



Reconceptualizing Empirical Legitimacy for Situations of Severely Conflicting Social Interests

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ARTICLE

ABSTRACT

In this contribution the argument is made that the current operationalization of empirical legitimacy falls short in cases of severely conflicting societal interests where alignment on moral values between conflict resolution authorities (policy makers, courts, controlling institutions) and subordinates is lacking. We attribute this shortcoming to two dominant features of the empirical concept of legitimacy and the research based on it: first, the overwhelming procedural character of the empirical legitimacy concept; second, the dominance of deductive, quantitative survey research. The argument is substantiated by the results of ethnographic fieldwork among unauthorized migrants that show that the existing approaches are important, but insufficient to explain the constitution of legitimacy perceptions of subordinates in this field. Feelings of justice are seriously violated because fundamental substantive needs are insufficiently taken into account according to these migrants, although this does not always mean that they feel badly treated in terms of the current empirical justice concept. In the discussion we reflect on the consequences of these insights for the conceptualization of empirical legitimacy and argue that these insights are not only important for our understanding of empirical legitimacy, but should also lead to a reflection on the (interpretation of the) normative frameworks on which decision-making in this field is built.

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Legitimacy literally means ‘lawful’, ‘appropriate’ or ‘just’.¹ It is considered a core concept in the legal domain since a legitimate approach helps to assess the ‘quality’ of the execution of power by powerholders. In addition, it may foster public acceptance and consequently contribute to the viability of institutions.² Furthermore, the concept is assumed to predict subordinates’ willingness to cooperate with powerholders.³ Despite the importance of legitimacy, there is no consensus on the meaning of the concept. There are myriad definitions and operationalizations of the concept that are being used within and across different academic research disciplines.⁴ In this contribution, we focus on empirical legitimacy which refers to the approval of authorities and laws by those who have to abide to it.⁵ This concept *subjectively* addresses people’s thoughts on the authorities’ right to hold power over them⁶ as well as people’s perceptions that those authorities act in ways that accord with prevailing notions of appropriate moral conduct.⁷ Empirical legitimacy is considered the opposite of normative legitimacy, which *objectively* addresses whether powers, policies and practices are legally permissible given the substantive criteria that specify how institutions ought to rule.⁸ This means that authorities meet ‘certain substantive requirements – say standards of justice and rationality expressed in a normative conception of legitimacy – irrespective of whether people believe that they are met or not’.⁹

Although empirical legitimacy and normative legitimacy are conceptually distinguished in current debates on legitimacy, it is generally acknowledged that both conceptualizations are equally important when evaluating the legitimacy of the execution of power.¹⁰ Both concepts can be brought back to Beetham’s work who, in response to Weber’s view that the acceptance of power is a sufficient condition for the legitimacy of it,¹¹ designed a conceptual framework for the analysis of legitimacy.¹² Beetham’s conceptualization is based on three conditions, that (1) subordinates offer their willing consent to defer to authority and that this consent is (2) grounded in the authority’s conformity to standards of lawfulness, and (3) a degree of moral alignment between powerholders and subordinates that is reflected in shared moral values.¹³ This scheme has become common sense for every legitimacy thinker, including empirical legitimacy scholars.¹⁴ However, in this contribution, we raise questions on the operationalization of Beetham’s third condition in current empirical legitimacy studies as we believe that this operationalisation falls short in cases of severely conflicting societal interests where moral alignment between authorities and subordinates cannot be taken for granted.

We attribute this shortcoming to two dominant characteristics of the conceptualization of empirical legitimacy in current research. The first characteristic concerns the overwhelming procedural conceptualization of Beetham’s third condition – moral alignment of subordinates and powerholders – of the empirical legitimacy concept. While Beetham writes that moral

1 J Tankebe and A Liebling, ‘Legitimacy and criminal justice: An introduction’ in J Tankebe and A Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013).

2 D Beetham, *The Legitimation of Power* (Red Globe Press London 1991).

3 TR Tyler, *Why People Obey the Law* (Princeton University Press 1990).

4 JV Roberts and MM Plesničar, ‘Sentencing, Legitimacy, and Public Opinion’ (2014) *Trust and Legitimacy in Criminal Justice* 33.

5 J Jackson and B Bradford, ‘Blurring the Distinction between Empirical and Normative Legitimacy? A Methodological Commentary on “Police Legitimacy and Citizen Cooperation in China”’ (2019) *14 Asian Journal of Criminology* 265.

6 Beetham, (n 2).

7 J Jackson, M Hough, B Bradford and J Kuha, ‘Empirical legitimacy as two connected psychological states’ in J Jackson, M Hough, B Bradford and J Kuha *Trust and Legitimacy in Criminal Justice* (Springer 2015) 137–160.

8 W Hinsch, ‘Justice, legitimacy, and constitutional rights’ (2010) *13(1) Critical Review of International Social and Political Philosophy* 39–54.

9 Hinsch (n 2).

10 Hinsch (n 2).

11 M Weber ‘Economy and society: An outline of interpretive sociology. Organized groups (an excerpt)’ (2017) *18(1) Journal of Economic Sociology* 13–27.

