

Empirical Legal Studies in the Netherlands

Towards a Jurisprudence
of Consequences?

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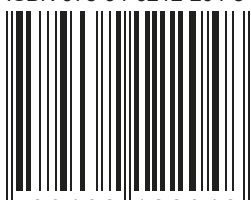
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Marc Hertogh
Paulien de Winter

This volume showcases a collection of Empirical Legal Studies (ELS) that were conducted at five universities in the Netherlands as part of the Law Sector Plan in the period between 2019 and 2025.

The contributions to this volume use both quantitative and qualitative research methods to study the effects of court decisions and legislation in various fields of law, including civil law, criminal law, administrative law and EU law. Based on these contributions, this volume examines how ELS research can help us to understand the limits and possibilities of a new 'jurisprudence of consequences'. In other words, how does ELS research help us to understand the social effects of law? And how does ELS research help us to understand how judges, legislators and other legal practitioners may (or may not) use empirical findings in legal decision-making?

This volume provides a valuable overview of innovative empirical legal research and will be of interest to academics, practitioners and students who are interested in the real-world effects of the law.

ISBN 978-94-6212-204-8



9 789462 122048 > www.boom.nl/juridisch

Empirical Legal Studies in the Netherlands

EMPIRICAL LEGAL STUDIES IN THE NETHERLANDS

Towards a Jurisprudence of Consequences?

MARC HERTOGH
PAULIEN DE WINTER (EDS.)

Boom

Cover design and typesetting: Textcetera, The Hague

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ISBN 978-94-6212-204-8

NUR 820

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INTRODUCTION: TOWARDS A JURISPRUDENCE OF CONSEQUENCES

Marc Hertogh and Paulien de Winter

Does anybody know, when we have a case..., where we can go to find light on what the practical consequences of these decisions have been? ... I don't know to what extent these things can be ascertained. I do know that ... they ought not to be left to the blind guessing of myself and others only a little less uninformed than I am. (Frankfurter, cited in Miller, 1965, p. 374)

THE NEGLECT OF THE LEGAL AFTERMATH

The judge hits the gavel, the parties shake hands with their lawyers and the doors of the courtroom are closed. The court case is over, but what happens next? Has the conflict been resolved? Is the court ruling fully complied with? And what are the broader social and economic effects of the case? The honest, and somewhat astonishing, answer to these questions is: we do not know. Scholars have studied the start of legal disputes (see, e.g., Felstiner et al., 1981) and, for example, the level of perceived procedural justice during a court case (see, e.g., Thibaut & Walker, 1978; Tyler, 1988), but the effects of court decisions often remain a black box. This “neglect of the legal aftermath” (see Von Benda-Beckmann, 1987, p. 27) applies not only to ‘small’ everyday cases about consumer problems or landlord issues, but also to the social, political and economic aftermath of landmark climate cases like the Urgenda-ruling of the Dutch Supreme Court¹ and the Swiss Grannies decision of the European Court of Human Rights.² Not knowing the true impact of judicial decisions is frustrating not only for the parties involved and for legal scholars studying these cases but (as the words of US Supreme Court Justice Felix Frankfurter at the top of this chapter illustrate) sometimes also for judges themselves. Moreover, the neglect of the legal aftermath applies not only to court decisions but also to many laws and regulations. Despite numerous implementation, evaluation and compliance studies (see, e.g., Sager et

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1. Rechtbank Den Haag 24 juni 2015, ECLI:NL:RBDHA:2015:7145, AB 2015/336, noot C.W. Backes (Klimaatzaak Urgenda).
 2. EHRM 9 April 2024, 53600/20, ECLI:CE:ECHR:2024:0409JUD005360020 (*Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*).

al., 2024; Van Rooij & Sokol, 2021), many questions about the social, economic or administrative effects of new legislation still remain unanswered.

This ambiguity about the legal aftermath is, of course, not a new problem. Over half a century ago, Arthur S. Miller (1965) signalled the same issue in a seminal paper. According to Miller, this knowledge gap calls for the development of a new ‘jurisprudence of consequences’. In his view, this means that both scholars and legal practitioners should pay more attention to the consequences of laws and court decisions. Although in more recent years the level of scholarly attention to the social effects of law has substantially increased, this has not yet amounted to the radical breakthrough in legal thinking that Miller was advocating. As a result, the project aimed at developing a new ‘jurisprudence’ has more or less come to a halt. At the same time, however, a new type of legal research has emerged under the heading of ‘Empirical Legal Studies’ (ELS). Over the past few years, ELS research has quickly become more popular in law schools, both in the United States and in Europe (see, e.g., Kritzer, 2021; Van Boom et al., 2018). Moreover, it is no exaggeration to say that “the Netherlands is at the vanguard of this development” (Mascini, 2025, p. 1). Many of these studies are doing exactly what Miller was arguing for. ELS scholars study the effects of court decisions and other legal actions, using research methods from law and other disciplines like sociology, economics and political science.

Considering this rapidly growing new body of literature, this volume will use ELS research to revisit (and possibly revive) the idea of a ‘jurisprudence of consequences’. More specifically, this volume will consider the following two questions:

- How does ELS research help us to understand the social effects of law?
- How does ELS research help us to understand how judges, legislators and other legal practitioners may (or may not) use empirical findings in legal decision-making?

To answer these questions, this volume will present a collection of empirical legal studies from the Netherlands that were all conducted as part of the Law Sector Plan in the period 2019 to 2025. The Law Sector Plan³ is a research programme funded by the Dutch government to facilitate innovative legal research through inter-university collaboration. As part of this programme, five universities in the Netherlands – Leiden University, Erasmus University Rotterdam, Groningen University, Utrecht University and Vrije Universiteit Amsterdam – have committed themselves to further developing and advancing ELS research in the Netherlands. The aim of this volume is to showcase this new

3. <https://www.sectorplanrechtsgелеerdheid.nl>.

research. The contributions to this volume use both quantitative and qualitative research methods to study the effects of court decisions and legislation in various fields of law, including civil law, criminal law, administrative law and EU law. Based on these contributions, this volume examines how ELS research can help us to understand the limits and possibilities of a 'jurisprudence of consequences'.

In the remainder of this introduction, we will first revisit Miller's concept of a 'jurisprudence of consequences' (Section 2). In addition, we will further introduce the field of empirical legal research and discuss several parallels with Miller's project (Section 3). Next, we will present the contributions to this volume, which will be organised into two sections. The first section looks at the effects of law (court decisions and legislation) in the real world. The second section looks at how judges, legislators and other legal practitioners may use empirical findings in legal decision-making (Section 4). In the conclusion, we will identify several common threads in the contributions and discuss some suggestions for future research (Section 5).

2 JURISPRUDENCE OF CONSEQUENCES

In 1965, Arthur S. Miller published his article 'On the Need for "Impact Analysis" of Supreme Court Decisions'. In it, Miller argues that court actions should be judged not only in legal dogmatic but also in societal terms. Or, as he puts it, "constitutional law degenerates into theology and barren exegeses upon the sacred text of the Constitution unless and until it is tested by its consequences" (Miller, 1965, p. 393). Therefore, the purpose of his article is "to suggest *one* added dimension which should be considered in an evaluation of judicial decisions, namely, "impact analysis" of the societal effects of Supreme Court decisions" (Miller, 1965, p. 367; emphasis in original). According to Miller (1965, p. 368), more "systematic and comprehensive attention [for] the social impact of Court decisions" requires the introduction of a completely new approach to legal research and legal practice, which he calls a 'jurisprudence of consequences'.

In his view, this new approach has two facets: first, "an evaluation by commentators of the effect of judicial decisions"; and, second, "an appreciation by judges of the consequences of their decisions" (Miller, 1965, p. 368). Yet Miller also points to some of the difficulties of this undertaking. With regard to the first element, he reflects on the fact that most lawyers may not have the skills to analyse the impact of court decisions and therefore that

lawyers will have to be privy to the insights of such disciplines as economics and sociology and political science if they are to be able to comment meaningfully upon Court decisions. (Miller, 1965, p. 368)

Second, he also emphasises that “[f]or judges to weigh the consequences of [their decisions] is a far more difficult job than to apply rules or principles in given cases” (Miller, 1965, p. 373). He then concludes:

It will not be an easy task, for it calls for a level of competence and expertise on the part of both judge and commentator that is rare indeed. But it is necessary. (Miller, 1965, p. 401)

Since the publication of Miller’s article, there has been a strong surge in the output of ‘judicial impact studies’, focusing mostly on the US Supreme Court (see, e.g., Canon & Johnson, 1998; Hall, 2017; Rosenberg, 1991; Wasby, 1970). Yet, despite the increased attention to the impact of court decisions, these studies have not yet resulted in a full-fledged ‘jurisprudence of consequences’. With regard to the first aspect of this new jurisprudence (an evaluation by commentators of the effect of judicial decisions), judicial impact studies have reached somewhat of an impasse. As one observer notes,

[f]or decades, research on judicial impact has supported two seemingly contradictory propositions. Courts are persistently viewed as weak institutions that lack implementation tools and powerful political actors that influence numerous social outcomes.

In his view, these contradictory outcomes illustrate the “schizophrenic state of the impact literature” (Hall, 2017, p. 461). With regard to the second aspect of Miller’s idea of a new jurisprudence (an appreciation by judges of the consequences of their decisions), most studies have emphasised the limitations of courts using empirical data. Rather than studying everyday legal practice, these studies often focus on the (philosophical and methodological) difficulties of bridging the fact-value gap (see, e.g., Hume et al., 1995; Lawless et al., 2010; Taekema & Van Klink, 2011). Consequently, “[a]fter many years and hundreds of impact investigations, neither of Miller’s hopes have been completely realized” (Brown & Crowley, 1979, p. 55).

3 EMPIRICAL LEGAL STUDIES

While in recent years judicial impact studies may have been less productive, a new field of legal research has quickly become more popular. Since the first decade of the 21st century, we have seen the emergence and rapid development of Empirical Legal Studies (ELS) (see, e.g., Heise, 2011; Kritzer, 2021). This ELS movement started in the United States but has also spread to Europe and many other parts of the world. As a result, “[e]mpirical legal scholarship is arguably the next big thing in legal intellectual thought” (George, 2006, p. 141). In short, empirical legal research is “a new way of looking at law” (Van den Bos, 2020, p. 3), which can be

defined as “the systematic collection of data based on observing what is going on in the legal world” (Van den Bos, 2020, p. 6).

ELS research has two important goals that strongly overlap with Miller’s original plan for a ‘jurisprudence of consequences’. First, ELS research aims to study “the effects of the law in the real world” (Bijleveld, 2023, p. 8). Second, the findings of ELS research “must be of relevance to lawyers or legal practice” (Bijleveld, 2023, p. 5), and ELS scholars should also consider the “implications for law, legal norms and the legal system” (Bijleveld, 2023, p. 12). For example,

ELS findings may advise judges about the general properties of cases such as the current case, trends in the interpretation of legal norms, or on the effectiveness in general of measures such as may be chosen from. (Bijleveld, 2023, p. 10)

Considering these interesting parallels between both bodies of literature, this volume will use ELS research to revisit the idea of a ‘jurisprudence of consequences’. In this volume, we will broaden Miller’s original project in two ways. We will first consider not only the effects of court decisions but also the social consequences of legislation. We will then not only look at judges, but also at how the legislature and other public officials may use empirical findings in legal practice.

4 OVERVIEW OF THE CONTRIBUTIONS TO THIS VOLUME

The contributions to this volume are organised into two sections. The first section looks at the effects of law (court decisions and legislation) in the real world. The second section looks at how judges, legislators and other legal practitioners may use empirical findings in legal decision-making. All chapters have a similar structure, first outlining the central research question and the empirical research methods, before discussing the key findings and the conclusion.

4.1 *Effects of Law in the Real World*

Chapters 2 and 3 focus on the effects of court decisions and legislation in the field of civil law.

In Chapter 2, ‘A jurisprudence of consequences as impact assessment in light of legal principles: evaluating the “Deliveroo judgement”’, **Anja Eleveld and Erik Wesselius** critically assess the extent to which the Dutch Supreme Court’s Deliveroo ruling provides clarity in classifying work relations of platform workers as either employment or self-employment. Drawing on oral diaries and qualitative interviews, the authors explore the lived experiences and working conditions of platform workers employed by hotels and restaurants in roles such

as waiters, hosts and cooks. They highlight issues such as stress, lack of control over working hours and limited professional autonomy. Based on these empirical findings, Eleveld and Wesselius argue that the court decision offers insufficient clarity regarding the employment status of platform workers. Furthermore, when evaluated against the internal values of labour law, they conclude that the Supreme Court ultimately fails to uphold important societal goals, which are reflected in the two fundamental principles of Dutch labour law.

In Chapter 3, 'Noise in open norms: an underestimated risk to legal certainty and equality', **Jessie Pool, Niek Strohmaier, Jan Adriaanse and Marc Broekema** study the impact of open norms on legal uncertainty and inequality in the context of bankruptcy cases. Using empirical insights from behavioural sciences, the authors introduce the concept of 'noise', which they define as the unwanted variability in decision-making. Next, they use a survey among members and fellows of INSOLAD (Dutch association of insolvency lawyers) to analyse the magnitude of noise among bankruptcy trustees, when they try to balance societal interests with the interests of the bankrupt company's joint creditors. Their study shows that when the legislature provides little guidance, the interpretation and application of a norm can vary significantly. Based on these findings, the authors make several recommendations to reduce the level of noise in new legislation.

