recyclers, municipalities and consumers – all have influenced the process according to their own perspectives and interests, however, as will be shown further, in distinctive proportions.

Notwithstanding the connection of some of the economic actors' involvement to the achievement of successful implementation, it must be questioned if better results could be achieved by the participation of all the different groups composing the dynamics of the WEEE management system. The discussion brought by this article is deeply related to one of the main concerns embedded in public trust and public law, as it is not possible to ignore the possible impact of influencing forces over the legislator's performance and their ability to remain impartial to interests of a specific pressure group.

Therefore, this article aims at understanding the dynamics of interest groups that might influence the legislator, taking the case of the WEEE Directives and their national implementation in the United Kingdom and the Netherlands, and discussing the relevance of all economic actors participating in the in the lawmaking process of e-waste laws. The theory of regulatory capture, the group politics theories, and the patterns of political interaction from the social sciences are used as support to understand the dynamics of the issues brought for discussion.

Section 2 will explain the European legislation for management of WEEE, its drafting process (influenced by producers), and the obligations it has established as well as an example of the process by which the WEEE Directives were established. More examples of interest groups influencing legislation will be illustrated for the discussion at hand when section 3 introduces two case studies (respectively): (1) the United Kingdom; and (2) the Netherlands. Section 4 will present the theories of regulatory capture and group politics to understand the phenomenon of interest groups influencing the regulator, and the balanced approach between supply and demand adopted by this article. Final conclusions will be drawn in section 5 where remarks with regard to the influence of economic agents in the lawmaking process of European WEEE Directives and their relevance to public trust in that process, as well as recommendations for better involvement of consumers, aimed at a more balanced representation of interests.

2. In the field of environmental law: the European WEEE directives

Within the discussions about the influence of economic agents over legislation, consumer and environmental laws are the most evident areas. Often, topics that

these laws seek to regulate have in their core the matter of producers' compliance and a history of extensive negotiations during the process of new legislation. To mention a few: product design, programmed obsolescence, and take-back systems for proper treatment, recycling and reuse of waste.

As a response to the side effects of the fast growth of technological innovation, the burden brought to municipal authorities, and the complex mixture of materials and components WEEE contains – some of which are harmful[6] to human health and the environment, while others are valuable resources to replace raw material production – the European Union designated electrical and electronic waste as one of its priority waste streams. Following the Council Resolution of 7 May 1990[7] calling for Community-wide action on waste, in 1991 the European Commission initiated the Priority Waste Streams Program which focused on six different waste streams; the Waste Electrical and Electronic Equipment (WEEE) was one of them.

Originally conceived in the late 90's,[8] the first draft regulation connected the collection and treatment of WEEE with the aims of the Restriction of Hazardous Substances Directive (RoHS) and the Energy using Product Directive (EuP), as complementary to these European Directives. When on 13 June 2000 the European Commission adopted both the proposal for a Directive on Waste Electrical and Electronic Equipment, and the proposal for a Directive on the Restriction of the use of certain Hazardous Substances in electrical electronic equipment, the announced purpose was the need for regulations to be designed to tackle the fast increase of the electrical and electronic equipment waste, and to complement European Union measures on landfill and incineration of this type of waste. Since the first debates started, the aims for the WEEE Directive expanded, including the objective of preventing the generation of EEE and promotion of re-use, recycling and other forms of recovery, as a means to reduce the eliminated amounts of such waste. Naturally, the improvement of the environmental performance of economic operators involved in the treatment of WEEE became part of the focused upon topics. At that time, the EU Commissioner for the Environment, Margot Wallström, acknowledged the electrical and electronic equipment as one of the fastest growing waste streams in the EU – as a result of the fast pace of technological innovation – and how particularly important it was

6 Later on the provisions of the Directive, Article 3(l) 2002/96/EC defined "dangerous substance or preparation" as "any substance or preparation which has to be considered dangerous under Council Directive 67/548/EEC or Directive 1999/45/EC of the European Parliament and of the Council." OJ 196, 16.8.1967, 1. Directive 1999 OJ L 200, 30.7.1999, 1.

7 OJ C 122/ 2 18.5.90.

8 DS Khetriwal, R Widmer, R Kuehr and J Huisman, "One WEEE, many species: lessons from the European experience", *Waste Management & Research* (2011) 954.

"to implement the key principles of EU waste management policy, especially the prevention and the recycling of waste, in this area."[9]

The proposal for a Directive on WEEE has its legal basis in Article 192 TFEU (*ex* Article 175 EC), and is supported by the Fifth Environmental Action Program. The Fifth Environment Action Program[10] was launched with an emphasis on the need for an active role of all economic operators involved in the quest for sustainable development. At that moment, the new policy and action on the environment and sustainable development covered specific themes, which also included the "Management of Waste". The focus of the Action Program on all economic operators involved in the process, and on significant changes in the patterns of development, production consumption and behaviour, can be further identified in the WEEE Directive. Public authorities, private and public companies, environmental organizations and, in particular, individuals – as citizens and consumers – are mentioned along the articles for the new established procedures proposing drastic changes in all patterns adopted until then.

Even though all actors were equally referred to as relevant players in the WEEE management system being created in Europe at that time, it became clear that some had more room to influence the new legislation than others. The first European Directive on electrical and electronic equipment from 2002 is an example of the dynamics existing between the interests from the stakeholders representing the supply side of the market economy and the drafting of laws. The intense participation of the private-sector to be affected by the WEEE Directive in the negotiations for the Directive led to provisions that would allow for better compliance. For instance, distributors were pressuring the negotiations about the extra costs in the case of an obligation for them to collect so many WEEE. Specific limitations were created in order to satisfy the demands from those actors and still have the Directive creating a free-of-charge take-back possibility for end-users of WEEE. The specific provision explaining the amount and limiting conditions for distributor's responsibility of collection of WEEE resulted in Article 5(2)(b) creating the "one-to-one basis": "when supplying a new product, distributors shall be responsible for ensuring that such waste can be returned to the distributor at least free of charge on a one-to-one basis as long as the equipment is of equivalent type and has fulfilled the same functions as the supplied equipment. […]".

Another example was the Directive 2003/108/EC which mainly altered the conditions for producer responsibility brought by the WEEE Directive. Initially, the 2002/96/EC WEEE Directive had been published defining the financial responsibility of producers for collection, treatment, recovery and environmentally sound disposal of private household WEEE and other WEEE.

---

9 IP/00/602 European Commission, "Commission tackles growing problem of electrical and electronic waste" Brussels, 13 June 2000.

10 OJ 1993 C138/5.

However, further studies indicated that the amount was considerably greater than imagined, and the costs and organization capabilities demanded from producers in a given short period of time was no longer reasonable. 2003/108/EC amended Article 9 and limited the responsibility of producers towards the "disposal of WEEE from users other than private households from products put on the market after 13 August 2005".[11]

Finally published in the Official Journal in 13 February 2003,[12] the WEEE Directive brought instructions for separate collection of e-waste[13] from the regular waste in order to improve WEEE waste management, with a distinction between separate collection of WEEE from private households and collection from non-households. Regarding physical responsibility, the Directive did not explicitly identify who should be responsible for setting up the infrastructure. Rather, it required distributors to accept WEEE from consumers on a one-to-one basis when selling new products. Member States could diverge from such requirements in the case of an existing alternative procedure being available for consumers. Concerning financial responsibility, producers were made financially responsible for at least collecting from the collection points onwards. This is an important issue which will be further encouraged at the recast of the Directive, where Member States will receive guidance to stimulate, when appropriate, producers to also finance the costs occurring for collection of WEEE from private households to collection points.

Despite the significant changes in the patterns of collection and disposal brought by the WEEE Directive a few years after its implementation – only an estimated 13% of WEEE going to landfill or incineration – there was a growing concern over the effectiveness and efficiency of the Directive. The EU collection target at the time was of 4 kg WEEE per capita, representing about 2 million tonnes per year, out of around 10 million tonnes of WEEE generated annually in the EU. By 2020, the estimated volume of WEEE will increase to 12 million tonnes. When such figures were compared to the impact of the Directive, the conclusion was that although it represented an important instrument, the Directive still had brought insufficient results, which derived from problems in achieving its main objectives with efficiency. In order to approach those issues, in 2008, based on the experience gathered from stakeholders and Member States during a three-year

11 2003/108/EC, article 1.