12 Beetham (n 2).

13 Beetham (n 2).

14 J Tankebe, ‘Public cooperation with the police in Ghana: Does procedural fairness matter?’ (2009) *47(4) Criminology* 1265–1293.

alignment refers to shared values of powerholders and subordinates¹⁵ and what ‘expectations people have about what government should and should not do’,¹⁶ the operationalization of the empirical legitimacy concept is currently dominated by the procedural justice school. Procedural justice scholars believe that subordinates will feel aligned with the moral values of powerholders in the case of adequately demonstrated fair procedures, which belief primarily follows from the work of Tom Tyler.¹⁷ Such fair procedures contain two main aspects, that is *quality of decision-making* and *quality of interpersonal treatment*.¹⁸ *Quality of decision-making* entails the extent to which subordinates are able to take part in the decision-making (voice), the perceived consistency of the decision-making and the absence of subjective preferences in the decision-making (neutrality). *Quality of interpersonal treatment* means that powerholders approach subordinates with dignity, courtesy and respect. Even though Beetham¹⁹ argued that socially expected standards in the exercise of power vary across time and space, the procedural justice findings are supposed to equally apply to men and women, regardless of their age, ethnicity or social class.²⁰ The procedural justice perspective has become very appealing to policy makers and politicians since it is accompanied by the conclusion that enhanced procedural justice may bring about greater compliance with the law and – in the context of criminal law – reduced rates of recidivism. Consequently, procedural justice has been extensively tested in legal decision-making contexts.²¹

Secondly, we believe that the current dominance of deductive, quantitative survey research in empirical legitimacy studies is unsuited to map legitimacy perspectives in situations of severely conflicting interests, which comes at the cost of the explanatory power of the concept. Empirical legitimacy has repeatedly been tested in quantitative survey studies.²² These studies constantly confirm the relevance of the previously mentioned procedural justice elements. However, these studies lack the – in our view necessary – inductive approach to detect additional elements that could play a role in the construction of these empirical legitimacy perceptions. As Beetham²³ himself argues: ‘the empirical study of legitimacy involves a discursive investigation of the grounds or criteria on which a claim to legitimacy is based’. This is also acknowledged by procedural justice researchers of the first hour who argue that, now the importance of legitimacy perceptions to shape behaviour has been sufficiently proven, it is time to broaden the concept.²⁴ Tyler and Jackson, for instance, argue that ‘the operationalization of legitimacy has been narrow, reflecting the limited manner in which legitimacy has been theoretically framed’.²⁵ Although they notice the difficulty that can arise in a multicultural society when moral values between powerholders and subordinates differ, they do not really elaborate on how these conflicting values should affect the empirical legitimacy construct. Jackson and Bradford²⁶ also stress that the current subscales of the empirical legitimacy concept should be

15 Beetham (n 2).

16 Beetham (n 2).

17 TR Tyler, ‘What is procedural justice?: Criteria used by citizens to assess the fairness of legal procedures’ (1988) 22(1) *Law and Society Review* 103.

18 J Sunshine and T Tyler ‘Moral solidarity, identification with the community, and the importance of procedural justice: The police as prototypical representatives of a group’s moral values’ (2003) 66(2) *Social Psychology Quarterly* 153.

19 Beetham (n 2).

20 DL Rothe ‘Book review: Tom Tyler (Ed.) *Legitimacy and Criminal Justice: International Perspectives*’ (2010) 20(4) *International Criminal Justice Review* 449–450.

21 L Ansems, *Procedural justice on trial: A critical test of perceived procedural justice from the perspective of criminal defendants* (Dissertation, Utrecht University 2021); K Beijersbergen and A Dirkzwager, ‘Procedural justice, anger, and prisoners’ misconduct: A longitudinal study’ (2015) 42(2) *Criminal Justice and Behavior* 196; L Hinds and K Murphy, ‘Public satisfaction with police: Using procedural justice to improve police legitimacy’ (2007) 40(1) *Australian and New Zealand Journal of Criminology* 27.

22 M Hough, J Jackson and B Bradford, ‘Legitimacy, trust, and compliance: An empirical test of procedural justice theory using the European Social Survey’ in J Tankebe and A Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 326–352.

23 D Beetham, ‘Revisiting legitimacy, Twenty Years on’ in J Tankebe and A Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 19–36.

24 Jackson and Bradford (n 5).

25 TR Tyler and J Jackson, ‘Future challenges in the study of legitimacy and criminal justice’ Survey’ in J Tankebe and A Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) 83–104.

26 Jackson and Bradford (n 5).

approached as possible sources of legitimacy and not as constituent components of it. They argue that researchers should not impose the preconditions of empirical legitimacy if they want to be sensitive to cultures that might have different values. Several scholars argue therefore for a more inductive approach in empirical legitimacy studies.²⁷

In this contribution, we draw upon ethnographic research among unauthorized migrants²⁸ in the Netherlands to illustrate the shortcomings of current operationalization of empirical legitimacy. We focus on the migration domain, given our expertise in this research field, but believe that our argument is valid in other situations of severely conflicting societal interests such as the debates on climate change and the COVID 19 pandemic as well. Previous research has shown conflicting and constantly changing opinions in the migration debate,²⁹ which implies that there are multiple audiences in this debate who hold different opinions and (are believed to) have different interests.³⁰ This makes it a suitable case study to substantiate our argument. After a note on the methods, we present our reasoning. While there is differentiation in the legitimacy perceptions of unauthorized migrants,³¹ most unauthorized migrants who participated in the study feel illegitimately treated because, in their view, fundamental values are insufficiently taken into account when immigration authorities use their powers, even in situations of perceived fair procedures and outcomes. Based on Beetham³² himself and Wilson, (elaborated on in the discussion),³³ we equate these fundamental values with the moral values that require alignment between powerholders and subordinates to bring about legitimacy according to Beetham's conceptualization. These values are currently not adequately included in quantitative empirical legitimacy studies with a strong focus on procedural justice. While such studies do include questions regarding whether authorities 'have the same sense of right and wrong' as research participants, these mainly focus on procedural aspects.³⁴ This means that the outcome of these studies might be that unauthorized migrants feel fairly treated, despite them considering the use of powers by the immigration authorities to be empirically illegitimate. As we illustrate in the discussion, this also has consequences for the normative legitimacy of the use of powers in the migration domain.