The next two chapters (Chapters 4 and 5) examine the effects of court rulings and legislation in criminal law.

In Chapter 4, 'Comparing behavioural and legal perspectives: an empirical-legal analysis of cases of addiction, accountability and prior fault', **Michiel van der Wolf and Anna Goldberg** discuss the social and legal effects of the landmark ruling of the Dutch Supreme Court in the *Thijs H.* case. In this case, the court has formulated new criteria for insanity. The authors study how these criteria relate to the assessment framework used in cases of addiction and prior fault. Moreover, they are interested in how well behavioural and legal practitioners remain within their disciplinary boundaries (and thus 'stay in their lanes'). To analyse this, Van der Wolf and Goldberg have conducted a structured case law analysis and an empirical analysis of behavioural expert reports. Their chapter shows that the current legal approach to prior fault does not match behavioural findings related to mental disorder and addiction or the recent case law on non-accountability from the *Thijs H.* case.

In Chapter 5, 'Investigating and prosecuting criminal activity committed outside the EU: the ability of EPPO to act and the MS of forum', **Andrew Zuidema** examines the effects of the EPPO Regulation. The European Public Prosecutor's Office (EPPO) is an independent body of the EU. It has the competence to

investigate and prosecute PIF offences (financial crimes against the Union). However, the Union did not create a new criminal legal system but requires the EPPO to use national criminal law systems. This means that the EPPO is required to determine the member state in which the EPPO will investigate and prosecute: MS of forum. Based on interviews with experts, the author investigates how EPPO officials interpret the rather vague legal terms of the Regulation whenever it wishes to handle a case. The findings show that, in general terms, their understanding of how to implement the Regulations is similar to the interpretation by most legal scholars. However, while legal scholars have wondered whether there will be issues that can arise with EPPO being unable to determine an MS of forum based on the Regulation, the EPPO does not consider this an important obstacle.

Chapters 6 to 10 focus on the effects of administrative law.

In Chapter 6, 'Fit for the purpose? The use of administrative law against organised crime', **Albertjan Tollenaar and Benny van der Vorm** examine the effectiveness of administrative law in fighting organised crime. More specifically, they study the implementation of the Dutch Integrity Screening Act (Wet Bibob). Based on an empirical analysis of primary and secondary data on the use of this act, the chapter shows that this legislation is not as effective in combatting organised crime as the legislature expected. Administrative authorities struggle to apply the act effectively for want of capacity and expertise. The authors argue that the most important explanation for this shortcoming is the absence of a uniform and supportive network that actively assists authorities in implementing the act.

In Chapter 7, 'The consequences of administrative decisions in regulating markets with public interests: the effects of open norms in administrative law', **Marin Coerts** examines the effects of open legal norms in legislation on the way in which administrative bodies use their discretionary power to impose obligations on private parties in regulated markets. Coerts focuses on three specific areas: telecommunications law, public transport law and electricity law. Based on semi-structured interviews with representatives of government organisations and licence and concession holders, the chapter demonstrates that administrative bodies use their discretionary power to further specify the content of conditions and impose additional obligations through subordinate regulation and individual licence and concession conditions, aiming to serve specific public interests. Considering these findings, the author identifies specific focus areas for administrative bodies when imposing obligations on private parties and discusses how the empirical insights can inform legislative decision-making by identifying whether additional statutory guidance is needed to clarify the scope of administrative discretion when imposing obligations.

In Chapter 8, 'Individual needs and family obligations: consequences of household means testing in German and Dutch social assistance', **Barbara Brink and Mira Holzmann** discuss the legal and social consequences of the ways in which social assistance schemes in the Netherlands and Germany define 'the household'. Drawing on insights from family law and an empirical analysis of legal texts and policy documents, they explore the role of various household definitions in calculating entitlement and benefit levels for individuals seeking support. Their chapter shows that the so-called 'household means test' in social assistance schemes reflects and reinforces normative ideas about family, care and mutual support and caring responsibilities. However, the present legal framework does not capture the complexity of contemporary household structures and dynamics.

In Chapter 9, 'Access to justice or excessive litigation? No-cure-no-pay representation in administrative disputes', **Marc Weber, Heinrich Winter and Bert Marseille** discuss the inherent tension between the promotion of access to justice and the prevention of excessive litigation because of 'no cure, no pay' (NCNP) systems. While NCNP arrangements provide essential legal support to individuals who might otherwise be unable to afford representation, or in situations where the stakes are relatively low, such as in property tax disputes, they have also led to significant increases in administrative and procedural costs. To analyse the legal and social consequences of this system, the authors have combined a literature review and a case law analysis with several semi-structured interviews with practitioners. Based on their findings, they propose a different perspective on the role of 'no cure no pay' firms in administrative litigation. Rather than restricting their operations, courts and legislators should also explore ways to increase transparency in administrative decision-making and enable citizens to challenge administrative decisions that impact their rights and interests.

In Chapter 10, 'Limit cases: sovereign citizens and a jurisprudence of consequences', **Luuk de Boer** looks at a broad societal effect of law and court decisions: the emergence of sovereign citizens in the Netherlands. Sovereign citizens reject the legal system in its entirety. In practice, sovereign citizen-case activity occurs predominantly to avoid having to pay (income) tax, fines, insurance premiums or other payment obligations; to attack or obstruct government and institutional officials (often by challenging the judge); or to avoid prosecution in criminal cases. In the Netherlands, the number of court cases against sovereign citizens has sharply increased, especially since 2020. Based on an empirical analysis of these cases, the author traces the socio-economic background of sovereign citizens. Also, using insights from similar studies in Germany and the United States, the chapter discusses several hypotheses for future research.

Chapter 11 discusses the legal and economic effects of EU law.

In Chapter 11, 'Making microgrids work: an empirical-legal study of their transaction costs under EU Law', **Jamie Behrendt** examines how EU legislation affects the development and operation of decentralised electricity systems known as 'microgrids'. In a microgrid system users can produce and consume their own electricity, often from renewable sources. Using surveys and interviews with microgrid developers and operators, the author shows that despite their potential, existing EU regulation does not address microgrids, leaving system developers and users in a state of uncertainty. Some respondents face legal prohibitions, such as a ban on operating as an islanded system or on owning a private network. The chapter suggests that there is a mismatch between regulatory structures and the practical needs of microgrid stakeholders, which results in high transaction costs, in particular search and information costs. The author concludes that in order to ensure that microgrids can contribute effectively to the energy transition, EU regulation needs to be altered to minimise legal uncertainty and complexity.

4.2 *Use of Empirical Research in Legal Decision-Making*

Chapters 12 to 14 examine how judges, legislators and other legal practitioners may use empirical findings in legal decision-making.

In Chapter 12, 'Disease or decision? How different views towards addiction can affect legal responsibility', **Anna Goldberg** looks at the effects of different views on addiction on legal decision-making. To analyse the consequences of a 'brain disease perspective' versus a 'choice perspective', the author has used a vignette study among more than 100 active public prosecutors in the Netherlands. The study shows that accountability for the offence was judged significantly lower when participants were presented with a disease perspective on addiction. Based on these findings, the author concludes that societal perspectives on addiction (such as perceptions of choice or disease) have a strong effect on legal decision-making, and vice versa.

In Chapter 13, 'Instrumentalising effectiveness and empirical legal scholarship in human rights legal interpretation', **Jordan Dez** examines the role of effectiveness in human rights interpretation. She argues that, although the principle of effectiveness holds a powerful interpretative position with human rights legal analysis, the question of whether effectiveness is essentially an empirical one is not often discussed. Focusing on the protection of rights to political freedom, she shows how empirical legal research on how people 'use' rights is relevant for the analysis of effectiveness of judicial human rights interpretation. The author explores three moments in the process of treaty interpretation from the Vienna Convention on the Law of Treaties and shows how empirical data can inform the application of the principle of effectiveness in those instances.

In Chapter 14, 'Public participation laws in action: Empirical insights from the energy transitions in the Netherlands and Nigeria', **Lorenzo Squintani, Edwin Alblas, Otelemate Dokubo and Maria Radulescu** look at public officials' perspectives on public participation processes related to energy transitions. The authors are interested in the way in which these officials make use of social scientific studies on the effectiveness of public participation. Based on semi-structured interviews with public officials, the chapter shows that public officials' perceptions on public participation generally align with the empirical insights from social sciences and with regulatory and policy frameworks in the Netherlands and Nigeria. In both countries, public officials recognise the relevance of empirical insights and have shown the willingness to implement them, despite specific regulatory or policy requirements on the subject matter. Moreover, officials highlighted the positive and negative experiences with integrating empirical insights into participatory practices and frameworks.

5 CONCLUSION

As Oliver Wendel Holmes famously wrote,

For the rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics. (Holmes, 1897, p. 469)

This volume shows "that future is here" (Epstein & Martin, 2014, p. viii). All the contributions to this volume clearly illustrate the added value of empirical research for the study of law. There are three common threads in these chapters.

First, and contrary to Holmes' early prediction, not only is empirical legal research based on 'statistics' and 'economics', but the chapters in this volume use a wide variety of research methods to study the effects of law in the real world. These include both quantitative and qualitative approaches. Moreover, these include traditional research methods, like document analysis, surveys and semi-structured interviews but also innovative methods like the use of oral diaries to record people's personal experiences with the law, a vignette study among legal professionals, and the analysis of court cases to map the socio-economic characteristics of defendants.

Second, the contributions to this volume demonstrate that 'legal impact' is a much more complicated term than it first appears to be. In reality, it is more like an umbrella term which may include many different types of acts and decisions (see, e.g. Griffiths, 2003; Wasby, 1970). While some contributions focus on the 'direct' effects of court decisions and legislation (or the level of legal compliance), other studies also discuss the 'indirect' effects of law. Similarly, some contributions

focus on the ‘intended’ effects of court decisions or regulations, while other contributions also look at some of the ‘unintended’ consequences of law. Finally, several contributions to this volume not only record what law does but also what it fails to do.

Third, the contributions to this volume show the added value of empirical legal research for legal decision-making. Empirical studies provide valuable information about three important (and interconnected) subjects:

the assumptions about the real world on which laws are built, the operations in the real world of the legal system, and the effects of the law in the real world. (Bijleveld, 2023, p. 8)

A number of chapters demonstrate how this research can be applied in legal practice and may contribute to an appreciation by judges and lawmakers of the consequences of their decisions.

Although Miller (1965) introduced his idea of a ‘jurisprudence of consequences’ over half a century ago, his project is more relevant than ever. Since the publication of Miller’s article in the 1960s, an ongoing process of ‘juridification’ has become an important feature of modern society, and the number of laws and court decisions has increased dramatically (see, e.g., Blichner & Molander, 2008). As a result, both scholars and legal practitioners can no longer afford to ignore the legal aftermath. The chapters in this volume show that contemporary empirical legal studies can make an important contribution to a ‘jurisprudence of consequences’. On the other hand, this volume also illustrates some of the challenges of this endeavour. These include methodological and conceptual obstacles, such as the lack of appropriate data, the lack of clarity of major concepts and the lack of longitudinal studies to track the lasting effects of law (see Brown & Crowley, 1979). Moreover, it has been argued that most empirical legal studies are not well grounded in theory and that, therefore, their findings do not accumulate (Twining, 2009). Hence, it is important that future empirical research is grounded in a well-developed analytical framework based on, for example, theories from sociology of law, social psychology or public administration (Van den Bos, 2020, p. 130). To conclude, this volume highlights both the potential and the challenges of a much-needed revival of a ‘jurisprudence of consequences’. Or, to reiterate Miller’s (1965, p. 401) own words: “It will not be an easy task.... But it is necessary.”

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A JURISPRUDENCE OF CONSEQUENCES AS IMPACT ASSESSMENT IN LIGHT OF LEGAL PRINCIPLES: EVALUATING THE ‘DELIVEROO JUDGMENT’

Anja Eleveld and Erik Wesselijs

How should a ‘jurisprudence of consequences’, as introduced by Miller (1965), be structured, and why is it significant in legal scholarship? These are some of the questions we seek to address in this contribution on the classification of platform workers in the Netherlands. Miller (1965) defines a ‘jurisprudence of consequences’ as an approach that examines the outcomes of judicial decisions and evaluates them based on how effectively they advance societal goals (p. 368). While he acknowledges that this idea is not entirely novel – having been implicitly referenced by Jeremy Bentham and central to the legal realism movement (pp. 400-401) – his interpretation emphasises that judges must not only anticipate the future by managing its trajectory (p. 365) but also reflect on the past to determine “what the law is” (p. 373).

Expanding on Miller’s concept within a civil law context, we argue that a ‘jurisprudence of consequences’ should assess the potential impact of a judgment on a specific group of people in light of the legal principles and values it upholds. This approach not only enhances the law’s effectiveness but also respects its normative function. To illustrate this, we investigate, first, the extent to which the Dutch Supreme Court’s Deliveroo decision provides clarity in classifying work relations (of platform workers) as either employment or self-employment.¹ Based on these findings, we then evaluate whether and how the Deliveroo decision aligns with the societal goals reflected in labour law’s internal values or fundamental labour: the efficient regulation of the labour market and employee protection (Cabrelli & Zahn, 2018; Davidov, 2016; Zekic, 2019).