12 OJ 2003 L 37/24.

13 Electrical and Electronic Equipment "means equipment which is dependent on electric currents or electromagnetic fields in order to work properly and equipment for the generation, transfer and measurement of such currents and fields and designed for use with a voltage rating not exceeding 1000 volts for alternating current and 1500 volts for direct current". As clarified by the DG-Environment, "dependent on electric currents or electromagnetic fields" means that electricity is the primary energy to fulfil the basic function of the product.

review, the European Commission released a staff working paper for a recast of the WEEE Directive.[14]

It was concluded that the technical, legal and administrative problems caused by the implementation process of the Directive were resulting in; costly efforts from market actors and administrations, low levels of innovation in waste collection and treatment, unnecessary administrative burdens, and not fully preventing environmental harm. Some of the main issues identified were related to problems in interpretation due to the definitions provided by the Directive, enforcement of the provisions and, as a consequence to the latter, the existence of "free riders" and illegal flows of e-waste. Either by misinterpretation due to lack of clarity on which products fell in the scope of the WEEE Directive, or by clear intent of evading the new rules, producers of electrical and electronic equipment were performing their activities as "free riders"; that is, they did not join nor set up any collection scheme in order to provide for take-back of WEEE and proper treatment, recycling or reuse. In the case of intentional disobedience of the WEEE Directive provisions, the most serious consequence encountered was the practice of illegal shipments of e-waste to countries outside the EU where the legislation for management of WEEE was less strict or non-existent.

In the reports evaluating the implementation of the first WEEE Directive, a recurrent complaint presented by the member states was the short deadline imposed for the national transposition of the Directive. It has been pointed out that due to the lack of time, proper consultations could not be performed.[15] The burdens brought to the national economies due to a rather superficial involvement of producers and distributors in the process of national implementation of the Directive brought attention to the need to look for alternatives to discuss with the "supply-side" which solutions would be preferred and less costly. The engagement of some of the actors in the shaping of the recast was chosen as strategy to improve the results.[16] Above all, producers' associations, but also the recycling industry had close participation, providing position papers containing valuable data for improved legislation.

Even if the focus was indeed on producers – given that those are the ones, along with distributors, to whom the financing of the take-back responsibility has been

---

14 SEC(2008) 2934. Commission staff working paper accompanying the proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) (recast) Summary of the Impact Assessment.

15 European Commission, "Implementation of Waste Electric and Electronic Equipment Directive in EU 25" (EUR 22231), Joint Research Centre AEA Technology, M Savage (author), S Ogilvie, J Slezak and E Artim (contrib.), (Institute for Prospective Technological Studies 2006) 9-11.

16 Council of the European Union, Commission Staff Working Paper accompanying the Proposal for a Directive of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE) - (recast) - Impact Assessment (COD) 2008/0241 (16 December 2008) 23.

imposed – a lack of space can be observed for participation of the civil society in the discussions. Relevant information could have been provided by the end-users of EEE and contributed to enhance the provisions concerning take-back logistics to distributors and collection centres, for instance. In addition, great knowledge from academia is ignored, where specialists could contribute with better data and specific knowledge, resulting in better legislation.

3. Transposition of the WEEE directives into national legislation

By the time a Directive comes into force, it is expected from EU member states to follow with procedures for transposition of the text into national legislation and for implementation within the deadlines. As explained by Prechal, according to articles 192 and 288[17] of the Treaty on the Functioning of the European Union (TFEU), Member States are bound to the result prescribed by a directive. Therefore, as a directive is not directly applicable, Member States are expected to adopt transposition measures at the national level in order for it to become fully effective. In that sense, as the main feature of a Directive is the need to be transposed to national law, it allows for Member States to choose the form and method of achieving the adopted results by selecting the most suitable procedures. In fact, Member States are expected to adapt their laws only as much as necessary to reach "the objectives set out in the relevant Treaty provision which serves as the legal base for the directive"[18] and it is "considered essential that the measures taken by the different Member States are applied with the same effectiveness and strictness as in the application of their national law".[19]

According to implementation reports,[20] the process of developing legislation for the transposition of the provisions specified in the Directive was strongly troubled by interpretation matters in most of the Member States. Discussions revolving around which products, and therefore, which producers and importers would be

17 Former article 249 TEC before amendments by the Lisbon Treaty, which came into force in 2009.

18 S Prechal, *Directives in EC law* (Oxford: University Press 2005) 4.

19 JH Jans, HHB Vedder, *European Environmental Law: After Lisbon* (Europa Law Publishing 2012) 141.

20 The review process of the implementation of the WEEE Directive included consultation of national implementation reports sent according to deadlines brought by the Directive (reporting period 2004-2006, 2007-2009) Those reports are not made public, however, official reports based on the information brought by the national ones could be accessed: European Commission, Implementation of the Waste Electric and Electronic Equipment Directive in the EU, Technical Report Series, Institute for Prospective Technological Studies (2006). European Commission, Final Implementation Report for the Directive 2002/96/EC on Waste Electric and Electronic Equipment (WEEE Directive) 30 January 2012, Consortium ESWI (2012). This report is a synopsis of national implementation reports in the form of responses by Member States to the questionnaire (contained in the Annex to Commission Decision 2004/249/EC) covering the period 2007-2009.

affected by the new rules, which roles and procedures were mandatory and which were desirable, among others, occurred. Naturally, industry was concerned and reluctant on the implementation of the Directive.

Reaching for an agreement amongst producers proved to be a challenging task, in addition to one extra complicating factor: time shortage. The deadline for all the rules for the establishment of national WEEE systems to be fully transposed to the national legal framework was considered short by most Member States. The general complaint presented both by national authorities and producers referred to the uncomfortable position of having to make fast, important decisions while not enough data was available to lead to a clear understanding of the consequences of different approaches, or even to properly evaluate the options. As one example of the issues at hand, in some countries the stakeholders pressured for the creation of national compliance organizations, while others sought for a more market-based approach, which meant the incorporation of a clearing house model. Member States with a strong Chamber of Commerce and tradition of centralized and collaborative decision-making tended to have producers presenting a united negotiated position to the government after resolving such issues amongst themselves. However, this was not the case for most of Member States.[21]

As a result, seeking to engage producers, importers and distributors for public consultations was adopted by the Member States during the process of drafting the national laws responsible for implementing the new Directive.

3.1 The British transposition of the WEEE directives

The UK was one of the last Member States to implement the WEEE Directive. As explained by the British Government, the WEEE Directive which was first agreed in 2003 proved to be a rather complex and costly text to be implemented. On 14 December 2005 the Government's Energy Minister, Malcolm Wicks, announced that the implementation of the Directive in the UK would have to be delayed until 2007 as a consequence of the Government's commitment to implement it in a way that would enhance the environmental benefits while minimizing the costs to businesses.

The UK, since the coming into force of the first WEEE Directive, has been constantly revising and enhancing its WEEE Regulations. In those procedures, the participation of producers and distributors in the drafting of the first WEEE Directive has been notorious,[22] however, little is known from the positions and requests of consumers of electrical and electronic equipment.

---

21 European Commission (n15) v.

22 For instance, foreword by Rt Hon Michael Fallon MP Minister of State for Business and Enterprise at the 2013 Public Consultation: "The proposed changes to the WEEE system are an important part of that commitment. They are a direct response to concerns expressed by producers of electrical and electronic equipment about the cost of

The low participation of consumers has shown small figures of compliance with the take-back regulations for returning WEEE to the distributors or for properly disposing of their e-waste according to municipal rules. As a strategy to reach consumers and achieve better results of collection, the government took over the task of developing the information campaigns – initially a task for producers and distributors. Observing the public consultations launched for the transposition of the Directives into British legislation, the focus on producers, and business in general, becomes quite evident. For instance, although the last public consultation[23] concerning WEEE legislation had been performed by the Department for Business, Innovations & Skills – responsible for supporting businesses and consumer protection – the questions were clearly directed to a target audience of producers. The questions listed in the consultation regarded only responsibilities assigned for producers, importers and distributors, the technical definitions, and procedures that those implied. Even though the base of the WEEE system relies on end-users properly disposing of their end-of-life electric and electronic appliances (WEEE), and that the collection of historic WEEE is financed by a visible fee included in the prices of new EEE, no consultations directed to the consumers could be found.

All participants to the consultation were representing interests of businesses, including the only two names of individuals that could be identified in Annex A (referred to in the next paragraph) as they were identified as directors of businesses directly involved with the distribution of EEE. According to the summary of responses:

> We received 256 responses to the consultation. A full list of respondees is attached at Annex A. The largest response came from producers of EEE (Electrical and Electronic Equipment) with 100 respondents identifying themselves as producers. This was followed by local government with 49 responses. 29 trade bodies also responded along with 22 Producer Compliance Schemes (PCS), 17 distributors of EEE, 16 WEEE treatment facilities, 16 charities or social enterprises, 14 electrical reuse organisations and 11 waste management companies (WMCs). The remainder of responses came from individuals, central government and staff associations.[24]

---

compliance within the existing regulations." Department for Business Innovations & Skills, Implementation of the WEEE Recast Directive 2012/19/EC and changes to the UK WEEE system (April 2013) 4.

23 Department for Business Innovation & Skills, "Implementation of the WEEE Recast Directive 2012/19/EU and Changes to the UK Waste Electrical and Electronic Equipment (WEEE) System: Consultation", April 2013 (2013).