2. METHODS

In this contribution, we have used a bottom-up approach to understand how unauthorized migrants perceive the legitimacy of the use of power by immigration authorities which make decisions concerning them. We draw upon multi-sited ethnographic fieldwork with 105 unauthorized migrants that was conducted in the context of the second author's PhD study on these migrants' legal consciousness. This study – the methodology of which is elsewhere discussed in more detail³⁵ – aimed to get an in-depth understanding of how unauthorized migrants understand, experience and negotiate immigration laws, policies and practices in their everyday lives. The study included unauthorized migrants' thoughts on the legitimacy of the use of power by immigration authorities such as the Immigration and Naturalization Service (IND), the immigration police, the Repatriation and Departure Service, immigration detention officers and the Royal Netherlands Marechaussee. In order to get an in-depth understanding of the unauthorized migrants' legal consciousness, Kox followed 45 unauthorized migrants over

²⁷ D Harkin, 'Police legitimacy, ideology and qualitative methods: A critique of procedural justice theory' (2015) 15(5) *Criminology and Criminal Justice* 594–612.

²⁸ This term refers to all migrants without a legal status who are not allowed to reside within the territorial borders of the nation state concerned.

²⁹ R Meuleman, M Lubbers and G Kraaykamp, 'Opinions on migration in a European perspective: Trends and Differences' in J Boelhouwer, G Kraaykamp and I Stoop (eds), *Trust, Life, Satisfaction and Opinions on Immigration in 15 European Countries* (The Hague: The Netherlands Institute for Social Research 2016) 32–55.

³⁰ A Bottoms and J Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2013) *Journal of Criminal Law and Criminology* <<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=7419&context=jclc>> accessed 13 February 2023.

³¹ This argument is further discussed in the dissertation of the second author, which is expected to be published in 2023.

³² Beetham (n 2).

³³ JQ Wilson, 'The moral sense' (1993) 87(1) *American Political Science Review* 1–11.

³⁴ Hough, Jackson and Bradford (n 22).

³⁵ The dissertation is expected to be published in 2023.

time and additionally interviewed, extendedly informally spoke to and/or observed another 60 unauthorized migrants between March 2015 and May 2018. In all interactions in the field, unauthorized migrants could (among other things) discuss their thoughts on the (legitimacy of the) use of power by Dutch immigration authorities. They were explicitly asked what was needed for a legitimate use of power in the migration domain and why this was needed. As this was a rather complex question for some of the research participants, they were also invited to discuss their ideas on the execution of powers by immigration authorities if they were the Prime Minister of the Netherlands and what should be taken into account in order to bring about empirical legitimacy in this domain. The interviews with the unauthorized migrants were literally transcribed and all informal conversations and observations were reported in extensive field notes.

The data were analysed using Atlas.ti (qualitative data-analysis software). In contrast with the dominant approach in empirical legitimacy studies,³⁶ this study was characterized by an exploratory, inductive approach. The preconditions of empirical legitimacy were used as a sensitizing concept, meaning that the conditions that are known from empirical legitimacy studies functioned as a starting point for data collection and analysis.³⁷ In addition, possible other criteria that shaped unauthorized migrants' empirical legitimacy perceptions were inductively explored. This means that all information that research participants brought to the fore when they discussed the perceived legitimacy of the use of power by Dutch immigration authorities, as well as their ideas on what was needed to bring about justice in the migration domain, was inductively coded. It was observed that unauthorized migrants believed that several elements were currently lacking in the migration domain which came at the cost of its empirical legitimacy. As such, the study moved beyond the narrow operationalization of empirical legitimacy in order to be able to contribute to the current understanding and operationalization of empirical legitimacy. This has resulted in an overview of substantive needs that should be included in the execution of powers in the migration domain to bring about empirical legitimacy, as well as more insight into the importance of procedures in cases of severely conflicting interests.

3. UNAUTHORIZED MIGRANTS' SUBSTANTIVE NEEDS

Unauthorized migrants have rather differing thoughts on the empirical legitimacy of the use of powers in the migration domain. While some of the research participants believe that the current use of powers by the immigration authorities is or can be legitimate, the majority points at its illegitimacy. The perceived illegitimacy is not the direct result of a procedural unjust treatment as assumed in many studies in which procedural justice is considered to be the strongest predictor of empirical legitimacy.³⁸ On the contrary, research participants argue that important fundamental values are inadequately incorporated in existing immigration policies and practices which, in their view, comes at the cost of its empirical legitimacy. They bring several substantive criteria to the fore that are needed to bring about empirical legitimacy. These needs can be directly derived from the moral or fundamental values that we distinguished in the introduction as one of the three conditions of Beetham's conceptualization of legitimacy. While research participants point at many values,³⁹ we have selected three to illustrate that such needs are currently not covered in the dominant quantitative procedural approach in empirical legitimacy studies, while these do have an important influence on people's perceptions of the legitimacy of powerholders' actions.⁴⁰

3.1. SECURITY GUARANTEES

Security guarantees is one of these substantive justice criteria that unauthorized migrants bring to the fore. Research participants consider it important that Dutch immigration authorities respect their security when they use their powers over migrants. The Dutch authorities have ratified the United Nations Refugee Convention 1951 as well as the European Convention

³⁶ Jackson and Bradford (n 5).