For Miller, judges should consider the possible consequences of their rulings *before* making a decision. However, this study takes a different approach. We

1. Supreme Court 24 March 2024, ECLI:NL:HR:2023:443.

conducted a qualitative *ex-post evaluation* of the Dutch Supreme Court's decision, analysing its real-world implications and assessing whether the anticipated effects align with the values and principles underpinning labour law. Nonetheless, based on the findings we will also reflect on the possible impact of a recent legislative proposal on the clarification of the assessment of employment relationships and legal presumption.²

To assess the impact of the *Deliveroo* ruling, we apply the Court's criteria for determining employment status to solo self-employed hospitality workers – such as waiters, hosts and cooks – who find work through the platform Temper in hotels and restaurants (hereafter Temper workers). Temper workers, registered on the platform, can respond to job offers via the Temper app, typically for single shifts at restaurants and hotels (the hirers). The hirers select the self-employed worker they wish to engage and pay them directly or through the Temper platform on completion of their shift.

Using Temper workers as a case study, this research explores two questions:

1. What are the potential effects of the *Deliveroo* decision on the classification of the work relationship between Temper workers and the hotels, restaurants or catering services they serve?
2. How do these effects align with societal goals reflected in the fundamental principles of labour law?

Our qualitative empirical-legal analysis concludes that the *Deliveroo* judgment provides insufficient clarity on the employment status of Temper workers and ultimately falls short in upholding labour law's fundamental principles. Moreover, our findings suggest that the proposed legislative reforms offer a more effective framework for safeguarding these principles. It is thus highlighted how (qualitative) empirical-legal research that explicitly engages with normative issues can not only enhance judicial decision-making but also inform and guide legislative reforms.

In addition to further developing and applying Miller's concept of a 'jurisprudence of consequences', this study explores the value of solicited oral diaries as a research method for assessing the impact of law in relation to its underlying principles. To our knowledge, this method has not been applied in empirical-legal research and remains underutilised in qualitative studies on workers' experiences, with only a few notable exceptions (e.g. Crozier & Cassell, 2016; Gebhard & Wimmer, 2023). In this regard, the study aims to contribute to the still-limited body of qualitative empirical-legal research on platform work (Dubal, 2019; Zeng & Eleveld, 2024).

2. Wet VBAR (Wet Verduidelijking Beoordeling Arbeidsrelaties en Rechtsvermoeden (Documenten bij Wijk Boek 7 BW ivm maatregelen verduidelijken onderscheid werknemers en zzp'ers en rechtsvermoeden | Overheid.nl | Wetgevingskalender).

This chapter is structured as follows: Section 2 outlines our analytical framework, and Section 3 presents our data and research methodology. We then discuss our findings in relation to the two research questions in Sections 4 and 5. Finally, Section 6 summarises and discusses our findings and highlights their implications for future legal developments in work classification.

2 ANALYTICAL FRAMEWORK

Under Dutch labour law, judges often consider the broader consequences of their rulings for the affected parties. For example, when an employee is lawfully dismissed, the judge may factor in the dismissal's impact when determining severance pay. In individual cases, such assessments typically do not require empirical research, as a worker's financial situation can be directly evaluated. However, when a ruling has significant implications for a broader group of workers, a more systematic impact assessment may be necessary – an approach consistent with the 'jurisprudence of consequences'. The *Deliveroo* ruling on the classification of workers as either employees or self-employed exemplifies such a decision, extending beyond the specific case at hand. This is particularly relevant given the sharp rise in solo self-employment in the Netherlands, where the number of solo self-employed individuals grew from 630,000 in 2003 to 1.2 million in 2022 – an increase from 8% to 12% of the total workforce (CBS, 2024; see also Conen & Schippers, 2019).

Miller's concept of a 'jurisprudence of consequences', which evaluates legal decisions in light of their societal impact, bears similarities to the broader movement of Empirical Legal Research in the Netherlands (Bijleveld et al., 2020). In the (critical) literature this type of evaluative research – often referred to as 'legal policy research' – has been criticised for primarily serving to legitimise governmental objectives (Bell, 2016; Sarat & Silbey, 1998). Miller, however, emphasises that a 'jurisprudence of consequences' is not solely forward-looking in that it evaluates the expected effects of the law; it also requires that judicial decisions align with existing legal principles. In a civil law context, we interpret this retrospective aspect as ensuring that legal consequences remain consistent with the fundamental principles underpinning the law.

In our impact assessment of the *Deliveroo* decision, this dual perspective – looking forward and looking backward – guides our evaluation. We assess whether the expected consequences of the ruling align with the societal goals reflected in labour law's internal values. This approach distinguishes empirical legal research from traditional policy evaluation, as it grounds the analysis in legal principles rather than external policy objectives (see further Eleveld, 2024).

This study proposes a two-step framework for interpreting a 'jurisprudence of consequences':

Step I – Empirical analysis: examining the actual or potential consequences of a legal decision (Section 2.1).

Step II – Normative assessment: evaluating these consequences against the societal goals reflected in the fundamental principles of labour law (Section 2.2).

2.1 *Step I: The Impact of the Deliveroo Decision on the Classification of Platform Workers in the Hospitality Sector*

Under Dutch law, workers are classified either as employees or as self-employed workers, with no intermediate category. In the Deliveroo decision the Dutch Supreme Court interpreted the definition of the employment contract stipulated in Article 7:610 of the Dutch Civil Code:

An employment contract is an agreement whereby one party, the employee, commits to performing *work* for the benefit of another party, the employer, for a *certain period of time*, under *the authority of the employer*, and in exchange for *remuneration*. (italics are added by the authors)

This definition allows for interpretation, especially regarding whether a worker operates under an employer’s authority. In the Deliveroo decision the Dutch Supreme Court, for the first time, formulated a (non-exhaustive) list of key considerations determining whether a work relationship qualifies as an employment contract while additionally emphasising that the final determination of the employment relation depends on all circumstances of the case.³ The Court’s key considerations are summarised in Table 1.

Table 1 Criteria from the Delivery Judgment

1. The nature and duration of the work;
2. The manner in which the work and working hours are determined;
3. The integration of the work and the person performing the work within the organisation and operations of the entity for which the work is performed;
4. The existence or absence of an obligation to perform the work personally;
5. The manner in which the contractual arrangement governing the relationship between the parties came into being;
6. The way the remuneration is determined and paid;
7. The amount of the remuneration;
8. The question of whether the person performing the work bears commercial risk in doing so;
9. Also relevant may be the question of whether the person performing the work behaves or can behave as an entrepreneur in the economic sphere, for example, in acquiring a reputation, engaging in acquisition, with regard to tax treatment, and considering the number of clients for whom they work or have worked and the duration for which they typically commit to a particular client;

3. Supreme Court 24 March 2024, ECLI:NL:HR:2023:443, para. 3.2.5.

10. The weight given to a contractual provision in determining whether an agreement qualifies as an employment contract also depends on the extent to which that provision has actual significance for the person performing the work.

For this research, we focus particularly on the considerations that define the concept of 'working under the authority of the employer'. Traditionally, a key indicator of authority has been the direct material supervision of the worker (e.g. consideration 2). However, as even genuinely self-employed workers may receive some instructions from clients, this factor alone has not been considered decisive in classifying employment relationships. In addition, the definition of 'working under the authority of the employer' needs further explanation in the context of platform work (Kocher, 2022). In recent years, organisational control and regulation has become more significant in assessing the degree of control exercised by the employer (Houweling, 2023). This criterion has been further elaborated in the Deliveroo decision in which the Court, following the Advocate-General's (A-G) recommendations, introduced two additional key considerations for assessing whether a worker is under the authority of an employer:

- Integration within the organisation (consideration 3): The extent to which the work and worker are embedded in the organisation's structure and operations. Greater integration suggests an employment relationship.
- Entrepreneurial behaviour (consideration 9): Whether the worker operates with business autonomy, also outside of the specific contractual relationship. This would indicate self-employment.

As these considerations play a central role in the A-G's advice on the Deliveroo decision – albeit phrased differently⁴ (see also Houweling, 2023) – this study examines them using the more traditional approach of assessing whether a worker operates under the control of another person, specifically through direct material supervision (consideration 2).

2.2 *Step II: Evaluating the Deliveroo Decision against Societal Goals in Labour Law*

The Advocate-General's opinion on the Deliveroo decision,⁵ as well as her opinion on the earlier *Amsterdam v. X* ruling,⁶ emphasises several societal goals related to the correct classification of workers. These include maintaining legal institutions built around the employment contract, fostering social cohesion and solidarity among workers, ensuring adequate social security and employment protection for

4. A-G De Bock, 17 June 2022, ECLI:NL:PHR:2022:578.

5. Ibid.

6. A-G De Bock, 17 July 2020, ECLI:NL:PHR:2020:698.

all employees and promoting equal opportunities for secure employment.⁷ These societal goals are reflected in the two core principles of labour law, as identified in theoretical labour law literature (Cabrelli & Zahn, 2018; Davidov, 2016; Zekic, 2019):

1. Protection of the dependent worker: safeguarding employees from the power imbalance inherent in employer-employee relationships.
2. Efficient labour market regulation: ensuring a stable, well-regulated labour market that supports economic productivity.

The relationship between societal goals and labour law principles can be explained as follows: protection under labour law safeguards dependent workers from unjust dismissal and grants them access to permanent employment contracts. Additionally, being covered by labour law ensures access to solidarity-based social security insurance. In both respects, the principle of protection of the dependent worker fosters the social goals of solidarity and social cohesion while preventing the emergence of a marginalised class of precarious workers. Furthermore, the social goal of securing legal institutions built around employment contracts contributes to the efficient regulation of the labour market – the second fundamental principle of labour law.

Both fundamental principles of labour law reinforce one another. Employment protection, including access to social security, enhances market stability, which is crucial for effective labour market regulation. At the same time, distinguishing between employees and self-employed workers remains justified, as entrepreneurial activity drives innovation and job creation (Verhulp, 2021). However, tensions arise when efficiency is prioritised over worker protection. This occurs when employers are allowed to hire unprotected, low-paid solo self-employed workers to respond efficiently to fluctuations in the market and reduce administrative burdens for businesses (Zekic, 2019).

In sum, this study applies a ‘jurisprudence of consequences’ approach to assess the impact of the Deliveroo decision on platform worker classification in the hospitality sector. By combining empirical research with normative evaluation, we aim to determine whether the ruling effectively advances the societal goals reflected in the fundamental principles of Dutch labour law.

3 DATA AND METHODOLOGY

The data for this research comprises semi-structured interviews with 30 solo self-employed platform workers in the hospitality sector, along with eight oral diaries maintained by eight of these workers who participated in follow-up interviews. Additionally, we organised a focus group with three solo self-employed platform

7. Ibid., paras. 3.16-3.19; A-G de Bock, 17 June 2022, ECLI:NL:PHR:2022:578, para. 8.20.

workers in the hospitality sector and conducted eight semi-structured interviews with managers in the hospitality sector.

The platform workers interviewed in our study were all recruited through the platform Temper. The interviews were carried out between September 2023 and August 2024. We recruited respondents by distributing flyers in bars, restaurants and hotels in the Amsterdam area, as well as by advertising through mailing lists of the Stichting Vrij Platform Werk. We also employed a snowball sampling method, allowing initial respondents to refer additional candidates.

Most of the solo self-employed workers interviewed were engaged through the platform Temper. Their roles varied widely, including those of bartender, kitchen chef, waitress, host, receptionist, barista, breakfast runner, catering staff and cleaning personnel. A minority had previously worked through Temper but were, at the time of the interviews, directly hired by their employers as self-employed workers. Almost all respondents were based in the Randstad region of the Netherlands. To focus on those primarily dependent on solo self-employment for their income, we excluded students from the sample. Ultimately, eighteen respondents were entirely dependent on this income, eight were partially dependent, and four considered it a significant supplementary income. In most cases, respondents worked for a minimum of 12 hours per week in the hospitality sector.

Our sample achieved a balanced gender distribution, comprising 50% male and 50% female respondents. In terms of age, we ensured an even representation between 21 and 65 years. Over half of the respondents were from the Netherlands, while the rest were migrant workers, over a quarter of whom were from non-EU countries and less than a quarter from EU countries.

All interviews were conducted in person at the Vrije Universiteit Amsterdam and lasted approximately 2 hours, for which each respondent received a gift voucher. Our interview guide covered five key themes: 1) motivations for working via platforms, 2) instructions on the work floor, 3) collaboration with colleagues, 4) labour conditions and 5) work-life balance.

In October 2024 the outcomes of the interviews were discussed and reflected on in a focus group consisting of three Temper workers we had previously interviewed.

In addition to the interviews, eight respondents maintained oral diaries for 6 to 12 weeks, providing one to three recordings of approximately 10 to 15 minutes each week. We chose to use oral diaries in conjunction with semi-structured interviews in view of several limitations of the latter method. While semi-structured interviews allow respondents to share their perspectives, they also enable the intentional construction of narratives. In the context of platform work, for example, interviewed workers often frame their experiences through the lens of entrepreneurship – a narrative actively promoted by the platforms themselves. This portrayal of workers as autonomous and enterprising does

not necessarily align with the reality of their situation, where their autonomy is severely constrained (Gregory, 2021; Rosenblat, 2018). Respondents may also unconsciously adapt their narratives to fit their restricted circumstances, a tendency noted in qualitative research on precarious workers (Léné, 2019).