24 Department for Business Innovation & Skills, "Implementation of the WEEE Recast Directive 2012/19/EU and Changes to the UK Waste Electrical and Electronic Equipment (WEEE) System: Summary of Responses to Consultation", August 2013 (2013) 6.

Perhaps questions concerning the preferences of consumers for options of disposal of old EEE (such as locations, schedules, types of WEEE), effective communication channels, and information being made available, among other factors, would contribute to an enhancement of the results of the WEEE system. Ensuring a greater involvement of consumers in the lawmaking process would increase their awareness of the essential role they have in the structure of the WEEE system. When end-users are not aware or engaged with the take-back system of WEEE, it leads to poor collection rates, which, in turn, result in unsatisfactory treatment, recycling and reuse rates.

3.2 The Dutch transposition of the WEEE directives

In 2004, the European WEEE Directive introduced legislation for e-waste take-back systems which were to be implemented into Member States' national legal framework no later than August 2006. Apart from Greece, the Netherlands was the only Member State to meet the deadline, achieved when the WEEE Directive was transposed to national law on 13 August 2004, causing no major impact caused on the Dutch system for WEEE Management. The explanation for a much simpler process than in most of the EU lies in the fact that the Netherlands was one of the pioneers of e-waste legislation, having had the concept of producer responsibility of electrical and electronic equipment exist in Dutch regulations since 1999, when a nation-wide system for the collection and recycling of end-of-life EEE was set up. The Dutch government[25] adds to the explanation the argument that the Directive was broadly inspired by the Dutch approach which, to some extent, contributed to a rather simple adaptation process of the national laws.

The Disposal of White and Brown Goods Decree, published in 1998,[26] established the requirements for the system to be based on; legislation which outlined the responsibilities of the producers with regard to waste electrical electronic equipment. However, there has been a strong influence from producers in the history of this decree. In 1989, white and brown goods were already identified as a special waste category in Dutch environmental policy. Further, in 1992 the Ministry of Housing, Spatial Planning and the Environment (VROM), in the context of attempts to reduce waste and the recycling of materials, sought an agreement with producers and suppliers of white and brown goods concerning the disposal of their products. From 1992 to 1994, a process of intense negotiations

---

25 Ministerie van Infrastructuur en Milieu, "Handboek EU-milieubeleid en Nederland. De omzetting in nationale regelgeving" <http://www.infomil.nl/onderwerpen/ integrale/ handboek-eu/afval/afgedankte/omzetting-nationale/> accessed 13 April 2015.

26 Staatsblad van het Koninkrijk der Nederlanden, "Jaargang 1998 Nr. 238 Gepubliceerd op 28 april 1998. Besluit van 21 april 1998, houdende vaststelling van regels voor het na gebruik innemen en verwerken van wit- en bruingoed" (Besluit verwijdering wit- en bruingoed) http://wetten.overheid.nl/BWBR0009561/geldigheidsdatum_18-03-2015# accessed 13 April 2015.

took place among members of the target group, the government, and third parties. Nevertheless, the goal of the process – the signature of a covenant – was not achieved. The outcome was influenced by the fact that producers were aware of the rising concern of other Member States on the matter. To settle for Dutch legislation on the matter would most likely force producers to adapt twice, thus leading to the choice to wait for homogeneous legislation defined at a European level, instead of having to adjust to a Dutch law which soon would be replaced and which would lead to extra costs.

Producers managed to prevent the new regulations at that moment. Even so, despite the frustrated attempt to sign an agreement with producers, the establishment of national regulations for an electronic waste management system came a few years later. Pressured by the need of regulating the matter and the EU Directive to come – which would represent a difficult process of transposition unless an already ongoing system was already established – the government had this strategy clear in its agenda and followed with the intent of regulating the management of WEEE and drafted the Disposal of White and Brown Goods Decree. The Decree came into force on the 1st of January 1999 and obliged the sector to set up a system for the disposal of white and brown goods in cooperation with the municipal authorities and distributors.[27]

In the coming years, a considerable amount of effort from the government for consulting and involving producers took place. This was due to a great concern on effective compliance of producers to the new regulations, and therefore, it became a main focus of the new Dutch environmental policy at the time.

4. Supply, demand, and their influence on new legislation

The increase in productivity and standards of living during the past two hundred years have far exceeded those that had been reached so far by the previous two millennia. Markets have played a central role – though so have governments – on this unprecedented speed. The power of markets in the global scenario, "whether for good or evil", is undeniably vast. According to key economic concepts, market economies are driven by the main forces of supply and demand,[28] and a counterbalancing reaction to the power that markets represent is the practice pursued by governments to repeatedly have them controlled and moderated, as much as reality allows for. The focus has been to have markets working to the benefit of most citizens and, for this, laws have been created and enhanced,

27 H Bressers, E Immerzeel and JJ Ligteringen, "The Disposal of White and Brown Goods" in M. de Clercq (ed.), *Negotiating Environmental Agreements in Europe: critical factors for success* (Edward Elgar Publishing 2002) 218-240.

28 *See* e.g. PR Gregory and RC Stuart, "Comparing Economic Systems in the Twenty-First Century" (South-Western CENGAGE Learning 2004).

dedicating special concern for consumer and environmental legislation.[29] Nevertheless, this has been a never-ending struggle.

Naturally, in the lawmaking process for new legislation considerable pressure from competing interests is present every step of the way: from work group meetings and debates to voting procedures. Stakeholders such as governments, industry, local communities, and ecologists play greater and smaller roles in shaping new laws in the most favourable possible way to protect the interests they stand for.

The balanced approach for the involvement of supply and demand in the dynamics of lawmaking in this field of law derives from empirical observation of the cases mentioned in this article, connected by the concepts of "bounded rationality"[30] and the political discussion of "democratic deficit".[31] The observation that competing wills are not always perceived nor granted equally, but instead are recognized according to the level of influence of its players, lead to an observation of whether balance would be desirable or what the risks are of ignoring the balance. In theory, the regulator assures that the lawmaking process will produce legislation in the public interest. In reality, the outcome can be good regulation that is complied with, but it may also result in a representation of the interests of those with the resources and ability to advance their interests over other groups.

The development of modern environmental law has been linked to the economic development of society. In this sense, the significance of engaging industry in the discussions must not be underestimated, especially if one considers that their participation can possibly assert more influence – and more adherence – on an environmental issue than a treaty ever could. As a consequence, States are more likely to comply with the demands presented by corporations due to their essential role in the economic development of a national market economy. At the same

---

29 JE Stiglitz, "Introduction" in *From Cairo to Wall Street: Voices from the Global Spring* (The New Press 2012) 19.

30 Bounded rationality is a school of thought about decision making that includes the subjective expected-utility variant of rational choice to the comprehensively rational economic and decision theory models of choice (integrating risk and uncertainty to the model). The model of "Bounded Rationality" was brought by Herbert A. Simon (in the 1940s and 1950s) who critiqued the existing theories of public administration and proposed a new approach for the study of organizational decision making. A major implication of the approach is that behavior is determined by the mix of incentives facing the decision maker, as explained by Jones. BD Jones, "Bounded Rationality", Annual Review of Political Science 2:297–321 (1999) 298-299.

31 Throughout the years, trust levels seem to have eroded in a number of democratic governments. The existence of a democratic deficit is a result of the fact that expectations about democracy have continued to rise, while satisfaction about the way democracy functions has, at best, remained the same. For more *see* also P Norris, "Democratic Deficit: Critical Citizens Revisited" (Cambridge University Press 2011).

time, industry can also make environmentally friendly processes mandatory, thereby creating a beneficial effect on environmental issues.[32]

Under the understanding that the supply is already structured in a successful way to promote its private interests, Coston argues that, "ideally, support to the demand side would assure that there is sufficient competition among these special interests that capture of state and local resources and power is prevented."[33] Certainly the strength and effectiveness of the demand side will depend on the ability of civil society actors to aggregate interests and articulate preferences, combined with the creation and strengthening of institutions that bridge civil society actors and lawmakers. With respect to civil society and its role played in democracy, a healthy and active civil society is a necessary complement to political representation at the regional and national level.

Since the early years of the twentieth century, there have been attempts to understand the interest groups phenomenon and to predict actions and outcomes. The behaviour of different pressure groups are deeply connected to public trust in policy, and naturally, the lawmaking process. It has been a concern of theories in the field of sociology and economics, which have discussed the dispute of groups of interests and their influence over policies in the social sciences. The next topic approaches these theories in order to bring some light to the discussion brought by the influence of the manufacturers of electric and electronic equipment in the cases mentioned in section 3.