³⁷ H Blumer 'Symbolic Interactionism. Perspective and Method' [1969] University of California Press <https://www.academia.edu/8302803/1969_Blumer_Symbolic> accessed 13 February 2023.

³⁸ Hough, Jackson and Bradford (n 22).

³⁹ These are more extensively discussed in a chapter in the dissertation of CC which is expected to be published in 2023.

⁴⁰ Rothe (n 20).

on Human Rights. This means that it is part of Dutch immigration laws and policies to grant asylum and offer protection to those who have real reasons to fear persecution, death, torture or other inhuman treatment, and victimization of random violence due to an armed conflict in their home country. Additionally, Dutch immigration laws and policies offer the possibility of granting a residence permit to migrants if admission is required by (other) international obligations, is beneficial to Dutch society or required for pressing humanitarian reasons.⁴¹ Given the principle of non-refoulement that is laid down in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), Dutch immigration authorities are not allowed to deport unauthorized migrants to countries where they would face torture, cruel, inhuman or degrading treatment or punishment and other irreparable harm. This implies that security guarantees are incorporated in Dutch immigration laws and should be respected by the immigration authorities.⁴²

However, research participants argue that the Dutch authorities' view on security – or who is in danger – is too limited and does no justice to those who need protection, which echoes recent findings of Amnesty International that asylum seekers are too often given 'the disadvantage of the doubt' when the IND assesses the credibility of the asylum seekers' claims.⁴³ The IND itself argues that officers are confronted with complex, painful casefiles and do not always experience that justice and a human approach are important on an everyday basis.⁴⁴ Research participants, especially rejected asylum seekers, believe that the current Dutch system provides too few opportunities for those in need of protection to obtain a residence permit – in contrast to the Dutch authorities' view that their migration policies are strict though fair. The migrants refer to their own position as well as that of other people. While discussing the fairness of the Dutch admission policies and what is needed for a fair use of powers by the immigration authorities, Hiba, a Turkish woman who is about to return to her home country, explains: 'I want the Dutch authorities to give them asylum. If you have real security problems, you don't get asylum'. Bah, an African man whose asylum claims have all been rejected, argues that the Dutch authorities currently 'forget the human beings' by using a too limited definition of security: 'Justice is ehm... I don't know much about justice, but justice is you try to find out where the truth is. And when you find out where the truth is, then you have to go on with the truth, not to deny it'. However, currently, the Dutch authorities do not help people in need according to some of these research participants. As security is considered a pillar of international refugee protection, these participants – and especially rejected asylum seekers – believe that universal human rights are inadequately reflected in the current use of power by the Dutch immigration authorities. This negatively impacts on unauthorized migrants' thoughts on the empirical legitimate execution of powers by the IND and other immigration authorities.

A substantial number of research participants argue that security guarantees – or at least respect for their security – is needed to bring about a fair or just use of powers by the immigration authorities. This also comes to the fore in the story of Christian, an African youngster whose asylum claim was being rejected while he believes that his life is at risk upon return to his home country:

Justice? What it should be like? Justice should be like ehm... Yeah. Once people are really, really in problems, you for sure should look on the situations in the countries of the eh people and eh... (...) People are dying from that. People are dying there every day, every day. And then you want to send someone there. So what will happen? That is what the Netherlands doesn't realize.

Christian considers Dutch immigration practices a 'crime against humanity'. In line with other research participants, he believes that the Dutch IND should include security guarantees in their admission and return decisions which, in his view, is not currently adequately achieved in

⁴¹ Par. 13 Aliens Act 2000.

⁴² See B Aarrass, *Mensenrechten en migratierecht. Mensenrechtennormen als grond voor toelating en verblijf* (Boom Juridisch 2021) for a more extensive overview of Dutch immigration laws and policies.

⁴³ Amnesty International, *Bewijsnood. Wanneer nationaliteit en identiteit ongelooftwaardig worden Bevonden* (Amsterdam: Amnesty International, 2020).

⁴⁴ IND, *De stand van de uitvoering* (The Hague: Immigratie en Naturalisatie Dienst, 2022).

the Netherlands. These research participants use a broader definition of security that includes the general situation in the asylum seekers' home country as well as individual elements that may threaten their lives. 'It's illogical law or breaking the law' not to include such elements according to Daniel who, after several rejections of his asylum claims, received a residence permit after all. We believe that this comes at the cost of the moral alignment between Dutch immigration authorities and unauthorized migrants, while the execution of power can only be legitimate to the extent that the rules may, in the words of Beetham,⁴⁵ be 'justified in terms of beliefs shared by dominant and subordinate'.

3.2. THE BEST INTERESTS OF THE CHILD

Research participants also argue that the interests of the child are not adequately included in the migration domain, which undermines the perceived legitimacy of the execution of powers by immigration authorities. The Dutch authorities have ratified the United Nations Convention on the Rights of the Child. This Convention applies to all children within the jurisdiction of the state, including unauthorized children. Article 3 (1) of this Convention provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. In line with this Convention, unauthorized migrants who participated in our research believe that the exercise of power by immigration authorities should consider the best interests of the child. However, as with the case of the perceived lack of security guarantees by immigration authorities, research participants argue that the best interests of the child are not or not adequately incorporated in practice when immigration authorities exercise their powers despite it being laid down in immigration laws and policies.