Moreover, because semi-structured interviews rely on respondents' memories, valuable details about their daily interactions with employers, managers, clients or others in positions of power may be lost or distorted. In contrast, solicited oral diaries require workers to record their activities, experiences, thoughts, feelings and observations in a systematic and natural way over a defined period (Bartlett & Milligan, 2015).

The diaries maintained by the eight respondents addressed topics aligned with the themes discussed in the semi-structured interviews. Respondents recorded their diaries on returning home after their shifts, guided by brief written instructions. They subsequently uploaded their recordings to our project website. To encourage ongoing participation, fees for their recordings were issued in two instalments, with an initial trial diary discussed briefly over the phone with researchers. For those who maintained oral diaries, we conducted a second round of semi-structured interviews via Teams, each lasting 1 hour.

In addition to interviews with self-employed workers, we conducted interviews with eight managers in the hospitality sector in the Amsterdam area, lasting between 15 minutes and 1 hour. Seven of these in-depth conversations occurred on-site, one of which was conducted via Teams. During these discussions, managers elaborated on their motivations for using platforms, their past experiences – both positive and negative – with hiring platform workers, the instructions given to these workers, and the dynamics of labour relations between employees and platform workers. These interviews provided valuable contextual information for the research project.

All qualitative data was transcribed and coded using ATLAS.ti. We employed both deductive and inductive coding methods. Deductive codes were derived from the five core themes – motivations, instructions on the work floor, collaboration with colleagues, labour conditions and work-life balance – and thorough readings of all interviews. To enhance inter-rater reliability, we initially deductively coded two full interview transcripts, comparing and discussing our codes to clarify any discrepancies in their application to specific segments of the text. This coding process facilitated the construction of several themes relevant to our research question.

Ethical approval for the study was obtained from the ethics committee of the Law Faculty prior to commencing the research.

4 POSSIBLE IMPACT OF THE DELIVEROO DECISION

In this section, we examine the potential impact of the Deliveroo decision on the classification of the working relationship between Temper workers and the hotels, restaurants or catering services they serve (research question 1). Section 4.1 outlines the structure of self-employed hospitality work through Temper, drawing primarily on information available on the Temper website, which has been verified through the interviews. This section addresses six of the ten considerations outlined in Section 2. As mentioned in that section, three considerations (2, 3 and 9) will be examined in greater depth using interview data and oral diaries. Section 4.2 explores how solo self-employed platform workers in the hospitality sector receive instructions and how their working hours are determined (consideration 2). Section 4.3 analyses the extent to which these workers and their roles are embedded within the organisations they serve (consideration 3). Section 4.4 examines whether and to what extent these workers operate as entrepreneurs (consideration 9). Wherever relevant, these sections will also address additional considerations. Finally, Section 4.5 presents the conclusions from this initial step of our impact assessment.

4.1 *Organisation of Temper Work*

Temper workers can be employed as waiters, cooks and hosts in restaurants and hotels, as previously mentioned. Registered workers can apply for single gigs through the Temper platform but may continue working at the same establishment for several months. Temper workers are allowed to cancel a shift, but if they cancel it 24 hours before the start and cannot find a replacement, a fine of €100 will be imposed. Many hotels and restaurants maintain 'flexpools' of Temper workers whom they have had positive experiences with. Workers in these pools receive priority for shifts if they respond promptly on the platform. Companies can assign workers ratings, which are visible within the system. The remuneration for each gig is displayed on the Temper website and is paid either by the hotel/restaurant or by Temper itself. When Temper handles the payment, a 3% fee is deducted. The average pre-tax pay for hospitality workers is around €20 per hour, and specialised cooks earn more. If a hirer cancels a shift within 24 hours of its start, they must compensate the worker with 50% of the agreed payment. Temper is responsible for drafting the contract, including the 50% cancellation rule. This rule shifts part of the risk of lower-than-expected business onto the worker. Beyond this, however, Temper workers do not bear any commercial risk.⁸

8. The conditions for Temper workers and hirers are posted on the Temper website: <https://go.temper.works/nl-nl/ons-verhaal>.

4.2 *Work Instructions, the Determination of Working Hours and the Weight Given to the Contractual Arrangements*

Self-employed workers, unlike employees, do not formally work under the authority of an employer. However, the findings show no significant differences when it comes to following instructions and determining working hours.

First of all, similarly to employees at a hotel or restaurant, self-employed workers attend briefings that provide detailed guidance for the workday, perform tasks assigned by supervisors, and must seek permission to take breaks or leave early at the end of their shifts. As one hotel manager stated, “Temps are here to listen to us” (Hotel Manager 1).

In addition, nearly all interviewees – except for cooks – reported feeling they had little autonomy when working as part of a team. Even when they disagree with the instructions, most platform workers know that not following these directives is not an option. One respondent explained, “I do everything they ask me. I say ‘okay’ with a smile. Even if I don’t like it, I do it. I get paid, finish, and go home” (Respondent 4). Another added, “You just have to do it. That’s it” ... “Anything they tell you to do, you just have to do it. And be fast” (Respondent 13). In high-end hotels, where Temper workers often handle simpler tasks during busy periods, the strictness of instructions and oversight leaves little room for individual initiative. Self-employed workers reported being publicly humiliated by hotel staff when they had failed to comply with instructions at prestigious hotels. Non-compliance can also negatively impact their ratings, which range from 0 to 5 stars. These ratings are crucial because access to shifts and income is often tied to maintaining high ratings. More than half of the respondents expressed dissatisfaction with this system, feeling that it gives employers excessive arbitrary power over them.

Some of the respondents also raised concerns about the consequences of not adhering to instructions on arrival times, dress codes, breaks and phone use. They could be sent home by strict hotel and restaurant managers, and there were fears of losing future shifts at specific locations, especially since some establishments reportedly keep ‘blacklists’. Some respondents also shared experiences of large hotels cancelling shifts at the last minute without paying for the required portion of the shift, warning workers not to claim the money (50% of the remuneration) if they wanted to continue receiving future shifts. The lack of control is also evident in disputes over clock-out times or missed breaks. Many workers felt powerless in these situations and ultimately absorbed the financial loss, choosing not to claim the pay they believed they were owed.

The dependency of Temper workers on the hotels and restaurants they work for, combined with their limited ability to control working hours, is especially evident in the oral diaries. These diaries often describe days when self-employed workers, unlike employees, worked more hours than agreed. For example, for

one respondent, overwork was the rule rather than the exception. In about a quarter of his submissions, he mentioned doing extra work, often remarking, "This extra work is not in my task description, but I don't mind doing it when the employees don't want to" (Respondent 11). Four respondents maintaining oral diaries described working despite feeling unwell in order to ensure future shifts. The diaries, even more than the interviews, also revealed how the lack of control over tasks and working hours contributed to both physical and mental exhaustion.

In addition, while Temper workers are officially free to set their own working hours, the interview and diary data suggests their ability to do so is often constrained. For example, many platform workers expressed concerns about their financial stability, particularly in winter, when competition for shifts is intense. During this 'dead zone', only a limited number of shifts are available, often at rates just above the minimum wage. To increase their chances of securing work, some workers proactively reach out to hotels or restaurants through the platform, while others constantly monitor the app for newly available shifts. Some also apply for zero-hour or part-time positions as back-up options to ensure financial security. In sum, from the viewpoint of Consideration 2, our empirical data suggests that the work relation of Temper workers points to an employment relation, instead of self-employment.

In this context, recall that Temper workers are allowed to appoint a replacement to cover their shifts. While this contractual arrangement provides them with a degree of freedom not typically granted to employees, most respondents were not inclined to find substitutes, as securing enough shifts was already challenging. Additionally, they viewed the €100 fine for failing to arrange a replacement as excessively high, placing a significant financial strain on their monthly income.

Consideration 10 examines whether a contractual provision holds actual significance for the worker. This consideration is based on the idea that certain clauses may be included primarily to suggest that the contract does not constitute an employment agreement. The replacement clause appears to serve this purpose, as it did not provide Temper workers with genuine flexibility to cancel shifts at will. On the contrary, data from the oral diaries indicates that instead of feeling free, many workers felt compelled to work even when they were ill or facing personal emergencies.

4.3 *Integration in the Organisation*

Consideration 3 pertains to the integration of both the work and the worker within the organisation and operations of the entity for which the work is performed. While the Supreme Court does not provide a precise definition of this consideration, it generally refers to the extent to which the type of work is central to the organisation and whether employees also perform similar tasks.

The interviews and diaries revealed that the respondents' *work* is clearly embedded within the organisation (i.e. the hotel or restaurant). However, due to their (very) short-term contracts – often lasting only a single shift – Temper workers and other solo self-employed hospitality workers themselves are usually not well integrated in the organisation. This lack of embeddedness of the Temper worker is evident in several ways: they are often excluded from sharing in tips, denied fixed access passes, prohibited from performing tasks reserved for employed staff (e.g. cashiering, administrative duties or using walkie-talkies) and required to pay for their own meals while employees receive them for free. Temper workers are usually also not provided with company uniforms, which they must supply themselves. In addition, one manager noted that Temper workers received a smaller Christmas gift package than employees, even if they had been working at the hotel for a longer period. Not being formally integrated into the organisation also means that Temper workers typically have no formal recourse when facing workplace harassment from hotel or restaurant managers. One respondent stated:

“I cannot say anything because I don't work in the firm. I don't have the right to say anything about my managers. In the end, it's my problem” (Respondent 1).

Also from a social perspective, many Temper workers feel like outsiders. For example, several respondents expressed frustration in their diaries over managers not knowing their names – even after they had worked at the same location for an extended period – or managers completely ignoring them on the work floor and interacting exclusively with employees.

However, in cases where Temper workers or other solo self-employed workers consistently return to the same workplace over time, they may begin to feel more like part of a team. As one respondent noted in her diary about her so-called 'favourite employer': “I have been working at this location so often now that my colleagues consider me more like an employee than a Temper worker” (Respondent 28). Additionally, when self-employed workers stay longer at a specific workplace, they may be entrusted with greater responsibilities, such as organising the order of kitchen tasks, suggesting new menu items or mentoring less experienced self-employed colleagues. However, even then they are not personally embedded in the organisation as employees – except for being scheduled on the work roster alongside them.

4.4 *Entrepreneurial Behaviour*

'Entrepreneurial behaviour' is a newly introduced consideration in determining whether an employment relationship qualifies as an employment contract. This addition is particularly remarkable, as the concept of 'entrepreneurial behaviour' is not mentioned in the definition of an employment contract under Article 7:610 of the Civil Code. According to the wording of Consideration 9, the assessment focuses on whether workers present themselves as entrepreneurs in the broader

economic sphere. Notably, this consideration does not evaluate whether a worker acts as an entrepreneur within a specific legal relationship – such as their engagement with platform Temper or with the restaurant/hotel they work for through Temper.

Our findings present a mixed picture regarding Consideration 9. Some respondents own a registered business and use Temper as a supplementary source of self-employed income, primarily to meet the requirements for special tax deductions available to self-employed workers. Although these entrepreneurial activities are unrelated to the hospitality sector, Temper workers engaged in entrepreneurial behaviour beyond their work with Temper would be likely to meet the criteria outlined in consideration 9. In addition, some of the respondents who do not engage in self-employed activities outside of their work via Temper described themselves as entrepreneurs in interviews – referring to themselves as 'their own boss' or as 'risk-takers' – and demonstrated entrepreneurial behaviour in their interactions with hotels and restaurants. For example, they sometimes negotiate their hourly rates and contribute to menu development. By contrast, other Temper workers are primarily drawn to platform work because of the relatively high earnings they could achieve as self-employed individuals in the hospitality sector. These financial benefits are largely due to minimal or non-existent tax obligations and the absence of mandatory social security contributions. This latter group of respondents actually prefer financial stability and secure employment over uncertain entrepreneurship. As a result, they show entrepreneurial behaviour neither within their Temper work relationship nor outside of it.

4.5 *Conclusion*

Based on our findings discussed in the previous subsections, we conclude that applying the considerations from the Deliveroo judgment to Temper workers does not provide a definitive answer regarding their employment status. First, in examining the overall organisation of the work in Section 4.1, we found mixed indicators. While the manner in which the contractual arrangement is established and the remuneration is determined suggests an employment relationship (consideration 5, how the contract came into being; and consideration 6, determination of the remuneration), other characteristics are less conclusive. For instance, the short duration of gigs (consideration 1, nature and duration of the work), the sharing of risks (i.e. the 50% rule) in the absence of sufficient work (consideration 8, commercial risk), and the lack of an obligation to perform the work personally (consideration 4, obligation to perform the work personally) suggest that the relationship does not necessarily constitute an employment contract. Furthermore, workers can choose to 'hire' others to take over their shifts, effectively using this flexibility as a business model.