4.1 Regulatory capture theory

One of the consequences of globalization is that governments have become far more vulnerable to different kinds of economic pressure. Even though they continue as significant players, dealing with global and local forces, they are no longer the only relevant players in the international arena ever since multinational corporations have been established. In this changing scenario, levels of public and private power are layered by networks of different actors, and rules derive not only from states, but also from private entities.[34]

Regulatory capture is one of the theories that approach the existing issues mentioned in the previous section of this paper. Over the years it has been adapted

---

32 M Eving-Chow and D Soh, "Pain, Gain, or Shame: The Evolution of Environmental Law and the Role of Multinational Corporations", *Indiana Journal of Global Legal Studies, Vol. 16, Issue 1* (2009) 195-222, 207.

33 JM Coston, "Administrative avenues to democratic governance: the balance of supply and demand", *Public Administration and Development* 18, 479-493 (1998) 483.

34 AC Aman, "Globalization, Democracy, and the Need for a New Administrative Law", *Indiana Journal of Global Legal Studies, Vol. 10, Issue 1* (2003) 125-155, 136.

and taken a broader view[35] from its original contribution, but nonetheless, it is a valid theory to explain and understand the influence of interest groups in regulations. Laffont and Tirole[36] argue that the origin of the regulatory capture theory can be traced back to Marx and to the early twentieth century political scientists' view that big businesses control institutions.

According to one of the main authors on regulatory capture – George Stigler – regulation, as a rule, is acquired by the industry and is designed and operated primarily for its benefit.[37] The explanation is that regulatory authorities mostly rely on information provided by the firms they regulate since it is virtually impossible for the regulatory authorities to have as much information as the firms in any other way than that. This practice provides an advantage for the firms to find ways to conduce the regulators to enforce regulations which, in the end, protect profits. In that sense, regulators find themselves "captured" by the very firms they are supposed to regulate. Therefore, although regulation – in its ultimate goal – is about controlling market entry, it is still made by politicians who make their decisions based not only on public policy goals,[38] but also on lobbying, here understood in a broader sense as organized groups promoting their interests.

For instance, a classical example is the case of regulations for appliance efficiency standards, more specifically, for washing machines.[39] In the United States,

---

35 As explained by Laffont and Tirole, Stigler's theory inferred that members of an industry have more incentives than dispersed consumers with a low per capita stake to organize themselves and affect the regulatory outcome. The emergence of some powerful consumer groups and the regulatory experience of the seventies led the academic profession to take a broader view of Stigler's theory, that allows government officials to arbitrate among competing interests and not always in favor of business. JJ. Laffont and J. Tirole, "The politics of government decision-making: a theory of regulatory capture", *106 (4) The Quartely Journal of Economics* (1991) 1089-1127, 1090.

36 JJ. Laffont and J. Tirole, "The politics of government decision-making: a theory of regulatory capture", *106 (4) The Quartely Journal of Economics* (1991) 1089-1127, 1089.

37 G Stigler, "The Theory of Economic Regulation", A Schiffrin and E Kircher-Allen (eds), *The Bell Journal of Economics and Management Science* 2(1) (1971) 3–21.

38 Birkland's definition for public policy "as a statement by government – at whatever level – of what it intends to do about a public problem. Such statements can be found in the Constitution, statutes, regulation, case law (that is, court decisions), agency or leadership decisions, or even in changes in the behavior of government officials at all levels. […] Because we also define public policy as what government chooses not to do, the lack of a definitive statement of policy may be evidence of an implicit policy." TA Birkland, *An Introduction to the Policy Process: Theories, Concepts and Models of Public Policy Making* (Taylor & Francis 2011) 9.

39 Example taken place in the United States of America, concerning regulations for washing machines which were mostly drafted by the manufactures. Mentioned by Former Government official and professor at George Washington University: Susan Dudley. S Dudley, "What is Regulatory Capture" (The Center for Economic

manufacturers – by making use of their lobbyists – pressured for new regulations that would forbid washing machines which made use of too much water. The new regulation brought many of the ideas and arguments presented by the manufactures' lobbyists and still seemed to be favouring consumers and the environment. However, this is only at a first sight, as with closer analysis of the situation reveals, the new machines that actually did not use too much water were significantly more expensive than the pre-existing ones which used more water. Before the new regulations, when consumers were presented with the low water-consumption machines – a more expensive product – they were not interested in the product due to its high pricing, and preferred the cheaper ones which used more water. With the ban of the cheaper ones – as those did not achieve the new water consuming standards – consumers were deprived of their freedom of choice. At the same time, manufacturers' concerns regarding consumer preference were no longer a problem.

As one may learn from this example, it is possible that even though regulations enacted by regulatory agencies may seem to bring benefit to the consumer, if their evolution processes are observed closer, their implications will evidence favouring private industries rather than public interest. Real examples, such as the one mentioned above, are evidence that Stigler's arguments in the theory of regulatory capture can be considered to understand current situations.

A possible contribution to be considered for the prevention of "capture" of public institutions could be, therefore, the use of instruments to include consumers' information (contributions) along with the data provided by industry (producers). Such instruments would provide the legislator with more complete – and balanced – information. The relevance of the information brought to the legislator relates to the concept of "bounded rationality" and the theories explained in the next section of this article. In the same vein, as explained by Coston:

> The essence of effective democratic governance is achieving an appropriate balance among interested parties such that the losses are minimized. Such a compromise is not possible if the state lacks the capacity to respond to the demands collectively, rather than putting out fires for short-term gain or responding only to the most vocal powerholders.[40]

To make a strategic institutional structure available to favour more room for citizens – "the least vocal powerholders" – to have their interests represented and balance the sometimes excessively influencing power of industry that could lead to regulatory capture, these are issues to be considered, and future studies could focus on possible structures to approach the matter exposed here.

Liberty 2012) http://centerforeconomicliberty.blogspot.de/2012/01/what-is-regulatory-capture.html accessed 29 July 2015.

40 Coston (n33) 486.

4.2 Group politics theories

Group politics theories begin by acknowledging the fact that the State is composed of actors, both institutional and non-institutional ones, and these are a product of a complex set of historical, social-economic, and political, among other, contexts. The theories also rely on the idea of the existence of different groups with competing sets of interests having the State acting as a control mechanism.

One of the central matters of policy-making is the need for decisions to be made, decisions which will also result in lawmaking. However, the process for making decisions is based on information and, as described by the concept of "bounded rationality",[41] information is limited, especially considering that within the reality of different groups disputing, only a few are invited to join the discussion and provide their piece of information. As explained by the incremental models,[42] decisions tend to be made on the basis of inadequate information and low levels of understanding. The outcome, as expected, could be no different: decisions based on information – and interests – provided only by "an elite" of groups.[43]

Although in a broader scope, Coston explained the problems of allowing for participation of more actors other than the public authority in a very enlightening way.

> It would seem that government performance can be enhanced by delegating functions to more efficient and effective actors and by entertaining the demands of constituents. So what's the problem? A serious danger exists that the state may come to be perceived as the problem only, and not a source of solution and/or contribution. The reality is not so simple. Yes, delegation or privatization can enhance efficiency and effectiveness, but perhaps not in all circumstances and not for all functions. Yes, public sector performance can be enhanced through pressure from its constituents, if there are credible options for exit and voice and, especially, if government has the capacity to respond to these demands. In short, while citizens need

---

41 The concept of bounded rationality considers that decision makers work under three unavoidable constraints: (1) only limited, often unreliable, information is available regarding possible alternatives and their consequences, (2) human mind has only limited capacity to evaluate and process the information that is available, and (3) only a limited amount of time is available to make a decision. Therefore, even individuals who intend to make rational choices are bound to make "satisficing" (rather than maximizing or optimizing) choices in complex situations. Proposed by the US Nobel-laureate economist Herbert Simon (1916-2001) in his 1982 book "Models Of Bounded Rationality And Other Topics In Economics." <http://www.businessdictionary.com/definition/bounded-rationality.html#ixzz3hNznQVWs> accessed 30 July 2015.

42 For more information *see* D Braybrooke and C Lindblom, *A strategy of decision: policy evaluation as a political process* (Collier Macmillan 1963).

43 A Heywood, *Politics* (Palgarve Macmillan 2002) 401.

> to demand, governments need to respond; both are capable of some supply; and none of these should be taken for granted.[44]

In an ideal scenario, either no interest group should be providing information for the decision-makers – who in turn would be responsible for producing their own sources of neutral information – or, what is proposed by pluralist theories,[45] all interest groups are given equal ability to participate in the debate. In the same direction, Heywood[46] explains that the core theme of pluralism is that political power is fragmented and widely dispersed. Consequently, decisions are made through a complex process of bargaining and interaction that ensures that the views and interests of a large number of groups are taken into account. This bargaining and involvement of industry into environmental legislation has been mostly successful and resulted, in most cases, in good legislation and good compliance.[47] However, when legislation and its compliance also includes actors that were not part of the negotiations, a "sub-optimal" implementation level is noticed.[48]

Arthur Bentley was one of the first and most prominent authors to develop a pluralist "group theory" by emphasizing that organized groups are the fundamental building blocks of the political process. According to Bentley, "[w]hen the groups are adequately stated, everything is stated".[49] The development of neo-pluralism and more arguments to study the phenomenon carried on as the power of major corporations (business groups) arising since the 50's increased the concerns of political scientists focusing on the existence of a privileged position enjoyed by some business groups, and the negative effect it causes to democratic societies.[50]

5. Conclusions

Based on the observations from both the drafting process of the WEEE Directives, and their national implementations in the Netherlands and the United Kingdom, in addition to the interpretation brought by the theories explained in section 4, it becomes clear that interest groups are strong players capable of influencing the

---

44 Coston, (n33) 480.

45 R Hague and M Harrop, *Comparative Government and Politics* (Palgarve Macmillan 2004) 177.

46 Heywood (n43) 273 – 274.

47 *See* JK Levit, "Bottom-up lawmaking: The Private origins of Transnational Law", *Indiana Journal of Global Legal Studies, Vol. 15, Issue 1* (2008) 49-73.