Research participants bring several examples to the fore in which immigration laws prevail over the best interests of the child. Among other examples, they share stories that are related to Dutch admission policies which allow children to be taken away from one of their parents. Migrants who were deported to Nigeria and Surinam, for instance, discussed that they were separated from their children and not allowed to return to the Netherlands as they did not meet Dutch admission criteria. This also applies to a Nigerian, Azibo, who was deported while his son was still in the Netherlands. He Face Times with his son on a weekly basis. Every time, his son asks him when his father will come to the Netherlands again. While the father would like nothing more than to be reunited with his son, he is not allowed to return to the Netherlands as his wife does not meet the income requirements for family reunification.⁴⁶ Consequently, his son has to grow up without his father being around. Regina, a Surinamese woman who has been deported and is not allowed to visit her daughter in the Netherlands, believes that her daughter 'will never forget that'. Furthermore, research participants point at the living conditions for unauthorized children in the Netherlands. Dutch authorities are no longer allowed to send children to live on the streets given a legal ruling of 2011. Consequently, Dutch authorities have arranged freedom-restricted family locations, aimed at removal, for children and their parents who are not authorized to be in the Netherlands. The living conditions at these locations have repeatedly been criticized for not being in the best interests of the child and for causing anxiety among children.⁴⁷ This also applies to the conditions in immigration detention centres for minors which also cause anxiety and stress among children there.⁴⁸ This, among other things, makes Kromhout, Kloppenburg and Van Doorn⁴⁹ believe that Dutch immigration authorities are not fulfilling their legal obligations towards unauthorized minors.⁵⁰

⁴⁵ D Beetham, *The Legitimation of Power* (Red Globe Press London 1991) 243–250.

⁴⁶ The Dutch authorities have introduced a wide range of pre-admission requirements in order to stimulate migrants to apply for admission while still being in their home country. Due to these new admission rules, migrants have to meet extra requirements in terms of visa restrictions, study and work contracts, proof of relationships, income requirements, civic integration tests and financial fees in order to be allowed to travel to the Netherlands and legally reside here (cf. Bonjour, 2010; Van Eijl, 2012).

⁴⁷ M Kromhout, R Kloppenburg and L van Doorn, 'Kinderen Buiten Beeld. De Leefsituatie Van Ongedocumenteerde Kinderen in Nederland' (2015) 24(1) *Journal of Social Intervention: Theory and Practice* 4.

⁴⁸ M Kox, M Boone and R Staring, 'The pains of being unauthorized in the Netherlands' (2020) 22(4) *Punishment and Society* 534–552.

⁴⁹ Kromhout, Kloppenburg and Doorn (n 44).

⁵⁰ IL Radl, M Klaassen, S Rap, P Rodrigues and T Liefwaard (eds.) 'Safeguarding children's rights in immigration law' (2020) *European Yearbook on Human Rights* 639–642.

Research participants say that the best interests of the child should be considered first and foremost when immigration authorities exercise their powers, otherwise there cannot be justice. They do not understand why children are treated in this unfair way in the Netherlands, especially as the best interests of the child are laid down in Dutch immigration laws and policies. Several research participants believe that the lack of respect for the best interests of the child harms the empirical legitimacy of the use of powers by Dutch immigration authorities. Rachel, a Surinamese woman whose children hold Dutch citizenship while she is not authorized to be in the Netherlands, is a case in point. She explains that her Dutch children are staying with her in a freedom-restricted family location aimed at her removal from the Netherlands, only because she is not allowed to remain in the Netherlands. Rachel believes that this hampers the opportunities of her children in terms of schooling, social life and safety which is not in their best interests:

I cannot understand that this happens in the Netherlands. I believe, whatever I think of the Netherlands, I believe that a child should be central. But that's not the case. If a child is central... Do you know how many Dutch children... How many Dutch children and their parents are victims [of Dutch immigration laws] here? You know? They really should look at it, because a child cannot be central in their policies if they are acting like this. The Netherlands should first... (...) Look, my child is here, because of me. Because I don't have a residence permit, because I don't have a personal service number. Because of that, my child doesn't receive child benefits, she cannot enjoy the Netherlands, I don't get that....

Research participants experience that the best interests of the child are subordinate to immigration laws. Liefwaard,⁵¹ too, believes that 'the focus of migration control often lies heavily on safety and security, often at the cost of adequate human rights protection and the best interests of the child serving as a primary consideration for governments, policy makers and judiciaries'. While he refers to normative legitimacy, our study shows that the dominance of immigration laws over the best interests of the child comes at the cost of its empirical legitimacy as well. Research participants consider that the use of powers by Dutch immigration authorities is unfair and unjustified because the best interests of children are not put first and foremost when these authorities use their powers.

3.3. THE RIGHT TO LIBERTY

A third value that research participants urgently bring to the fore is their right to liberty as they may only be deprived of their liberty on the basis of international legal standards. Unauthorized migrants refer here to the authorities' use of immigration detention, that is an administrative measure to ensure that migrants cannot abscond while preparations for deportation are being made.⁵² Although most research participants acknowledge the legitimacy of immigration detention as such, they argue that it is now used by the Dutch authorities in an inhuman, inappropriate and ineffective way which does not align with international legal standards. Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, for instance, states that everyone has the right to liberty and security and that this right may only be withdrawn in accordance with a procedure prescribed by law if it is, among other things, needed to prevent unauthorized entry into a country or if action is being taken with a view to deportation.⁵³ Additionally, international human rights standards such as the EU Returns Directive,⁵⁴ European soft law measures as well as court rulings of the European Court for Human Rights state that immigration detention is a last resort. It means that immigration detention may only be used with the utmost reluctance if needed to achieve the unauthorized migrants' deportation and it should be used for a limited amount of time. In addition, unauthorized migrants may not be held under prison-like conditions. The detention conditions should fit the purpose of detention and entail a minimum of restrictions.