In Sections 4.2, 4.3 and 4.4, we examined the potential impact of key considerations based on our empirical research. Our findings in Section 4.2 indicate that most Temper workers, much like employees, operate under the authority of another party (the employer). They are expected to follow the employer's instructions regarding both the tasks they perform and their working hours. In some cases, employers appeared to exert even greater control over Temper workers than over employees, as Temper workers often felt pressured to secure sufficient shifts (consideration 2, determination of the work and working hours). Additionally, we argued that the contractual clause allowing Temper workers to appoint a substitute (consideration 4) has little practical significance (consideration 10, actual significance of the provision for the worker), as they are generally seeking more rather than fewer shifts. Taken together, the findings in Section 4.1 strongly indicate an employment relationship.

On the other hand, Section 4.3 highlighted that Temper workers are not embedded within the organisations they work for (consideration 3, integration of the work and the worker in the organisation), unlike traditional employees, suggesting a degree of self-employment. Moreover, as noted in Section 4.4, Temper workers form a diverse group: some exhibit entrepreneurial behaviour by negotiating their pay (consideration 7, amount of remuneration) or actively developing independent businesses outside of their Temper work (consideration 9, behaviour as an entrepreneur), while others do not engage in any entrepreneurial activities.

Overall, our findings suggest that while some self-employed Temper workers could be classified as employees, others – despite working under the hirer's authority – might still be considered self-employed. However, since the Deliveroo judgment does not provide clear guidance on how these considerations should be weighed, the exact classification will ultimately depend on the specific circumstances of each case.

5 SOCIETAL GOALS AND LEGAL PRINCIPLES

The second step in our 'jurisprudence of consequences' involves assessing the judgment against the societal goals reflected in the two fundamental labour law principles described in Section 2 – the regulation of efficient labour markets and its role in protecting workers from power imbalances in the employer-employee relationship.

First and foremost, the ongoing uncertainty surrounding the classification of Temper workers weakens the regulatory framework of labour law, as the rights and obligations of a growing number of workers and their hirers remain unclear. As long as this ambiguity persists, labour law fails to fulfil its regulatory function for an increasing segment of the workforce, many of whom continue to be misclassified as self-employed. Ultimately, this misclassification threatens to erode

the institutions built around employment contracts, such as collective bargaining and collective social security. Moreover, it risks triggering a race to the bottom in employment conditions, as employees are forced to compete with (bogus) self-employed workers who perform the same tasks but without the protections of social security contributions or job security, exerting additional pressure on labour standards.

In addition, the ongoing misclassification of dependent workers as self-employed not only weakens their legal standing but also undermines another core principle of labour law: the protection of dependent workers. As noted in Section 2, the regulation of efficient labour markets can sometimes conflict with the need to safeguard worker rights. This tension is particularly evident in the rise of platform-based work and the related increasing flexibilisation of the labour market. While laws permitting businesses to engage flexible self-employed workers may contribute to the efficient functioning of labour markets, this efficiency must not come at the expense of worker protection. However, the current situation suggests that the misclassification of dependent workers as self-employed is widening the gap between those protected by employment law and those who, despite being equally dependent on their hirers, remain unprotected.

Moreover, as suggested in the previous section, misclassified workers often become even more dependent on their hirers than regular employees. For instance, Temper workers may feel pressured to work additional hours to secure future job opportunities. They may also hesitate to claim their right to 50% compensation when a hirer cancels a shift within 24 hours or choose to continue working despite illness, fearing they will not be rehired. Leaving these workers at the mercy of market forces – despite their clear need for protection against the inherent power imbalance in the employer-employee relationship – risks severe social consequences, including the emergence of a marginalised underclass reminiscent of the impoverished day labourers of 19th century Europe. At this point it should be noted that alternative legal solutions are available which are more in line with both fundamental labour law principles. For example, Platform James Horeca, which operates similarly to Platform Temper, offers a temporary agency contract to workers registered on the James Horeca platform.⁹

In conclusion, the findings suggest that the Deliveroo decision contributes insufficiently to societal goals, such as fostering social cohesion and solidarity among workers, ensuring adequate social security and employment protection for all employees, promoting equal opportunities for secure employment and safeguarding legal institutions built around employment contracts, all of which are reflected in the two fundamental labour law principles.

9. See: <https://www.jameshoreca.com>

In our view, a ‘jurisprudence of consequences’ should assess the potential impact of a judgment on specific groups, considering the legal principles and values it upholds. With this in mind, we explored whether and to what extent the Deliveroo decision clarifies the classification of platform workers, such as those employed by Temper. To achieve this, we used both oral diaries and qualitative interviews as methods of ‘a jurisprudence of consequences impact assessment’. The oral diaries proved particularly useful in shedding light on the dependence of Temper workers on the hotels and restaurants they serve, highlighting issues such as stress, lack of control over working hours, and limited autonomy.

We subsequently evaluated the findings against two core labour law principles: the regulation of efficient labour markets and the protection of dependent employees. Our analysis concluded that the Deliveroo decision offers insufficient clarity regarding the employment status of Temper workers, ultimately failing to adequately uphold important societal goals, which are reflected in the two fundamental labour law principles.

A potential counter-argument to our position is that workers choose to work as self-employed through platforms like Temper due to higher remuneration. However, we rebut this argument by pointing out that the higher earnings stem from the fact that these workers do not contribute to social security and often benefit from tax deductions intended for genuinely self-employed individuals. As a result, society bears the costs of these employment arrangements, as these workers may still rely on publicly funded social assistance. Additionally, as previously discussed, this trend threatens the sustainability of collective insurance systems.

The preference for self-employment in the hospitality sector also creates a seemingly inescapable dilemma: while workers opt for self-employment to secure sufficient income, achieving better wages and conditions would require collective action as employees. The most effective way to resolve this tension is by establishing clearer criteria for determining employment status, such as the legislative proposal we will discuss shortly.

First, it should be noted that the classification issue extends beyond Temper workers and is crucial for addressing bogus self-employment across various sectors, particularly in an economy where an increasing number of workers operate as solo self-employed individuals. In this regard, the advice of the Advocate General in the Deliveroo provides greater clarity compared to the Supreme Court’s ruling. First, the A-G argued that while the embeddedness of the *work* within an organisation is indicative of an employment relationship, the embeddedness of the *worker* is irrelevant. Our findings suggest that had the Supreme Court adopted this reasoning, it would have been relatively easy to establish that the *work* carried out by Temper workers is embedded in

the organisation. Second, the A-G focused on the worker's behaviour within the contractual relationship (e.g. with the Deliveroo platform) to determine employment status,¹⁰ which aligns with the reasoning of the Court of Justice in the FNV Kiem case.¹¹ In the Deliveroo judgment, the Supreme Court, by contrast, also considers entrepreneurial activities outside the specific contractual relationship. Our research indicates that limiting the assessment of entrepreneurship along the lines proposed by the A-G would considerably simplify the classification process. For example, in such a scenario, a worker's ownership of a separate business would be irrelevant in assessing their employment status with Temper.

Interestingly, a legislative proposal published on 4 July 2024¹² – aimed at clarifying the assessment of employment relationships and introducing a legal presumption – partly aligns with the Advocate General's (A-G's) advice. Based on our findings, we believe that implementing this proposal would offer much needed clarity in determining the nature of employment relationships. Like the A-G's opinion, the proposal emphasises the embedment of the *work* (rather than the *worker*) within the organisation as a key indicator of an employment relationship. This is considered alongside other factors, such as the employer's authority to issue instructions, the degree of control exercised over the worker, and the structural integration of the work into the organisation. Under the proposal, a worker will be classified as an employee if the work is embedded within the organisation, has a structural character, is subject to organisational control and is performed alongside employees. However, if there are stronger indicators of genuine self-employment – such as the worker presenting themselves as self-employed in a manner recognisable to third parties – then the worker must be classified as self-employed. The proposal further clarifies that entrepreneurial activity outside the specific work context is relevant only when it involves similar work. Overall, the various indicators used to assess the nature of the contractual relationship are explained in greater detail.

Applied to our research, we believe that our respondents would overwhelmingly be classified as employees under this proposal. Their work is embedded in the organisation, they are subject to organisational control, there is little evidence that they present themselves as self-employed to third parties, and the entrepreneurial activities are not related to the hospitality sector. Moreover, under the proposed framework, a worker earning less than €33 per hour would be presumed to be an employee – a threshold that most Temper workers do not meet.

In this context, it is noteworthy that the Council of State, in its advice on the legislative proposal, questioned the necessity of new legislation, arguing

10. A-G De Bock, 17 June 2022, ECLI:NL:2022:578, paras. 8.1-8.25. See, particularly, para. 8.13.

11. CJEU, 4 December 2014, C-413/13 (*FNV Kiem*), ECLI:EU:C:2014:2411.

12. Wet VBAR (Wet Verduidelijking Beoordeling Arbeidsrelaties en Rechtsvermoeden (Documenten bij Wijz Boek 7 BW ivm maatregelen verduidelijken onderscheid werknemers en zzp'ers en rechtsvermoeden | Overheid.nl | Wetgevingskalender).

that it merely codifies existing Supreme Court case law and that all relevant circumstances should ultimately be considered.¹³ Instead, the Council suggested expanding social security coverage to include self-employed workers and reducing tax advantages for the self-employed. While we agree with the latter recommendation (also see Barrio, 2024; Becker et al., 2024), our case study clearly demonstrates the advantages of the proposed legislation. Under this law, nearly all Temper workers in the hospitality sector would be classified as employees, whereas under the Deliveroo decision, their employment status remains ambiguous.

In conclusion, our research demonstrates that a 'jurisprudence of consequences' incorporating qualitative empirical research can play an important role in improving the law. While our *ex-post* impact assessment of the Dutch Supreme Court's decision comes 'too little, too late', we hope it will still offer valuable insights for the legislative process surrounding the Law on clarification of the assessment of employment relationships and legal presumption. More broadly, this study underscores the significance of a 'jurisprudence of consequences' that explicitly integrates the fundamental values and principles of the law, particularly in legal decisions with far-reaching implications beyond the specific case before the court.

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13. Council of State, Advice legislative proposal on the clarification of the assessment of employment relationships and legal presumption, W12.24.00156/III, <https://www.raadvanstate.nl/adviezen/@144529/w12-24-00156-iii>.

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NOISE IN OPEN NORMS: AN UNDERESTIMATED RISK TO LEGAL CERTAINTY AND EQUALITY

Jessie Pool, Niek Strohmaier, Jan Adriaanse and Marc Broekema

INTRODUCTION

In creating laws that are just and effective, lawmakers must navigate the tension between drafting laws that are, on the one hand, precise enough to provide clear rules and guidance, and, on the other hand, flexible enough to make them adaptable and future-proof. Open norms – legal provisions that leave room for interpretation – are designed to provide this flexibility, allowing the law to be adapted to a wide range of circumstances. However, what seems like a strength can also be a significant flaw. When open norms are left too vague, they invite inconsistency, arbitrariness, and, ultimately, inequality and uncertainty (e.g. Wiarda, 1988).

This chapter argues that concerns about open norms are more serious than often recognised and deserve more attention from lawmakers. Central to this analysis is the concept of ‘noise’ – unwanted variability in decision-making – which has gained prominence following the publication of the book *Noise* in 2021 (Kahneman et al., 2021).

As a demonstration of how noise affects the application of open norms and how it creates legal uncertainty and inequality, this chapter presents empirical findings from a study conducted on bankruptcy trustees’ decision making. This group of legal professionals is faced with a very open norm when it comes to weighing societal interest in dealing with bankrupt companies, and this context therefore serves as a good illustration of how noise arises in practice. Overall, the chapter aims to inform lawmakers about the risks of using open norms and answers the following research question:

How can empirical insights from noise in bankruptcy trustees’ decision-making enhance the law-making process for open norms?

The chapter ultimately calls for legislative reforms that incorporate behavioural insights, thereby advancing a so-called ‘jurisprudence of consequences’, in which

lawmakers use empirical insights to assess and anticipate the real-world effects of laws and regulations. By systematically analysing how legal norms function in practice, rather than relying solely on abstract legal reasoning, lawmakers can design more effective and equitable legal frameworks. This evidence-based approach helps ensure that laws not only align with their intended objectives but also mitigate unintended consequences, such as inconsistent or unpredictable decision-making. In the context of open norms, incorporating empirical insights can provide guidance on how to structure legal provisions to reduce variability, promote fairness and enhance trust in the legal system.

The chapter begins with the analytical framework (Section 2), which (i) explains how open norms emerged in the Netherlands and outlines their advantages and disadvantages, and (ii) introduces the concept of ‘noise’, using empirical findings on noise in the context of legal decision-making. Next, we present our own research on noise in the decisions of bankruptcy trustees, illustrating the significant variability and how it can be empirically measured (Section 3). Finally, we end this chapter with a general discussion and offer recommendations for legislators to mitigate noise: increasing awareness through education and training, using noise measurements to guide norm development, and promoting decision hygiene strategies to reduce bias and noise in legal processes (Sections 4 and 5).

2 ANALYTICAL FRAMEWORK

2.1 *The Emergence and Definition of Open Norms in the Netherlands*

Open norms have increasingly been incorporated into Dutch legislation throughout the 20th century, particularly with the introduction of the new Civil Code (Hartkamp, 1981; Wiarda, 1988). Before the term ‘open norm’ became prevalent, and prior to the introduction of the new Civil Code, the terminology used included vague norms, abstract norms, blank norms and undefined norms.