48 *See* examples of the implementation in the UK and the Netherlands mentioned further in this article.

49 The text makes reference to A Bentley, "The Process of Government: a study of social pressures", (The University of Chicago Press 1908) 208.

50 R Dahl, *Who Governs?* (1961). For "neopluralism" originating from Dahl's pluralism model also *see* JK Galbraith, *The New Industrial State* (1985) and CE Lindblom, *The Intelligence of Democracy* (1965).

drafting process of new legislation for e-waste. It is also noticeable that the strongest and most organized players promoting their interests on the WEEE systems – producers and, to some extent, distributors – have caused relevant influence in the processes that have led to the WEEE Directives and national laws for e-waste in the Netherlands and the United Kingdom. In that sense, the power of pressure groups over the legislator should be of greater concern and monitored, even though when seeking to protect their own interests it has been noticed that producers can also promote positive effects on legislation on environmental protection (e.g. regulations on washing machines).

Consumers do not directly influence the legislation making process of e-waste regulations at the same pace or strength that producers and distributors do. As explained by the theories, with the instruments currently available to each side (supply and demand), it is easier to lobby for the interests of few than interests of many. Although the demand side of the market economy – for purposes of this article, understood as the consumers of EEE – can influence legislation by their preferences in shopping, this, when added to the democratic elections of their representatives, is still of minor power when compared to the performance of big firms (producers). There is great difficulty for direct representation to become stronger[51] and organized. It has been noted that it is far more unlikely for consumers to be invited by the regulator to the discussion table and directly[52] participate in the negotiations of new regulations.

So far, in the dynamics of the WEEE system, it has been observed that even though consumers are of key importance for the success of the system itself, they have not been directly involved in the shaping process of its laws. In order for a more balanced representation of interests to be reached, it should be of concern that all are present to contribute to the discussions. A model somewhat closer to the framework proposed by the pluralist model, where all groups would be given room at the discussion table, to provide information and, along with it, to promote their interests in a direct way, seems to offer the most balanced representation of supply and demand sides of the economy in economic decisions and new regulations.

---

51 The influence power of an interest group, as stated by Rod Hague and Marin Harrop, relies on four of its main features: sanctions, legitimacy, membership and resources. Namely, those represent 1) the ability of a group to invoke sanctions (such as take investments elsewhere or go on strike); 2) a high degree of legitimacy, prestige, is more likely to prevail on particular issues; 3) high penetration (high density of membership) increases influence; 4) although resources available are relevant, "money talks but not always loudly". R Hague and M Harrop, "Comparative Government and Politics" (Palgarve Macmillan 2004) 175.

52 On regulatory capture theory members of industry have more incentives than dispersed consumers with a low per capita stake to organize to exercise political influence.

Therefore, better representation of the interests of consumers, who are also economic agents and relevant pieces of the dynamics of the WEEE management system, could increase the success rates of collection, treatment, recycling and reuse of WEEE, as compliance levels could increase. In the same direction, it is important to remember the central role of consumer protection within the EU set out in Article 153 of the Treaty.[53] According to the Treaty, "the interests of consumers at EU level require that all markets across the European Member States (collectively the "internal market") work effectively. For the market to work effectively it should be competitive and deliver a fair deal for consumers. A competitive and efficiently regulated market provides the greatest opportunity for business and delivers the choice, low prices, innovation and better service that consumers desire."[54]

These statements show that environmental regulations are strongly influenced by the interests and negotiations among the stakeholders involved. A level playing field to be offered for all presents itself as a way of approximating regulation to all players in the market economy, not only the strongest ones (the 'supply side of the market economy'). A change in these dynamics could provide more positive results for the WEEE management system and place it a step closer to a more symbiotic interrelationship between (environmental) law and the economy.

---

53 OJ C 325, 24/12/2002 0101. Treaty establishing the European Community - Part Three: Community policies - Title XIV: Consumer protection - Article 153 - Article 129a - EC Treaty (Maastricht consolidated version) Article 153. In order to promote the interests of consumers and to ensure a high level of consumer protection, the Community shall contribute to protecting the health, safety and economic interests of consumers, as well as to promoting their right to information, education and to organize themselves in order to safeguard their interests. 2. Consumer protection requirements shall be taken into account in defining and implementing other Community policies and activities. 3. The Community shall contribute to the attainment of the objectives referred to in paragraph 1 through: (a) measures adopted pursuant to Article 95 in the context of the completion of the internal market; (b) measures which support, supplement and monitor the policy pursued by the Member States. 4. The Council, acting in accordance with the procedure referred to in Article 251 and after consulting the Economic and Social Committee, shall adopt the measures referred to in paragraph 3(b). 5. Measures adopted pursuant to paragraph 4 shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. The Commission shall be notified of them.

54 European Commission, Health and Consumers "Safeguarding Consumers' Interests" <http://ec.europa.eu/consumers/archive/cons_int/index_en.htm> accessed 23 July 2015.

Rethinking Lawmaking and Public Trust: Five Lessons from the Low Countries

Marc Hertogh[*]

1. Introduction

In the classic model of the *Rechtsstaat*, public lawmaking and public trust are strongly interconnected. Governments can only be effective if citizens trust their institutions. Moreover, citizens trust their government when they can participate in political decision-making through elected representative bodies and when government decisions are bound by clear and explicit rules. This model is based on two important assumptions. First, all laws are made by the state, which acts as the sole and central legislator. Second, as long as the legislator acts in accordance with public law, this will automatically generate public trust in government.

In this volume, both assumptions were subjected to a rigorous "reality-check". In this closing chapter, I will summarize and analyse the most important results. In the next section (section 2), I will examine the first assumption of the classic *Rechtsstaat*-model. Are all laws still exclusively made by the central state, or can we also observe examples of lawmaking without a central role for the legislator? In section three, I will focus on the effects of lawmaking. Here, I will examine the second assumption. Does public lawmaking always generate public trust or are there also cases where lawmaking lacks legitimacy? Based on the chapters in this volume, I will then draw five lessons about lawmaking and public trust (section 4). In the final section, I will draw some general conclusions and I will make some suggestions for rethinking our conventional ideas about lawmaking and public trust (section 5).

2. Lawmaking without the legislator?

According to the classic model of the *Rechtsstaat*, the national legislator plays a crucial role in the lawmaking process. However, the chapters in this volume illustrate that this is no longer an accurate picture of reality. In many cases, the national legislator is no longer the sole and central lawmaker.

Two decades ago, a group of Dutch researchers published a study in which they argued that the balance in lawmaking in the Netherlands was gradually shifting from the central government in The Hague to numerous other locations. They

[*] Professor of Socio-Legal Studies at the University of Groningen, the Netherlands.

referred to this process as "the displacement of political decision-making".[1] Their study identified a number of important social and political trends. Comparing the situation to a bathtub in which the water level is constantly dropping because the bathwater is leaking away through several holes in the bath, they argued that these trends would result in a situation in which most lawmaking would no longer be carried out by the national legislator, but rather by numerous other actors, bodies and institutions.

In 1995, most of these developments were still in their early stages. In 2016, however, the displacement of lawmaking is no longer just an abstract scenario but this has become an everyday reality.[2] Moreover, this development is not unique to the Netherlands, but echoes elements of what other authors have described as the rise of the "(post-) regulatory state",[3] the growth of "collaborative governance"[4] or the development of "regulatory capitalism".[5] The chapters in this volume highlight three important dimensions of this development: internationalisation, juridification and privatisation.[6]

Internationalisation: lawmaking and the European Union

The first trend that Bovens et al. identify is the rapidly decreasing importance of the national legislator against the background of a globalizing economy.[7] Over the past few decades, we have witnessed the growing importance of "Europe" with an increasing number of rules and regulations from Brussels. This development is also clearly illustrated in this volume.

Mendelts describes how environmental law in both the Netherlands and Germany is influenced by the European Habitats Directive.