⁵¹ Radl et al (n 47).

⁵² G Cornelisse, 'Immigration detention and human rights' [2010] <<https://doi.org/10.1163/ej.9789004173705.j-384>>.

⁵³ Guide to Article 5 of the European Convention on Human Rights. (n.d.). Retrieved 13 February 2023, from <https://echr.coe.int/documents/guide_art_5_eng.pdf>.

⁵⁴ Directive 2008/115/EC of 16 December 2008 of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L348/24.

Additionally, the UN Working Group on Arbitrary Detention has stated in its position document based on international law, as well as its own jurisprudence, that:

The irregular entry and stay in a country by migrants should not be treated as a criminal offence, and the criminalization of irregular migration will therefore always exceed the legitimate interests of States in protecting their territories and regulating irregular migration flows. Migrants must not be qualified or treated as criminals, or viewed only from the perspective of national or public security and/or health.⁵⁵ The Dutch authorities have ratified these instruments and implemented them in their national immigration laws.

However, research participants argue that Dutch immigration authorities do not respect their right to liberty given the current use of immigration detention. They provide several examples to illustrate that, in their view, the organization of immigration detention in the Netherlands does not align with the human right standards discussed above. Their point of view is supported by a wide range of academics, NGOs and advisory committees, all of whom have criticized Dutch immigration detention policies in recent years.⁵⁶ First, they point at the frequent use of immigration detention in the Netherlands. While the number of immigration detainees decreased during the period of the fieldwork,⁵⁷ research participants believe, in line with NGOs and academics, that Dutch immigration authorities too often and too easily make use of immigration detention where alternatives are available. This is considered inhuman and inappropriate as the unauthorized migrants have not committed a crime and detention does have an injurious character. Second, unauthorized migrants believe that the detention conditions are not suitable for unauthorized migrants and are not in accordance with what is required on the basis of international human rights standards. This also comes to the fore in an interview with Christian (previously mentioned). He has been detained in immigration detention many times. While discussing the fairness of the Dutch immigration system, he declared:

It is like a prison, it is the same as a prison because doors are closed and only temporarily open. It is the same like in a prison, because it is closed and open. You cannot go outside, you can not even... (...) There is no difference with jail there, it is jail only, you know. ? (...) It is a crime against human, against humanity. It is a violation, that's it. But some people here, they don't know.

Several research participants argue that if the immigration authorities want to make use of immigration detention, they should carry out the measure in such a way that it suits the reason for the unauthorized migrants' deprivation of liberty. Third, research participants consider the use of immigration detention useless or ineffective, and coming at the cost of fairness. While the effectiveness of immigration detention in the Netherlands has increased over the years, almost half of the immigration detainees were released in the Netherlands without being granted residency rights.⁵⁸ They are provided with a train ticket to the place of their apprehension and ordered to leave the country within 24 hours, something that is not realistic for most of them. This means that they are offered no solution but that they continue their unauthorized residence in the Netherlands.

⁵⁵ Working Group on Arbitrary Detention 'Revised Deliberation No. 5 on deprivation of liberty of migrants' [2008], <https://www.ohchr.org/sites/default/files/Documents/Issues/Detention/RevisedDeliberation_AdvanceEditedVersion.pdf> accessed 22 June 2022.

⁵⁶ e.g. Amnesty International, *Het recht op vrijheid. Vreemdelingendetentie: het ultimatum-beginsel* (Amsterdam: Amnesty International, 2018); Amnesty International, *Geen cellen en handboeien! Het beginsel van minimale beperkingen in het regime vreemdelingendetentie* (Amsterdam: Amnesty International, 2018b); G. Cornelisse, *Immigration Detention and Human Rights: Rethinking Territorial Sovereignty* (Leiden and Boston, M Nijhoff 2010); De Nationale Ombudsman, *grenzen aan vreemdelingenbewaring. Een onderzoek naar de uitvoering van vreemdelingenbewaring*, 2020); A Leerkes and M Kox, 'Pressured into a preference to leave? A study on the "specific" deterrent effects and perceived legitimacy of immigration detention' *Law and Society Review* 2017, nr. 4, 895.

⁵⁷ 'Universiteit Leiden onderzoekt 'Interpretatie en Implementatie van de Terugkeerrichtlijn' [n.d.], <https://www.njb.nl/nieuws/universiteit-leiden-onderzoekt-interpretatie-en-implementatie-van-de-terugkeerrichtlijn/> accessed 13 February 2023.

⁵⁸ This number refers to immigration detainees without a 'Dublin claim', meaning that they are not deported to another European country which is responsible for their legalization trajectory. Ministerie van Justitie en Veiligheid 'Advies 'Samen Werken Aan Terugkeer' [2022], <https://www.adviesraadmigratie.nl/publicaties/publicaties/2021/04/22/advies-samen-werken-aan-terugkeer> accessed 13 February 2023.