The principle of reasonableness and fairness is the most obvious example of an open norm, manifesting across various areas of law (Timmerman, 2023). In civil law, one can also consider the duty of care and reasonable attribution in tort law (Hartlief, 2002; Hoekstra, 2023). In administrative law, duties of care (Ippel et al., 2023; Van Ommeren, 2012b, para. 5.4) and the general principles of proper administration (Huisman & Jak, 2022) are prominent examples.

It is clear that open norms are omnipresent in Dutch law. But what exactly constitutes an open norm? The legislature itself never concretely defined the term ‘open norm’, although numerous authors have attempted to provide useful definitions. For instance, Nan (2011) defined an open norm as “any norm where there is more than negligible uncertainty regarding its content, applicability, or consequences for those subject to it”. Van Klink (1998) described open norms

as “norms that grant the judge significant interpretative freedom due to their indeterminacy, generality, and/or abstraction”. Van Lochem (2019) characterised an open norm as “a norm formulated so generally that it requires further interpretation before it can apply to specific facts”.

For the purpose of this chapter, we consider the specific definition or degree of openness of a norm to be of lesser importance. Our primary concern is with norms that grant norm addressees – such as judges, administrators, governmental bodies, regulators and citizens – discretionary power in interpreting and applying these norms.

2.2 *The Benefits and Drawbacks of Open Norms*

A significant advantage attributed to open norms is their broader applicability, which is thought to reduce the volume of regulations and thus lessen regulatory pressure (Van Lochem, 2019, p. 34). The ability to provide tailored solutions is also cited as a key benefit of open norms. While legal equality is highly valued, it may sometimes be necessary, for the sake of justice, to differentiate between similar cases (Tollenaar, 2008). The more rigid and defined a norm is, the less flexibility there is for differentiation and customisation. Its flexibility also allows open norms to adapt more easily to societal developments. The interpretation of an open norm can align with changing perspectives on what is considered just and desirable, whereas a narrowly defined closed norm would require continuous amendments to keep up with prevailing views (Pool, 2022b).

However, these advantages of open norms represent only one side of the coin. The drawbacks of open norms have been discussed extensively, notably by Barendrecht (1992), who provides a comprehensive list in his dissertation. His list includes concerns related to judges’ lack of democratic legitimacy for their de facto lawmaking role (see also Van Lochem, 2019, p. 43), and excessive judicial freedom, which Barendrecht finds problematic in part because judges will inadvertently incorporate their personal opinions into their decisions.

Given the scope and goal of this chapter, we will focus primarily on issues related to legal uncertainty and legal inequality. Legal uncertainty due to open norms was already addressed by Wiarda (1988, pp. 77-82), who stated:

The first consideration concerns the dangers of arbitrariness and legal uncertainty inherent in any form of jurisprudence, stemming from the unpredictability of decisions made by judges not bound by fixed and universally known norms.

Regarding legal inequality, Barendrecht asserted that because a wide range of decisions can be justified in any given case, there is a tendency for “decisions in comparable cases to vary significantly” (1992, p. 76).

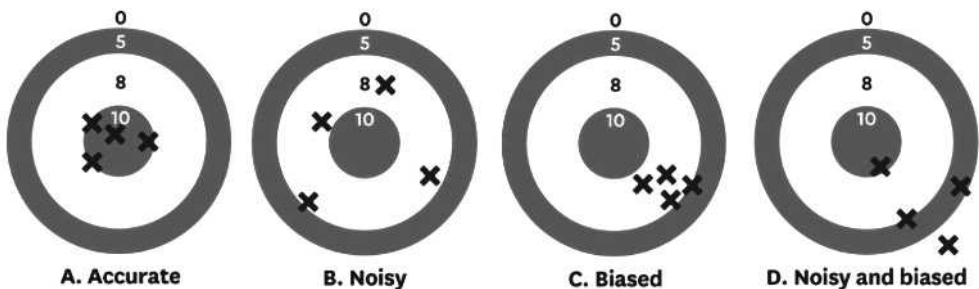
Although it is widely acknowledged that open norms can cause legal uncertainty and inequality, the scale of these problems remains underexplored, thus giving rise to the risk of not being taken seriously enough. In the following paragraph, we will provide a behavioural science perspective on arbitrariness in the interpretation of open norms, aiming to clarify the *magnitude* of the issues of legal uncertainty and inequality.

2.3 *Noise: A Behavioural Science Perspective on Variability in Open Norms*

In legal literature, we speak mainly of the risk of arbitrariness when the use of (open) norms can lead to widely differing interpretations, while in behavioural sciences, the term ‘noise’ is used (Kahneman et al., 2021). Both phenomena, arbitrariness and noise, refer to the same issue, namely the unwanted variability in judgments and decisions that should, ideally, be uniform. It is important to note that noise is not the same as *bias*, a psychological phenomenon that is also receiving increasing attention within the legal domain (See e.g., Guthrie et al., 2000, 2007; Strohmaier, 2020; Strohmaier et al., 2021). While biases refer to unconscious prejudices or cognitive errors in judgment and decision-making that often result in a certain systematic deviation in a particular direction – think, for example, of prejudices leading to in-group bias (favourable judgments towards one’s own group) – noise refers to variability without any systematic pattern; judgments that can go in any direction.

The distinction between bias and noise is further illustrated in Figure 1. Here, it can be seen that bias involves a systematic deviation from the ideal (the bullseye), while this systematicity is absent in noise. In legal judgments, there is often no such thing as an ‘accurate’ or ideal judgment. However, this does not make the problem of noise any less significant. Even without the possibility of an accurate judgment or a correct decision, a high degree of variability poses a problem as it leads to legal uncertainty and inequality.

Figure 1 Visualisation of the Difference between Bias and Noise (Kahneman et al., 2016)

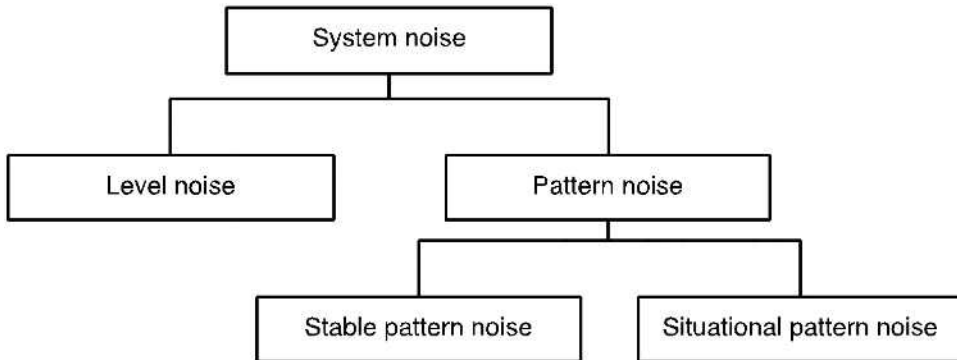


The issue of noise within the legal domain and its consequential challenges has been discussed for decades. For example, it was American federal judge Marvin Frankel who drew attention to the topic as early as in the seventies of the previous century. Based on his own observations, Frankel strongly believed that the outcome of a case depends primarily on the judge assigned to it rather than the facts of the case. To test his intuition, he commissioned a study in 1974, the conclusion of which was “absence of consensus is the norm” (Partridge & Eldridge, 1974. See also Clancy et al., 1981; Van Koppen & Ten Kate, 1984). In one of the cases presented to participants in that study involving a robbery, the participating judges’ verdicts ranged from 30 days’ to 5 years’ imprisonment. How is it possible for those tasked with interpreting and applying legal norms to differ so significantly in their judgments while having access to the same information? The following sections address this question.

2.3.1 *Sources of Noise*

The total amount of noise in a particular system (also known as system noise), such as the total noise in the interpretation of a specific open norm, can be divided into noise *between* assessors (level noise) and noise *within* assessors (pattern noise). The latter can then be further divided into ‘stable pattern noise’ and ‘situational pattern noise’. The relationship between these different sources of noise is shown in Figure 2.

Figure 2 Visualisation of the Different Components of System Noise



2.3.2 *Level Noise*

When averaging a number of decisions or judgments by a range of different assessors, one assessor will on average judge or decide differently from the next. This is essentially what constitutes level noise: variation between assessors when looking at their judgments and decisions in the aggregate.

In the context of legal decision-making, the existence of level noise among judges has been convincingly demonstrated. For example, a study that analysed

2,200 court decisions showed that on average, Republican judges in the United States handed out 7 months longer prison sentences than Democratic judges, meaning that one source of level noise may be found in differences between assessors in political orientation (Schanzenbach & Tiller, 2008. See also Arora, 2018; Cohen & Yang, 2019; Epstein & Knight, 2013; Shamena & Patrick, 2015).

Another example of level noise concerns research on asylum application decisions in the USA. This comprehensive study analysed more than 400,000 decisions and, for example, demonstrated that Colombian asylum applicants in the US federal immigration court had a 5% chance of success with one judge versus an 85% chance with another (Ramji-Nogales et al., 2007).

The most recent and perhaps most comprehensive study on the topic, using machine learning, analysed six million decisions by immigration judges in the USA. This study concluded that 58.5% of the variation in rulings can be explained by extra-legal factors, such as personal characteristics of the judge (Raman et al., 2022). Indeed, the reason for the existence of level noise (i.e. why people judge differently in the aggregate) can largely be found in differences between assessors in terms of personal backgrounds, political views, personalities, norms and values, prejudices, etc. (for further examples of level noise, see Boyd, 2013; Fox & van Sickel, 2000).

2.3.3 *Pattern Noise*

Noise can also arise from factors within assessors because they themselves are not always consistent. This form of noise, called pattern noise, refers to the fact that an assessor may judge differently as a result of (conscious or unconscious) personal preferences and biases and properties of what is being judged (and, especially, the interaction between them) or by irrelevant situational factors. Pattern noise can arise from two different sub-types of this form of noise: stable pattern noise and situational pattern noise.

By stable pattern noise, one should think of a certain stable pattern of biases. For example, again in the context of judicial decision-making, a generally very lenient judge may exercise much more strictness in a particular type of cases or a judge who, because of his more socialist background, is extra strict in tax fraud cases or a judge who is particularly harsh towards those who commit theft or violence towards the elderly. Further, research showed that female judges were more likely to approve the request for protection of (female) victims of domestic violence than male judges, and this effect was particularly visible among older female judges and primarily when their workload was high (Vallbé & Ramírez-Folch, 2023). Also, research on the role of age in legal decision-making found that younger judges seem less inclined than their older colleagues to rule in favour of the plaintiff in age discrimination cases (Manning et al., 2004). In short, because of the idiosyncrasies of judges, they do not judge uniformly in every case, and the pattern of judgments is also different for each judge.

Situational pattern noise should be thought of as irrelevant situational (and thus temporal) factors that affect the judgment of assessors. In the context of judicial decision-making, one might think of a judge's mood on a particular day, the weather, a defendant's birthday, etc. These examples may seem somewhat ridiculous, but there is empirical evidence that such factors can, in fact, influence judicial judgments. For instance, a study of 4.8 million legal judgments in France over a 12-year period found that judgments were less harsh when it was the defendant's birthday (Chen & Philippe, 2023). Other research found that when judges in the USA were in a bad mood because their local football team had unexpectedly lost over the weekend, they ruled more harshly (longer sentences) on the Monday after the weekend and that this effect also trickled down into the following days (Chen & Loecher, 2022; Eren & Mocan, 2018). For a win or an already anticipated loss, this relationship was not found.

2.3.4 *Interim Conclusion Regarding Noise*

This paragraph has explained that the total amount of noise – system noise – when using an open norm arises from level noise (one assessor is not the other), stable pattern noise (idiosyncratic patterns of an assessor, including personal biases) and situational pattern noise (irrelevant factors of temporary nature). The empirical evidence on these sources of noise is substantial. Political preferences, biases, mood, weather, suspects' birthdays and many other factors can automatically and unconsciously influence judgments, and the literature reviewed hitherto is far from exhaustive. The sum of the various sources of noise means that once there is some room for discretion on the part of the assessor, the degree of noise in the system can be severe and should not be underestimated.

To demonstrate the severity of noise following from the use of open norms and, furthermore, to demonstrate that the issue of noise is not confined to judges outside the Netherlands but that it also affects other norm addressees within the Netherlands, we will discuss our own research on noise among bankruptcy trustees in the following paragraph. An additional aim of the next paragraph is to illustrate how lawmakers and legal practitioners can measure noise through a 'noise audit'. The upcoming section will first outline the legal context surrounding the role of a trustee in bankruptcy and then discuss the methodology and results of the noise audit.

3 NOISE AUDIT: BANKRUPTCY TRUSTEES AND THEIR TASK TO BALANCE INTERESTS OF STAKEHOLDERS

3.1 *The Role of the Bankruptcy Trustee in Bankruptcy Proceedings*

Each year, thousands of companies unable to meet their debt obligations are declared bankrupt in the Netherlands. To effectively manage the resolution of

these bankruptcies, a bankruptcy trustee is appointed (Art. 68 Dutch Bankruptcy Act). The trustee's primary role is to oversee and liquidate the bankrupt estate.