Jans and Outhuijse demonstrate how access to justice in German administrative law is influenced by the Convention on Access to Information, Public

1 M. Bovens et al., *De verplaatsing van de politiek: een agenda voor democratische vernieuwing*. Amsterdam: Wiardi Beckman Stichting 1995.

2 *See*, e.g., J. van Erp & P. Mascini (eds.), *Contextualizing regulatory governance* (special issue), *Recht der Werkelijkheid* 2014 (3).

3 C. Scott, "Regulation in the age of governance: the rise of the post-regulatory state", in: J. Jordana & D. Levi-Faur (eds.), *The politics of regulation*. Cheltenham, UK: Edward Elgar 2004, p. 145-174.

4 C. Ansell & A. Gash, "Collaborative governance in theory and practice", *Journal of public administration research and theory* 2008 (8), p. 543-572.

5 D. Levi-Faur, "The regulatory state and regulatory capitalism: an institutional perspective", in: D. Levi-Faur (ed.), *Handbook on the politics of regulation*. Cheltenham, UK: Edward Elgar 2011, p. 662-672.

6 In their report, Bovens et. al also identified three additional trends: regionalisation, bureaucratisation, and the rise of technology. These are also important trends in the Netherlands, but they are not discussed separately in this volume.

7 *See* Bovens et al., *op.cit.,* p. 14.

Participation in Decision-Making and Access to Justice in Environmental Affairs (Aarhus Convention).

Más shows how environmental law and policy both in the Netherlands and in the UK is shaped by European regulation, such as the Waste Electrical and Electronic Equipment Directives (WEEE Directives).

Juridification: lawmaking and the courts

According to Bovens et al., a second trend is the growing importance of (national and international) courts in lawmaking.[8] Both the growing emancipation of individual citizens and the fact that formal lawmaking is often a very complex and slow process can lead to a situation in which an increasing number of important social and political conflicts are no longer decided in Parliament but rather in a courtroom. Several chapters in this volume illustrate this process of juridification.

Jans and Outhuijse analyse the response of the German legislator and courts in relation to their obligation under the Aarhus Convention to broaden access to justice for environmental organisations. In their first case study (on access to justice for environmental organisations), they examine how the German legislator created new rules in order to align German administrative procedural law with its international EU obligations. They refer to this process as "front-door" lawmaking. However, in their second case study, it was no longer the legislator but rather the highest German administrative court that made the final decision. According to Jans and Outhuijse, this case is a good example of "back-door" lawmaking, in which the court effectively acts as a "quasi-legislator".

Mendelts discusses the important role played by national courts in the interpretation of open norms in European Directives. Based on several cases regarding the levels of nitrogen deposition on so-called Nature 2000 sites, he shows that Dutch and German courts have developed two widely diverging interpretations of one of the key provisions of the EU Habitats Directive.

Lubach looks at the importance of supranational dispute resolution and, in particular, the growing impact of arbitration. Following the German "Atomausstieg" (exit from nuclear energy), the energy company Vattenfall decided to sue Germany before the International Centre for Settlement of Investment Disputes (ICSID), which is connected to the World Bank. He argues that this procedure (as well as other forms of arbitration related to the TTIP-treaty) may ultimately lead to tensions between European and national regulations.

De Ridder discusses the effects of juridification on the way in which public officials may contribute to administrative justice. In his view, the increasing role

8 *See* Bovens et al., *op.cit.,* p. 19.

of the courts in administrative decision-making may also have some negative side-effects. He argues that "if compliance and judge-resistance are the prime standards for the quality of a decision, the intrinsic motivation to come up with a just solution is accordingly reduced". He refers to this as the "crowding out effect of juridification".

De Graaf and Marseille look at the way in which the mandatory objective procedure provided for by Dutch administrative law gradually became more juridified during the first decade following its implementation. Although the legislator intended the objection procedure to be flexible and informal (and, possibly, an alternative for administrative adjudication), in practice most members of the municipal external advisory committees were lawyers. As a result, many of the hearings of the municipal advisory committees started to resemble those of the administrative courts. Moreover, these committees primarily focused on issues of legality and gave hardly any attention to other aspects of the original administrative decision, such as effectiveness and reasonableness.

Privatisation: lawmaking and civil society

A third important development is the shift from public to private lawmaking (or a mix of these two). Corporations, NGOs and other private actors have become increasingly important in the regulation of public interests.[9] In many areas, this has led to a shift from (public) government to (private) governance. Consequently, civil society is not just a passive "receiver" of rules and regulations adopted by a national legislator, but an active "co-producer" of public policy. Several chapters in this volume demonstrate what this development looks like in everyday practice.

Winter and Klein Haarhuis explain that, in recent years, the character of lawmaking has changed rapidly. In the past, legislation used to be a "vertically structured process" which only involved government ministries, the Cabinet and Parliament. More recently, they observe "the emergence of countless forms of societal dialogue and stakeholder consultation". For instance, several forms of social consultation (including internet consultation with several target groups) take place at the drafting stage of new legislation while, at the implementation stage, several (government and societal) organisations contribute in the form of implementation and enforcement checks.

Bröring and Cherednychenko discuss several examples of principles-based regulation in the financial sector. Given the high degree of complexity and innovation involved in the financial services industry, legislation cannot achieve its regulatory objectives without open norms. In their chapter, they look at several examples of open norms in the Dutch legislation concerning the financial sector, including the duty to supply information that is accurate, clear and not misleading;

9 *See* Bovens et al., *op.cit.,* p. 18.

the duty to lend responsibly; and the general duty of care. In all three examples, it is up to the financial services industry to fill in the details of these norms.

Schwitters and Vonk analyse an important shift in the rationale of the welfare state. Historically, the focus was on a system of social rights and universal entitlements but, over the past decades, the focus has shifted to responsibilities and restrictive conditions. As part of this development, the role of the legislator is decreasing while the role of civil society and individual citizens (sometimes summarized as the "participation society") is increasing.

According to Tollenaar, social security is by definition a combination of public and private legal regulation. Yet, he argues, in the past two decades public regulation has retreated to make more room for private instruments. This is reflected, for instance, in the contracting out of social services and in the creation of a market that enhances competition between public and private providers.

Westerman discusses the practice of goal-legislation (or principles-based regulation). Here, the legislator no longer issues detailed legislation that prescribes how citizens should act. Instead, the law merely indicates the goal to be achieved. Also, the law commissions other (public or private) parties to concretise this goal in more detailed rule-making. Westerman characterises this approach to legislation as a form of "outsourcing regulation".

Más focuses on lawmaking on a European level. In her chapter she describes how both the drafting and the implementation of the European Waste Electrical and Electronic Equipment Directives (WEEE Directives) include several consultations and working group meetings with important stakeholders. These Directives are not exclusively drafted by public officials, but (at least on paper) they are the result of intensive consultations with private companies, environmental organizations and consumers.

3. Lawmaking without legitimacy?

Public trust is often seen as an important indicator of public legitimacy.[10] The classic model of the *Rechtsstaat* assumes that, as long as the legislator acts in accordance with public law, this will automatically generate public trust in government. However, several authors in this volume question the legitimacy of public lawmaking. Their chapters describe, for example, "urgent problems of legitimacy" (Schwitters and Vonk), a "crisis of trust" in the financial markets (Bröring & Cherednychenko) and a "democratic deficit" in the EU (Zeegers). Recent survey data support these findings. Although the level of public trust in

10 *See*, e.g., J. Jackson and J.M. Gau, "Carving up concepts? Differentiating between trust and legitimacy in public attitudes towards legal authority", in: E. Schockley et al. (Eds.), *Interdisciplinary perspectives on trust: towards theoretical and methodological integration*. Heidelberg etc.: Springer 2016, p. 49-69.

the government and the courts in the Netherlands may still seem quite high from a comparative perspective, these surveys demonstrate that the (perceived) legitimacy of public institutions has become more contested.

Public trust in government

In the 1990s, public trust in government was still high in the Netherlands. At the turn of the century, however, public opinion surveys started to show a remarkable disruption of this trend.[11] A sharp decline in public trust, sharper than in most other countries, started in 2001. In 1997, 66 per cent of the population reported trusting the national parliament. By 2004, that number had dropped to 45 per cent. In the same period, the percentage of the population that reported trusting the government fell from 68 to 38 percent. Finally, in 1998, two-thirds of the population thought that the Dutch government was doing a good job. However, by the end of 2004, this number had fallen to less than a third of the population. Yet, according to some commentators, the "Dutch drop" in public trust may be largely explained by temporary factors (such as strong fluctuations in the economy and dissatisfaction with the incumbent cabinet).[12]

Recent data from the Netherlands Institute for Social Research (SCP) indicate that, at present, about 50 percent of the Dutch population have (some) trust in government and around 45 percent have (some) trust in Parliament.[13] When asked to express their level of trust on a scale from 1-10, the overall score for government was 5.1 (4.7 for respondents with a lower education and 5.7 for those with a higher education).[14] In general terms, there is wide support for the Dutch democratic system. However, researchers also emphasize that there is more support for the way in which the political system protects individual rights and freedoms than for the process of political decision-making and the responsiveness of the political system.[15] This is also reflected in a recent study by the Dutch Scientific Council for Government Policy (WRR). In a representative survey among some 1,300 people in the Netherlands, only a quarter of all respondents (25%) agreed that "Usually, the government listens closely to what citizens want". By contrast, nearly two thirds (64%) of them said: "I don't think that Members of

11 *See*, e.g., F. Hendriks, "Contextualizing the Dutch drop in political trust: connecting underlying factors", *International review of administrative sciences* 2009 (3), p. 473-492; T. van der Meer, "In what we trust? A multi-level study into trust in Parliament as an evaluation of state characteristics", *International review of administrative sciences* 2010 (3), p. 517-536.