The lack of a solution in the authorities' use of power is considered a form of injustice by the research participants, especially as they are excluded from most social services, possibly subjected to migration controls and confronted with several forms of deprivation that are hard to cope with.⁵⁹ They feel stuck in the Netherlands where they are not allowed to reside, while they believe they cannot return to their home country or another country.⁶⁰ This applies in particular to elderly unauthorized migrants with lengthy unauthorized residence.⁶¹ They believe that the Dutch authorities should offer a solution and should not leave them in limbo as this causes injustice. Research participants believe that Dutch immigration authorities should protect and respect their right to liberty, otherwise the use of powers by these authorities is not fair. This aligns with the ideas of Rodrigues who argues that the authorities are responsible for all unauthorized migrants whom they cannot actually deport to their home country.⁶² Research participants explain that the protection of and respect for their liberty entails that they are treated as human beings and provided with some solutions. A labour migrant from the Philippines is a case in point. While he understands that the Netherlands sets rules to regulate migration and that not everyone is allowed to reside in the Netherlands, he considers the current Dutch approach to be unjustified: 'I think it is injustice you know to catch them [unauthorized migrants] and then they do just like they are criminal. I think that is not human, you know. Because they also have human rights to live'.

The respondents' ideas are reinforced if Dutch immigration authorities apply their powers in vain, as such application does not result in legalization or deportation in their particular situation. This aligns with the ideas of Beetham who argues that authorities should be able to 'satisfy the ends which justify its enormous concentration of powers'.⁶³ According to a substantial number of research participants, this is currently not the situation in the Netherlands, given the ongoing infringement in their everyday lives by the immigration authorities which do not offer them a solution.

4. DISCUSSION

We started this contribution with a reference to Beetham's influential work in which he distinguished three conditions for a legitimate use of power by powerholders, that is consent, legality and moral alignment between powerholders and subordinates. We have raised the question whether the third element – moral alignment between powerholders and subordinates – has been sufficiently incorporated in current empirical legitimacy studies given the strong focus on procedural elements. While these studies do include questions on whether authorities 'have the same sense of right and wrong'⁶⁴ as their research subjects, it seems that researchers in this field take the fulfilment of this element as a given, without feeling the need to explicitly operationalize or test it. Tankebe, for example, refers to Wilson's rise of universalism to state that all modern democratic societies are characterized by a universalistic ideology of human equality and takes this idea for granted in the subscales of the empirical legitimacy construction.⁶⁵ Although he sees that the universalist ideal is sometimes poorly fulfilled for certain groups in society, this does not fundamentally affect this common legitimacy framework. Tyler and Jackson do point at the difficulties that can arise when powerholders and subordinates do not share the same moral values but, in line with Tankebe, do not really elaborate on this possible conflict and hardly include it in their quantitative approach.⁶⁶ We believe that this comes at the cost of the explanatory power of current empirical legitimacy study.

59 M Kox and R Staring, "'I call it a system.'" Unauthorized migrants' understandings of the long reach of Dutch internal migration controls' (2021) 10(3) *International Journal for Crime, Justice and Social Democracy* 87–100.

60 Kox, Boone and Staring (n 45). and

61 R Staring, N Boesveldt and M Kox "'Vechten met het Leven": Een kwalitatief onderzoek onder ongedocumenteerde oudere migranten in Nederland' [2022] *Boom criminologie*, https://pure.uva.nl/ws/files/75349975/vechten_met_het_leven_binnenwerk_definitief_0.pdf accessed 13 February 2023.

62 P Rodrigues, 'Zorgen voor Uitgeprocedeerde Vreemdelingen' [2016] Universiteit Leiden, <https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/immigratierecht/thorbeckelezing-2016.pdf> accessed 13 February 2023.

63 J Tankebe, 'Viewing things differently: The dimensions of public perceptions of police legitimacy' (2012) 51(1) *Criminology* 103–135.

64 Tankebe (n 58).

65 JQ Wilson, 'The moral sense' (1993) *American Political Science Review* (2012) 87(1) 1–11.

66 TR Tyler and J Jackson, 'Future challenges in the study of legitimacy and criminal justice' Survey' in J Tankebe and A Liebling (eds), *Legitimacy and Criminal Justice: An International Exploration* (Oxford University Press 2013) and 83–104.

We have substantiated this claim on the basis of ethnographic fieldwork by Kox among unauthorized migrants. The data show that it is precisely this lack of moral alignment between powerholders and subordinates that can prevent feelings of a legitimate use of power by Dutch immigration authorities towards many of the unauthorized migrants who participated in this study. While we believe that there is congruence between powerholders and unauthorized migrants on the importance of certain values, these values are – in the view of our research participants – very poorly or inadequately implemented in immigration laws, policies and practices. This hampers a legitimate use of powers by the immigration authorities in the eyes of unauthorized migrants. Our bottom-up approach shows that powerholders and subordinates have different views on how these values should be interpreted and what moral obligations follow from them. While Dutch immigration authorities have implemented security guarantees, the best interests of the child and the unauthorized migrants' right to liberty in national immigration laws and policies, research participants argue that these are not adequately implemented in practice. According to the migrants, immigration authorities do not take these values into account when they use their powers towards unauthorized migrants, meaning that these migrants feel adversely affected in their sense of justice. Procedural politeness cannot compensate for the perceived negligence of fundamental values in the authorities' use of powers.