The guiding principle for Dutch trustees is to act in the best interest of the joint creditors. However, during the liquidation process, trustees often encounter various conflicting interests (Pool, 2022b). For example, when considering the possibility of a business' continuation, a trustee may face two potential buyers: one may offer a higher purchase price, while the other, despite offering less, may commit to retaining more employees. While it might seem that the trustee should select the highest bidder based on the principle of prioritising creditor interests, this is not always the case. The Supreme Court has ruled in multiple decisions that trustees can consider all relevant interests during the bankruptcy process and that societal concerns, such as employment, may even take precedence over the interests of individual creditors.¹ As a result, trustees have considerable discretion in regard to how they weigh these competing interests.

The ambiguity surrounding the expectations from lawmakers regarding how these interests should be prioritised creates a vague norm for trustees. Terms like 'taking into account' and 'significant societal interests' lack clear definitions, creating uncertainty regarding how the interests of creditors and other (societal) interests should be balanced in practice. This open-ended nature of the trustee's responsibilities can lead to significant variability in decision-making, which can disadvantage creditors and other stakeholders (Pool, 2022a). These parties often find themselves uncertain about the process and how the outcomes will be influenced by the individual trustee's judgment. Until recently, the actual extent of this variability has been difficult to quantify. While it is possible that trustees have different interpretations of their roles and the societal interests they value, they may still arrive at similar decisions in specific cases. This raises the question of whether the bankruptcy process is truly as dependent on individual trustee discretion as it seems.

To empirically investigate the extent to which trustees exhibit differing judgments and considerations of interests in specific cases – and to evaluate the level of noise in the system – we recently conducted a study measuring this variability among trustees. The following sections will present the findings of this investigation.

1. For examples of landmark cases, see: Dutch Supreme Court 24 February 1995, ECLI:NL:HR:1995:ZC1643, para. 3.5, *NJ* 1996/472 (Sigmacon II); Dutch Supreme Court 19 April 1996, ECLI:NL:HR:1996:ZC2047, para. 3.5.2, *NJ* 1996/727 (Maclou), Dutch Supreme Court 19 December 2003, ECLI:NL:HR:2003:AN7817, para. 3.5, *NJ* 2004/293 (Curatoren Mobell/Interplan).

3.2 *A Noise Audit among Bankruptcy Trustees*

3.2.1 *What Is a Noise Audit?*

In response to the lack of clarity on how to balance the interests of creditors and other stakeholders in bankruptcy proceedings, our research team has conducted several studies to explore the presence of noise among bankruptcy trustees through what is called noise audits (Adriaanse et al., 2023; Pool et al., 2023). In these audits, we present a single case to a group of decision makers (in this case, trustees) to examine how uniform their decisions are (Kahneman et al., 2021, appendix A). Greater variance in their decisions indicate a higher level of noise.

It is important that the case used in a noise measurement is credible and relevant to the experiences of the participants (Kahneman et al., 2021, p. 381). Therefore, in one of the studies, we created a scenario in which a trustee had to choose between the interests of the joint creditors and the interests of the employees. This scenario is commonly discussed in the literature, and employees' interests are explicitly mentioned by the Dutch Supreme Court as a societal interest that bankruptcy trustees should take into account.

Using a simplified case in a noise audit is both acceptable and beneficial. Since more complex cases typically allow for a wider range of interpretations, one can argue that if we can detect noise in a simple case, even more noise would be observed in a complex case, as there are more factors that could influence decision-making (Kahneman et al., 2021, p. 382).

3.2.2 *Sample, Procedure and Materials*

We conducted a noise audit among members and fellows of INSOLAD, the Dutch association of insolvency lawyers, which includes the majority of Dutch bankruptcy trustees ($N = 200$). At the time the survey was conducted, INSOLAD had 739 members and fellows, meaning the response rate was 27%. Of the respondents, 78% indicated that they were currently working as a trustee. Although not all members and fellows have worked (or are currently working) as trustees, the study refers to them as trustees since participants were required to adopt the role of a trustee. The average age of the respondents was 49.8 years ($SD = 9.9$), and they had an average of 22.1 years ($SD = 22.6$) of professional experience. In terms of gender, 81% of respondents were male, 17.5% were female, and 1.5% preferred not to disclose their gender.

Participants were presented with a case, consisting of roughly 500 words, concerning a bankrupt company, for which the trustee needed to assess the feasibility of a business continuation. The case provided a description of a company that recently went bankrupt as well as the dilemma the trustee dealing with this bankruptcy now faces, which was deciding between prioritising the interests of creditors and those of the company's employees.

Participants were asked to adopt the perspective of the trustee tasked with deciding between two options:

1. Business continuation: This option would allow the company to continue operating, thereby retaining all employees. However, the downside would be that the bankruptcy creditors would receive only 25% of their claims instead of 40% in the event of liquidation, indicating a preference for societal interests.
2. Liquidation: In this scenario, creditors would receive 40% of their claims (compared to 25% in a business continuation scenario), but the company would cease operations, resulting in job losses, loss of revenue for suppliers, and financial distress for the family that operated the business, thus prioritising the interests of the creditors.

What participants were unaware of was that there were two variations of this case. Half of the participants encountered a scenario in which the hypothetical company was a 'sympathetic business' (the recreational park 'The Green Wijk'), established by the reputable Wijk family. Conversely, the alternative version characterised the company as an 'unsympathetic business' (the adhesive manufacturer VLACO), founded by the notorious Vlasbom family. The purpose of creating these two distinct cases was to investigate (for exploratory reasons in addition to investigating noise) whether this legally irrelevant factor – sympathy for the business – would influence the decision-making process. All other aspects of the case, such as the number of employees who would lose their jobs, the accrued debt, available candidates for a business continuation, and the payout difference for creditors, remained identical in both variations.

Participants were asked to indicate their inclination towards either business continuation or liquidation on a 7-point Likert scale, where 1 represented 'Strongly in favour of business continuation' and 7 indicated 'Strongly in favour of liquidation'. Choosing liquidation meant that the respondent prioritised the interests of the creditors, whereas opting for business continuation indicated they valued societal interests more highly. After making their choice, respondents were asked to explain their reasoning.

Next, to check whether the 'manipulation' of the company's profile (sympathetic vs. unsympathetic) worked, participants were asked to indicate on a 7-point Likert scale what their impression was of the bankrupt company, ranging from 'not at all sympathetic' (1) to 'very sympathetic' (7).

Finally, to understand what variables may be related to trustees' decision-making, we measured participants' sleep quality and quantity, as well as their 'intellectual humility', using a validated scale consisting of twelve items, such as 'When I think about the limits of my knowledge, I feel uncomfortable' and 'I find it hard to admit when one of my convictions turns out to be untrue' (Haggard et al., 2018). Prior research has demonstrated a connection between the amount of sleep judges had and the punishment they assigned (Cho et al., 2016). Moreover, in

psychology, increasing attention is paid to the concept of intellectual humility, and it has been shown to be related to a reduction in political ‘myside bias’ (Bowes et al., 2022), more prosocial behaviour, less dogmatism, etc. (Porter et al., 2022). No concrete hypotheses were formulated for how such prior research may translate into bankruptcy trustees’ decision-making. These variables were included in the design for exploratory reasons only.

3.3 *Result of the Noise Audit among Bankruptcy Trustees*

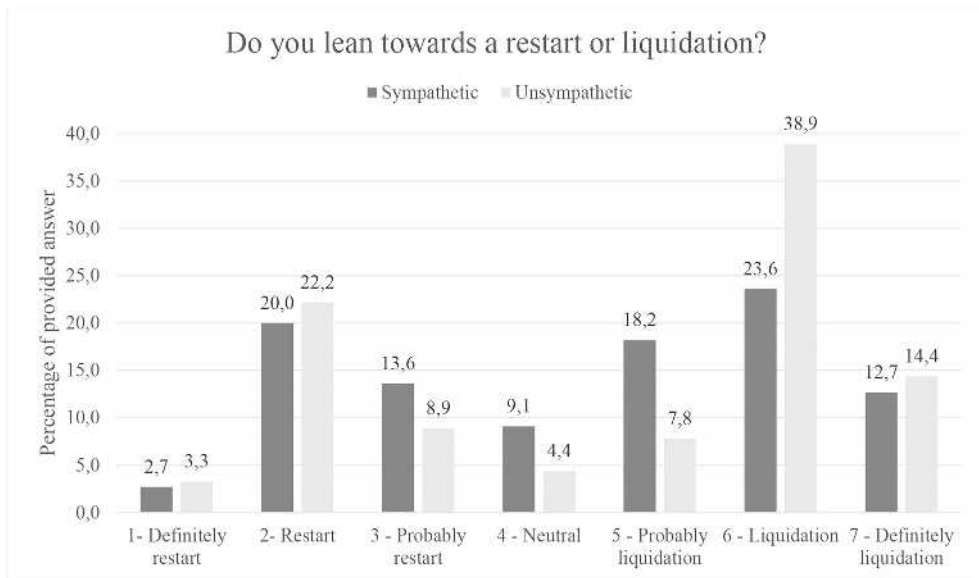
3.3.1 *Degree of Noise*

The manipulation check showed that participants who read the version of the case with the ‘sympathetic company’ indeed considered this company to be more sympathetic ($M = 5.43$, $SD = 1.04$) than those who read the case with the ‘unsympathetic company’ ($M = 3.88$, $SD = 0.97$), $F(1, 198) = 117.32$, $p < 0.001$, $\eta_p^2 = 0.37$, meaning that the manipulation of the company’s moral profile was successful.

Both groups of participants showed a slight preference for liquidation (combined: $M = 4.52$, $SD = 1.88$), indicating that they prioritise the interests of the creditors (Mode = 6). Among the participants who were presented the sympathetic case, 54.5% scored above 4 on the scale (the midpoint), suggesting that more than half lean towards liquidation and would act in the interests of the creditors. For those who viewed the unsympathetic case, this percentage increased to 61.1%, indicating a slightly stronger inclination towards liquidation (and thus favouring the interests of the creditors) compared to those responding to the sympathetic case, but this difference did not reach statistical significance, $t = -0.88$, $p = 0.17$.

The most noteworthy observation for the purposes of this chapter is the substantial variation in responses for both cases. Figure 3 clearly illustrates that the answers from respondents vary widely, revealing considerable noise among trustees.

Figure 3 **Answers on the Key Dependent Variable (Preference for Business Continuation/Restart or Liquidation) Separated by Group (Sympathetic Business vs. Unsympathetic Business)**



3.3.2 Sources of Noise among Bankruptcy Trustees

To gain further insight into the potential sources of the observed noise, we asked respondents to explain how they arrived at their decisions. Analysis of the responses to this open-ended question, conducted via ATLAS.ti, revealed a division among the respondents. One group believed that the interests of the creditors were paramount because the trustee has to act in the interest of the collective creditors. Members of this group often indicated in their explanations that the 15% difference in payouts to creditors was too big to allow the societal interest to prevail. In contrast, the other group that chose that the societal interest in maintaining business continuity took precedence over the interests of the collective creditors. Notably, respondents in this latter group often considered a 15% difference in payout to be negligible. Thus, the choice between a business continuation and liquidation appears to be influenced by the trustees' understanding of their role and their perception of the magnitude of the estate shortfall.

To investigate whether the participants' preference for business continuation or liquidation correlated with any of the other variables included in this study, we ran correlation analyses of which the results can be found in Table 1. As can be seen in the table, participants' age significantly correlated with the preference for business continuation or liquidation such that younger participants were more

inclined to favour liquidation. No significant correlations were found between the participants’ preference and sleep quantity, sleep quality, or their intellectual humility. When looking at the correlations separately for the participants in the sympathetic and unsympathetic cases, as in Table 2, a few noteworthy correlations appear. For those who read the version of the case with the sympathetic company, their perception of the moral profile of the company (sympathetic or not) correlated with their preference for business continuation or liquidation in such a way that these participants were more inclined to liquidate the company at the expense of societal concerns the more they perceived the company to be unsympathetic. Furthermore, the correlation between age and preference only reached statistical significance for participants in the unsympathetic version of the case.

Table 1 **Correlations between All Measured Variables for the Entire Sample (So Not Split by Group Based on the Version of the Case; N = 200)**

	Continuation vs. Liquidation	Sympathy for Company	Age	Sleep Quality	Sleep Quantity	Intellectual Humility
Continuation vs. liquidation	-	-0.11	-0.17*	0.04	0.11	0.04
Sympathy for company		-	-0.11	-0.03	-0.04	0.03
Age			-	0.18*	-0.02	-0.05
Sleep quality				-	0.28*	0.03
Sleep quantity					-	0.07
Intellectual humility						-

Significant correlations are denoted with * ($p < 0.05$)

Table 2 **Correlations between All Measured Variables, Split by the Two Groups with Different Versions of the Case (S = sympathetic company, N = 110; U = unsympathetic company, N = 90)**

	Continuation vs. Liquidation		Sympathy for Company		Age		Sleep Quality		Sleep Quantity		Intellectual Humility	
	S	U	S	U	S	U	S	U	S	U	S	U
Continuation vs. liquidation	-	-	-0.19*	0.05	-0.13	-0.22*	0.02	0.07	0.05	0.16	-0.02	0.12
Sympathy for company			-	-	-0.16	-0.09	-0.07	-0.08	0.08	0.01	-0.05	0.01
Age					-	-	0.21*	0.15	-0.00	-0.05	-0.02	-0.07
Sleep quality							-	-	0.40*	0.16	0.01	0.03
Sleep quantity									-	-	-0.03	0.20
Intellectual humility											-	-

Significant correlations are denoted with * ($p < 0.05$)

Given the degree of discretion that trustees have in balancing interests, the presence of noise among trustees is not surprising. The extent of this noise, however, is substantial, especially considering that the societal interest discussed in the noise audit case (i.e. retaining employment) is deemed so significant by the Dutch Supreme Court that trustees are required to take it into account. Additionally, it is surprising that irrelevant factors such as moral judgments about the company seem to influence the trustees’ decision-making process.