12 M. Bovens & A. Wille, "Deciphering the Dutch drop: ten explanations for decreasing political trust in the Netherlands", *International review of administrative sciences* 2008 (2), p. 283-305.

13 P. Dekker, P. van Houwelingen & T. van der Meer, *Continue Onderzoek Burgerperspectieven 2015/3.* The Hague: Sociaal en Cultureel Planbureau 2015, p. 3.

14 Dekker, Van Houwelingen & Van der Meer, *op. cit.*, p. 35.

15 P. Dekker & J. den Ridder, "Publieke opinie", in: R. Bijl et al. (red.), *De sociale staat van Nederland 2015*. The Hague: Sociaal en Cultureel Planbureau 2015, p. 73.

Parliament and government ministers care much about what people like me think." Also, 71 percent of the respondents agreed that: "People like me have no influence whatsoever on what the government does".[16] Finally, there is growing public support for more direct forms of democracy. According to one study, 80 percent of the Dutch population is in favor of a referendum and 70 percent supports a directly elected mayor.[17] Based on these and other data, a recent report concludes that the current Dutch democratic system faces "serious and persistent problems of legitimacy".[18]

Public trust in courts

In general terms, the overall level of public trust in the courts seems fairly high. The Netherlands Institute for Social Research (SCP) has reviewed a series of available opinion survey datasets on trust in the justice system. This evidence suggests a decline in trust between 1981 and 1999. While both in 1981 (65%) and in 1990 (63%) nearly two thirds of the Dutch population expressed a (very) high level of trust in the justice system, the proportion had dropped to less than half (48%) of the population by 1999.[19] Since the late 1990s, however, this downward trend seems to be halted. According to the Eurobarometer, between 1997 and 2005 the level of trust in the Dutch legal system fluctuated between 51 and 64 percent, with no clear trend.[20]

Recent data indicate that, at present, 60 percent of the Dutch population has (some) trust in the courts. However, at closer inspection, this figure primarily reflects the opinion of respondents with a higher education. Among people with a medium level of education, only 35 percent say they trust the courts while this proportion drops to only 24 percent among those with a lower education.[21] Other studies also suggest that there is considerable public criticism aimed at the courts in the Netherlands. For example, there is a general feeling that some judges are out of touch with society. One study found that a sizeable proportion of respondents agreed with the following statements: "Judges do not try hard enough to explain their decisions to the common man" (82%), "Judges decide too often in a way unacceptable to the ordinary citizen" (61%), and "The Dutch judge lives in an ivory tower"(48%).[22]

---

16 WRR, *Vertrouwen in burgers* (WRR rapport nr. 88). Amsterdam: Amsterdam University Press 2012, p. 235.

17 F. Hendriks et al., *Bewegende beelden van democratie (Legitimiteitsmonitor Democratisch Bestuur 2015).* The Hague: Ministerie van Binnenlandse Zaken en Koninkrijksrelaties 2016, p. 29/30.

18 Hendriks et al., *op. cit*, p. 16.

19 P. Dekker & T. van der Meer, *Vertrouwen in de rechtspraak nader onderzocht*. Den Haag: Sociaal en Cultureel Planbureau 2007, p. 12.

20 Dekker & Van der Meer, *op. cit*., p. 14.

21 Dekker & Den Ridder, *op. cit*., p. 71.

22 H. Elffers & J. de Keijser, "Different perspectives, different gaps. Does the general public demand a more responsive judge?", in: H. Kury (ed.), *Fear of crime - punitivity.*

Lawmaking and contested legitimacy

Having legitimacy means that the regulated believe that the authorities "deserve" to rule and make decisions that influence their lives. The survey evidence suggests, however, that a considerable number of people in the Netherlands no longer share this belief. Although the available data do not allow us to specify the exact scope of this phenomenon, most studies suggest that the legitimacy of both the government and the courts in the Netherlands is no longer self-evident but has, instead, become structurally contested.[23] Rather than automatically accepting the decisions and rules of public authorities as "right" or "proper", the survey evidence indicates that the Dutch first need to be convinced by these authorities that they "deserve" to rule. People still accept the government and the courts as legal, but not always as fair or just, i.e. legitimate. This explains why people still express some level of trust in both the government and the courts while, at the same time, they are critical of these institutions.[24]

4. Lessons from the Low Countries

The chapters in this volume paint a lively, but also highly complex, picture of lawmaking in the Netherlands (and beyond). Based on these contributions, we can draw five general lessons on lawmaking and public trust.

a. Traditional lawmaking does not automatically generate public trust

Trust is an important social lubricant that facilitates communication and relationships (Beaudin). However, several chapters in this book demonstrate that the conventional approach to lawmaking (with the state as the sole and central legislator) does not automatically generate public trust (Bröring and Cherednychenko; Schwitters and Vonk; De Ridder). Considered from a strictly legal perspective, this model of "traditional lawmaking" may still be the best guarantee for effective and legitimate laws (Jans and Outhuijse; Tollenaar; Westerman). In practice, however, it is increasingly difficult for the legislator to write good laws without the expertise and help of other stakeholders (Winter and Klein Haarhuis; Más). Moreover, public opinion surveys indicate that many people criticize the institutions of traditional lawmaking for their lack of responsiveness.

New developments in theory and research. Bochum: Universitätsverlag Brockmeyer 2008, p. 457.

23 H. Weyers & M. Hertogh, *Legitimiteit betwist: een verkennend literatuuronderzoek naar de ervaren legitimiteit van het justitieoptreden.* The Hague: WODC 2007.

24 *See* M. Hertogh, "The curious case of Dutch legal culture: a reassessment of survey evidence", in: D. Nelken (ed.), *Using legal culture*. London: Wildy, Simmonds & Hill Publishing 2012, p. 189-217.

b. Modern lawmaking does not automatically generate public trust

To increase both the efficacy and legitimacy of the traditional approach, several alternative forms of modern lawmaking have been introduced. The most important feature of this alternative approach is that the national legislator plays a less central role. However, this book illustrates that modern governance does not automatically generate public trust either.

Some chapters clearly demonstrate that several forms of modern lawmaking can produce more legitimate and more effective laws than traditional forms of lawmaking. For example, in the financial sector, more principles-based regulation may contribute to an increase in public trust (Bröring and Cherednychenko). Also, on a European level, the introduction of the European Citizens' Initiative has opened up the political debate and has stimulated grassroots activism (Zeegers). Similar positive findings are also reported in relation to adjudication and dispute resolution. For example, it has been suggested that mediation is an important tool for "trust repair" (Beaudin). Also, judges in Dutch administrative courts increasingly apply ideas from the "procedural justice" literature in efforts to create a procedure in which all parties feel that they are being heard and that their position is taken seriously (De Graaf and Marseille).

However, other chapters also point to potential adverse effects of modern lawmaking. For example, it has been argued that principles-based regulation may also lead to a lack of democratic responsiveness (Westerman). Likewise, there is some evidence that, although in theory modern lawmaking provides for active consultations with all stakeholders, in practice highly organized corporations and their powerful lobbies may be heard far clearer than consumers (Más). Also, the transfer of more power to the market may eventually produce not less but more rules (Schwitters and Vonk).

c. Legal certainty is the linking pin between lawmaking and public trust

Given the fact that neither a traditional nor a modern approach to lawmaking will *automatically* increase public trust, it is important to identify those individual elements that may increase or decrease public trust. Several chapters in this volume suggest that legal certainty can operate as an important linking pin between lawmaking and public trust. For example, it has been argued that the Dutch practice of tacit authorization may cause legal uncertainties and thus undermine public trust (Hoogstra). Also, the social security system in Germany is said to generate more public trust than the same system in the Netherlands because the German legal norms are more predictable than the Dutch norms (Tollenaar). Furthermore, divergent court interpretations of open EU norms by national courts could ultimately decrease the level of legal certainty (Mendelts).