One can seriously wonder whether our findings add something new to the already existing approaches in legitimacy research. While procedural elements are most commonly used to operationalize moral alignment in empirical legitimacy studies, there are also studies which include other elements in their operationalization of empirical legitimacy, that is perceived lawfulness, fair outcomes and effectiveness of the use of powers.⁶⁷ We have wondered whether these elements would help us to understand the unauthorized migrants' experiences. For instance, the different valuation of the extent to which security guarantees are included in decision-making about admission and return, may also be explained by a different interpretation of the international and national immigration laws and therefore by perceived lawfulness as a subscale of empirical legitimacy. It could also be concluded from these findings that our research participants simply prioritize outcome justice over procedural justice, because the (desired) result of giving more weight to their need for security will usually be that they receive permission to stay in the Netherlands. Contrary to the general idea that procedural justice dominates empirical legitimacy judgements in a study on perceptions of police legitimacy in Ghana, Tankebe found effectiveness to be more important in shaping cooperative behaviour than procedural justice which he explained through the history of violence and abuse by the police in colonial and post-colonial periods.⁶⁸

Despite these already existing additions and nuances in the empirical justice debate, we think the added value of our work is threefold. First, it has repeatedly been questioned whether the concept of empirical legitimacy – and its strong focus on procedural justice – fits the current globalized and polarized world.⁶⁹ Liebling and Tankebe, for example, state that, despite the great insights which the procedural justice literature has brought with regard to people's normative expectations about power, there is a need to develop a broader theorization.⁷⁰ Empirical legitimacy criteria – and the importance of these criteria – could differ between and within societies and depend on the way in which power is organized.⁷¹ This aligns with the ideas of Fraser who points at the importance of redistribution, recognition *and* representation moving beyond the territorial borders of the state to bring about justice in society.⁷² In this contribution, we aim to contribute to this broader theorization, by bringing to the fore unauthorized migrants' substantive expectations on the execution of power of a group of subordinates that normally stays under the surface, but can be regarded as the weaker party in the social and political conflictual domain that is migration. While unauthorized migrants are directly confronted by immigration laws, policies and practices, their voices are hardly ever included in the debate on its legitimacy.

⁶⁷ Hough, Jackson and Bradford (n 22).

⁶⁸ Tankebe (n 14).

⁶⁹ Tankebe and Liebling (n 1).

⁷⁰ *ibid.*

⁷¹ Bottoms and Tankebe (n 29). and

⁷² N Fraser, 'Reframing Justice in a globalizing world' 2005 *New Left Review* 36, <https://newleftreview.org/issues/ii36/articles/nancy-fraser-reframing-justice-in-a-globalizing-world> accessed 13 February 2023.

Second, while it is often assumed that empirical legitimacy and procedural justice findings seem to hold for minorities as well (see the Introduction), we doubt whether quantitative surveys adequately access hidden groups in society which might hold different ideas and perceptions on empirical legitimacy. While we understand that quantitative scholars test for and correct missing groups in their data sets, we wonder whether the group central to this contribution is sufficiently represented in these surveys, or whether a group of sufficient size could be encouraged to participate in this type of research if one wanted to conduct a separate survey on their perceptions. After all, they are a hidden group in society and may not speak the destination country's language, which complicates reaching out to such a group to fill out a survey. Since the expertise of both authors is not in quantitative research, we seriously wonder whether it is possible to include such hidden groups as unauthorized migrants and others in a quantitative research design.

Third, we think our findings should also have consequences for the normative legitimacy claims that are made by powerholders in the migration domain. As we have tried to illustrate in the empirical part of this paper, moral alignments between powerholders and subordinates with regard to important fundamental values such as security guarantees, the best interests of the child and the right of liberty, are not or not adequately respected in the eyes of the subordinates. Although the Universalist ideal, as expressed by Wilson, should protect nationals and non-nationals equally against infringements of rights that follow from these moral values, it is not experienced as such by our research participants.⁷³ Despite this, decisions made against them with regard to topics discussed in the empirical part of this contribution are supported by the highest political institutions and courts. For Bosworth, this is reason enough to step out of the existing legitimacy discourse in an attempt to understand the functioning of immigration detention centres.⁷⁴ She argues that the concept of legitimacy 'with its intellectual roots in liberal communitarian societies' is simply not useful as a tool to either understand or critique the legitimacy of immigration detention centres. Following Beetham, she reasons that these legitimacy judgements need 'congruence between a given system of power and the beliefs, values, and expectations of the subordinates' and in her eyes this congruence is missing in mobile, unbounded institutions such as immigration detention centres.⁷⁵ Although she admits that a simple rejection of these institutions from a legitimate perspective would be a more obvious response to her observations of the daily routine in these institutions, she would not know 'what legitimacy claims she should make given the transitional and no man's land character of these institutions of which the residents don't seem to be fellows of a single political community'. Although we can go along with the inability that Bosworth feels when she compares the situation of unauthorized migrants to the existing frameworks of legitimacy, as academics we do not settle for that. Qualitative and quantitative researchers should jointly try to further refine these frameworks, so that the minority views of hidden groups in society about conflicting social interests can be better brought to light. In time this will hopefully also lead to a different interpretation of the normative frameworks of legitimacy, which still breathe a promise of universalism but for the time being mainly seem to protect the interests of the dominant majority.

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COMPETING INTERESTS

The authors have no competing interests to declare.

⁷³ Wilson(n 60).

⁷⁴ Bottoms and J Tankebe (n 29). and

⁷⁵ M Bosworth, 'Can Immigration Detention Centres be Legitimate? Understanding Confinement in a Global World' in K Franko Aas and M Bosworth (eds), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford University Press 2013) 149–165.

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