This volume also suggests that contemporary governance requires a modern approach to legal certainty. In the traditional model, the legality principle implies that norms must be clear and foreseeable. However, in an era of globalization, this approach is no longer a guarantee for public trust. While public trust presupposes the existence of a public authority that acts in relation to its partners in a trustworthy way, defending the public interest sometimes also implies a certain level of flexibility and the possibility of radical policy change (Lubach). Moreover, detailed regulation can also become an obstacle for trust-based contact between the administration and the administered (De Ridder). Precise and detailed norms *on paper* do not always lead to more clarity and predictability *in practice*. Instead, legal certainty is – in essence – a matter of good communication (with or without clear and foreseeable legal norms). As a result, lawmaking may increase the level of legal certainty (and hence the level of public trust) by improving co-operation between the regulator and the regulated (Bröring and Cherednychenko).

d. Public trust is based on reciprocity

Several contributions to this volume demonstrate that public trust is essentially a two-way street. Trust is based on mutual expectations and when the expectations that a person has towards an organization are not reached, this may be seen as a "psychological contract breach" (Beaudin). So if the system loses faith in the citizens, the citizens may equally lose faith in the system (Schwitters and Vonk). In other words, when people generally tend to reciprocate expectations and to respond in just the same way as they are treated, there is reason to believe that, as a result of growing distrust in the public, public trust will dwindle as well (Westerman). Consequently, restoring public trust in lawmaking not only requires a strong commitment from the general public but also from lawmakers themselves.

e. Public trust requires both normative and empirical legitimacy

The final lesson drawn from this book is that public trust requires both "normative" and "empirical" legitimacy.[25] The "normative" aspect of legitimacy refers to the legal theoretical requirements for laws and policies to be legitimate in relation to the fundamental characteristics of democratic constitutional states: rule of law, human rights and democracy. "Empirical" legitimacy refers to the perception of the legitimacy of laws and policies by different actors: members of the public, politicians, legal professionals, etc.

Several authors in this book emphasize the importance of "normative" legitimacy to maintain or restore public trust. To maintain the credibility of the government, it is important to operate in accordance with the principles of legality,

[25] *See* S. Snacken, "Legitimacy of penal policies: punishment between normative and empirical legitimacy", in: A. Crawford & A. Hucklesby (eds.), *Legitimacy and compliance in criminal justice.* New York and London: Routledge 2013, p. 50-70.

transparency, legal certainty, inclusiveness and other central ideas of democracy and the rule of law (Hoogstra, Westerman, Jans and Outhuijse, Mendelts, Más). However, only a few authors analyse how the general public actually perceives the legitimacy of different laws and policies (Tollenaar, Zeegers, De Ridder). Although many authors simply *assume* that more "normative" legitimacy will automatically lead to more "empirical" legitimacy, most of them do not provide any empirical data to *support* this claim. As a result, many important questions still remain unanswered. For example, will an open and informed debate about the proposed alternatives for legislation really boost public trust in the option ultimately selected? (Winter and Klein Haarhuis) Are both the "Professional Treatment Model" and the "Moral Judgment Model" of administrative justice more likely to promote public trust in government than the "Bureaucratic Rationality Model"? (De Graaf and Marseille) To what extent is timely decision-making crucial for the credibility of government? (Hoogstra) Will principles-based legislation increase (Bröring and Cherednychenko) or decrease (Westerman) public trust? And will the "front-door" method of lawmaking lead to more public trust than the "back-door" method? (Jans and Outhuijse)

5. Conclusion: rethinking lawmaking and public trust

Confucius allegedly told his disciple Tzu-kung that three things are needed for government: weapons, food and trust. If a ruler can't hold on to all three, he should give up the weapons first and the food next. Trust should be safeguarded to the end: without trust there can be no government at all.[26] Public lawmaking and public trust are strongly interconnected in the classic model of the *Rechtsstaat*. However, the chapters in this book question two important assumptions of this model. First, this book illustrates the increasing role of the European Union, of the courts and of civil society in lawmaking. As a result, the national legislator is no longer the sole and central lawmaker. Second, this volume shows that public lawmaking does not always generate public trust. Both findings challenge us to rethink our conventional ideas about lawmaking and public trust.

We may use the lessons from this book to help us set up an agenda for future research. Future studies may benefit from a more *critical* perspective. What are some of the strengths and weaknesses of both traditional and modern forms of lawmaking? And why do both forms of lawmaking not automatically generate public trust? Moreover, researchers should work towards a *multidisciplinary* approach, which combines methods from both law and the social sciences. What are some of the most important developments in lawmaking on paper and in practice? And how will future lawmaking contribute to both the "normative" and the "empirical" legitimacy of public institutions?

---

26 *See* O. O'Neill, *A question of trust* (The BBC Reith Lectures 2002). Cambridge: Cambridge University Press 2002, p. 3.

Previously Published in the Governance & Recht Series

Volume 1	C.E.C. Jansen, S.A.J. Munneke, F.J. van Ommeren & J.W. Rutgers [Eds.], *Zorgplichten in publiek- en privaatrecht*, 2011
Volume 2	A.J.J. Kemps & T.J. van der Ploeg [Eds.], *De toekomst van het toezicht op fondsenwerving voor goede doelen in Nederland*, 2012
Volume 3	P.J. Huisman, *De bevoegdhedenovereenkomst*, 2012
Volume 4	A.P.H. Meijers, *De rechtspersoonlijkheid van geloofsgemeenschappen,* 2012
Volume 5	T.J. van der Ploeg, *Vrijheid, gelijkheid en redelijkheid*, 2013
Volume 6	O.O. Cherednychenko, C.E.C. Jansen, A.R. Neerhof & F.M.J. Verstijlen [Eds.], *Het publieke van het privaatrecht: hoe regulering van publieke belangen het privaatrecht beïnvloedt*, 2013
Volume 7	H. Bosselaar & G. Vonk [Eds.], *Bouwplaats lokale verzorgingsstaat. Wetenschappelijke reflecties op de decentralisaties in de sociale zekerheid en zorg*, 2013
Volume 8	S. Comtois & K.J. de Graaf [Eds.], *On Judicial and Quasi-Judicial Independence*, 2013
Volume 9	A.L.B. Colombi Ciacchi, M.A. Heldeweg, B.M.J. van der Meulen & A.R. Neerhof, *Law & Governance – Beyond The Public-Private Law Divide?*, 2013
Volume 10	A. McCann, A.E. van Rooij, A. Hallo de Wolf & A.R. Neerhof, *When Private Actors Contribute to Public Interests. A Law and Governance Perspective*, 2014
Volume 11	A. van Dijk & H. Wolswijk, *Criminal Liability for Serious Traffic Offences. Essays on Causing Death, Injury and Danger in Traffic*, 2014
Volume 12	A.M. Keppel, *De onverplichte tegemoetkoming: Een probleemverkenning vanuit democratisch-rechtsstatelijk perspectief*, 2015
Volume 13	M. Duchateau, S. Fikkers, L. Lane & E. van Schagen [Eds.], *Evolution in Dispute Resolution. From Adjucation to ADR?*, 2015
Volume 14	S. Comtois en K. de Graaf [Eds.], *On Lawmaking and Public Trust*, 2016

Over the last decades, the evolution of public law has been marked by a trend towards the diversification of sources and forms of law, processes and governance tools. In our globalized world, various factors – such as the increasing importance of European law, international law and fundamental rights, as well as the greater prevalence of social and economic concerns – have tended to justify the need to harmonize legal norms and practices and, thus, to open the borders of legal normativity. The increased interaction between legal systems and other sources of normativity that has followed has led to the coexistence of a diversity of normative authorities (ranging from civil society and the industry itself, to European and international organizations). It has also resulted in the emergence, within domestic law, of a broad range of norms grounded in different sources of legitimacy and with varying degrees of normative force, not merely constrained to the narrow formal definition of "legal norm".

This book explores ways in which public lawmaking is changing and examines the impact of such changes on the law itself, on the lawmaking processes, and on the role of decision-makers (judges, public administrators and stakeholders). It also questions the legitimacy of the new governance tools that have emerged from this transformation as well as their impact on the public's trust and confidence.

The series **Governance & Recht** is aimed at the general debate concerning governance in relation to law. The series provides a platform for contributions to this debate in the fields of positive law, comparative law, legal theory, philosophy of law, sociology of law, political science and public administration. This series is part of the book series published by the Netherlands Institute for Law and Governance (NILG).

The Netherlands Institute for Law and Governance (NILG) is a joint venture between the faculties of law at the VU University Amsterdam, the University of Groningen and other research institutions to improve research in the field of Law and Governance. The NILG's research theme is the interaction between the regulation of public and private interests in law and the way in which these interests are being regulated.

Suzanne Comtois is Full Professor (Professeur titulaire) at the Faculty of Law, Université de Sherbrooke, Québec, Canada and was visiting Professor at Groningen University Law School, Netherlands (2010-2014). **Kars de Graaf** is an Associate Professor and holds a chair in Public Law and Sustainability at the University of Groningen in the Netherlands.

ISBN 978-94-6236-684-8

9 789462 366848