4 DISCUSSION OF THE MAIN FINDINGS, LIMITATION, AND NORMATIVE IMPLICATIONS

4.1 *Main Findings*

Based on the results, we can conclude that whether societal interests are considered, and if so, which ones, depends on the trustee handling the bankruptcy. The discretion granted to trustees contributes to substantial legal inequality and uncertainty. Creditors who happen to encounter a trustee who deems a particular interest sufficiently important may receive considerably lower payouts than in the case where a trustee does not find that societal interest compelling enough.

Furthermore, it is unclear in advance which trustee will consider which interest, leaving creditors unable to anticipate the outcome.

While numerous authors have highlighted the risks associated with this unpredictability, the vast majority advocate for maintaining trustees' discretion. When calls are made to clarify the norm, it is not due to the resulting legal uncertainty and inequality in the system. The prevailing thought is that the unique nature of each bankruptcy makes it impossible to establish further guidelines for trustees. We believe this argument indicates that the extent of noise has not yet been fully recognised. Moreover, it is, in fact, possible to mitigate the risk of noise, which will be discussed in the following paragraphs.

4.2 *Limitations*

Some limitations of the empirical study addressed in paragraph 3 should be discussed. First, a limitation of any experimental study is that fictitious materials are used in an artificial setting. The question therefore arises to what the extent the findings about how bankruptcy trustees make decisions in practice can be generalised. Second, we presented the participants with a single case. It therefore remains an open question as to what the degree of noise might be when using a different case with different facts. Based on these two limitations, one could argue that the degree of noise observed in the study is overstated and that the level of noise found in legal practice does not warrant any real concern. Alternatively, one could argue that the degree of noise will be significantly worse in legal practice as the number of variables that decision makers are exposed to in real life and that may affect their judgment is infinite, resulting in a higher degree of noise than one could measure in an experiment. Based on the numerous studies that have demonstrated substantial noise in a range of contexts (some of which are discussed in this chapter), we consider it a safer bet that the degree of noise observed in our study underestimates the degree of noise in legal practice rather than that it is an overestimation.

4.3 *Implications: Reducing Noise*

We hope this chapter contributes to raising awareness of the phenomenon of noise, and thus the issues of legal inequality and uncertainty associated with open norms. Ideally, this increased awareness will motivate efforts to reduce the level of noise. This final paragraph will provide some suggestions in this regard. It should be noted that the primary aim of this chapter is to introduce the phenomenon of 'noise' and to draw attention to the significant and underestimated level of noise resulting from open norms. Therefore, the goal is not to directly elaborate on solutions for reducing noise, as this would require a second chapter in terms of the required text and research. Another point to consider is that it is unlikely that noise

can be entirely reduced to zero. As long as the addressees of the norms are human beings, a certain degree of subjectivity and thus noise will always exist.

4.3.1 *Awareness of Psychological Processes in (Legal) Decision-making*

Although it may sound like a cliché, if legislators and norm addressees are not aware of the (legally irrelevant) factors that can unconsciously influence decision-making and judgment, little will change. Practice shows that people often believe they are not susceptible to unconscious psychological factors such as biases (Olthuis, 2024). This is especially true for legal professionals. Too many legal practitioners maintain the illusion that, due to their education and/or experience, they are less (or not at all) susceptible to processes that stem largely from millions of years of evolution. This mindset (the illusion of infallibility) is also evident among trustees and insolvency law professionals, as discussed in Section 3. We endorse the importance of acquiring knowledge from the behavioural sciences and hope that this chapter can contribute to that.

Interestingly, some attention is paid within the legal field to biases such as tunnel vision among judges but hardly any is devoted to the notion of noise. One possible explanation for this is that decisions influenced by bias can sometimes be retrospectively identified as ‘wrong’; for example when it later turns out that a defendant was wrongfully convicted. The individual cases where errors have been made due to biases are thus tangible. In contrast, noise cannot be pinpointed in a single instance, making it somewhat abstract and elusive. In case of noise, there is not necessarily any wrong decision having been made. The norm addressee simply uses the discretion granted to them in good faith, and whether another decision maker would have arrived at a different judgment will always remain unknown. As a result, noise is largely invisible.

This invisibility means that noise often remains unaddressed in discussions, and, therefore, efforts to limit noise are non-existent. We hope that this chapter regarding the risk of noise will contribute to the necessary awareness and advise the legislature and legal practitioners to educate themselves through training and courses.

4.3.2 *Normalising ‘Decision Hygiene’*

Once awareness around noise has been raised and people are motivated to reduce noise, one method to do so may be to pay more attention to the decision-making process itself (Kahneman et al., 2012). Regardless of how open a norm is and how much noise it generates, it is advisable to make decisions considering so-called *decision hygiene*. This phenomenon relates to making decisions based on specific rules and protocols. This can include appointing a ‘devil’s advocate’, using a ‘bias checklist’, anonymising and filtering documents, and aggregating individual judgments to utilise the ‘wisdom of the crowd’. These are just a few examples, and which technique is most meaningful should be assessed based on the decision-

making context, such as who the norm addressee is and whether a decision is made by an individual or a group. Decision hygiene is particularly important in situations where a group makes decisions collectively, as group decision-making can exacerbate the problem of noise (Sunstein, 1999). To reduce noise, it may therefore be beneficial to consider not only how to further specify norms but also whether noise can be diminished by implementing decision hygiene interventions among decision makers.

5 CONCLUDING

In this chapter, we have introduced the reader to the phenomenon of ‘noise’, specifically as a risk associated with the use of open norms. The problem of noise is not new; it is frequently discussed in legal literature. However, we believe that the extent of noise and the resulting legal uncertainty and inequality are grossly underestimated by legal professionals and legal scholars alike. To strengthen this statement, we have provided examples from empirical research, particularly from the behavioural sciences, regarding the various forms of noise in legal decision-making.

We have also demonstrated how noise can be measured by reporting our own research among bankruptcy trustees. This noise audit shows that when the legislature provides little guidance, the interpretation and application of the norm can vary significantly. Solving the problem of noise is easier said than done, unfortunately. We believe the goal should not necessarily be to eliminate noise entirely, as this is virtually impossible given that decision-making is inherently a human endeavour and will remain so for the foreseeable future. However, this does not mean that the legislature cannot take any measures to reduce noise. We recommend several measures to reduce noise, starting with raising awareness, which we hope this chapter will contribute to. Unless the issue is recognised, there will be little urgency in addressing it. Promoting behavioural science courses and training can help increase the required awareness. Finally, we recommend adopting decision hygiene practices to reduce bias and noise, especially in group decision-making. We hope this chapter highlights the underestimated impact of noise on legal uncertainty and inequality in legal decision-making. Overall, we hope that the reader of this chapter has come to view legal uncertainty and inequality resulting from noise in open norms as a problem that deserves more attention and weight in the creation and evaluation of legislation.

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COMPARING BEHAVIOURAL AND LEGAL PERSPECTIVES: AN EMPIRICAL-LEGAL ANALYSIS OF CASES OF ADDICTION, ACCOUNTABILITY AND PRIOR FAULT

Michiel van der Wolf and Anna Elisabeth Goldberg

A recent landmark case of the Dutch Supreme Court sparked interest – and some controversy – among legal and behavioural scholars in the Netherlands (Thijs H.: Supreme Court of the Netherlands, 2023). In this particular case, three reports by two experts each, discussed the defendant's mental state to determine whether he should be held accountable for the offence he committed: three murders of seemingly random passersby, arguably committed while experiencing a psychotic episode. Due to H.'s mental disorder, two reports advised the court to consider the defendant non-accountable, and the third expert report refrained from providing a definitive recommendation. However, both the Court of First Instance and the Court of Appeal did not follow the majority expert opinion and considered H. to be diminished accountable instead of non-accountable.¹

When the case of H. reached the Supreme Court, it established two important notions in the context of the defence of mental incapacity, in addition to upholding the lower court's judgment. First, it determined that establishing the presence of a mental disorder is the judges' task: a mental disorder in the context of the non-accountability defence ought to be interpreted as a legal concept. Second, the assessment criteria for non-accountability ought to be based on the defendant's inability to *understand* that his acts were unlawful or on his *inability to act* in accordance with his understanding of this unlawfulness (Supreme Court of the Netherlands, 2023), i.e. a cognitive and a volitional requirement. Although

1. The defence of mental incapacity ex. Art. 39 Dutch Criminal Code, i.e. the Dutch insanity defence equivalence, can be translated as 'an inability for attribution' (*ontoerekeningsvatbaarheid*). For the sake of readability, we use the translated terms non-accountability and diminished accountability throughout this chapter.

previous scholarly discussions had drawn up an assessment framework containing both cognitive and volitional aspects (e.g. Bijlsma, 2016), the Thijs H. case is the first instance whereby the Supreme Court confirmed these criteria.

Especially the fact that a mental disorder is established by the court, which may disregard the experts' opinions therein, caused debate among behavioural experts. Experts question their role in the criminal process and feel 'tricked' by the legal practitioners (Haan, 2023), who are now strengthened by this Supreme Court decision to determine and formulate their reasons for non-accountability themselves. In underlining the tension that may arise by the normative nature of such psycholegal assessments, an interesting comparison can be drawn with cases of prior fault. If a defendant culpably contributes to the development of a mental disorder, for instance through the voluntary use of substances, the defendant cannot rely on a defence of mental incapacity (Bijlsma, 2011). This prior fault doctrine essentially prevents exculpation, by arguing that it is the defendant's 'own fault' that they ended up in this situation and thus ought to be held responsible. Prior fault cases present an interesting intersection between behavioural insights (e.g. was the substance use voluntary, and did it cause a mental disorder?) and normative conclusions (e.g. can this prior fault behaviour result in anterior culpability, and thus accountability?) Yet for prior fault cases, it is uncontroversial that the judges decide on the consequences of such mental states, without a clear-cut role of a behavioural expert. In fact, the behavioural experts' disciplinary guidelines explicitly advise them to refrain from drawing conclusions regarding prior fault (NVVP, 2024). As a seemingly clear normative issue, prior fault is not considered to fall within the realm of behavioural expertise. However, the question of non-accountability seems equally normative – especially after the Supreme Court confirmed that establishing a mental disorder is at the judges' discretion. Thus, cases of prior fault present an interesting case study to evaluate the recent developments to the concept of non-accountability and disciplinary tensions therein.

Following the Thijs H. case, we explore disciplinary divisions and the integration of the empirical, behavioural features of a defendant's mental impairment(s) and the consequent normative, legal conclusions that ought to be drawn, using prior fault cases as an example. This leads us to two main aims of this research. First of all, we raise the question of how well the disciplines stay in their lanes in such cases of mental disorders and substance use and how (if at all) these two disciplines may be integrated. Second, we analyse the established decision-making in such prior fault cases in light of the new criteria for non-accountability, based on the Supreme Court ruling. With a confirmed volitional prong in the non-accountability defence, it is especially interesting to analyse how prior fault is assessed in cases of addiction and intoxication. After all, an underlying addiction

is a relevant circumstance explaining a lack of control towards self-intoxication. Moreover, it is also considered a mental disorder in the behavioural sense but not so much in the legal sense (Van der Wolf & Bijlsma, 2022), potentially resulting in legal conflicts. Thus, the overarching research question of this chapter is: How can an assessment of the differences between behavioural and legal perspectives on prior fault help us understand the recently affirmed normative standard of the non-accountability defence, and vice versa, how does this new non-accountability standard relate to the current prior fault assessment framework?²

To address this question, our research looks at substance use and addiction cases, whereby behavioural expert witnesses advise the court on accountability and prior fault to examine differences in perceptions and perspectives of both parties. Although we delve into the peculiarities and the overarching legal context of prior fault rules in more detail later, as a result of the Thijs H. case, our empirical-legal research design aims to examine differences between empirical insights and legal decisions in the context of prior fault. Based on the discrepancies that our research uncovered, we argue that such empirical research is a useful tool to challenge assumptions underlying the prior fault doctrine and to nuance the application of prior fault rules. As such, our research contributes to a ‘jurisprudence of consequences’, by using empirical data regarding a large body of criminal cases to develop appropriate assessment frameworks for complex cases of substance use and prior fault (Miller, 1965).

2 LEGAL AND ANALYTICAL FRAMEWORK

In Dutch criminal law, the concept of prior fault is known as ‘*culpa in causa*’, which is used interchangeably in this chapter. *Culpa in causa* can be defined as the exclusion of an *a priori* applicable justification or excuse, normally leading to non-responsibility, because the defendant himself culpably contributed to the creation of these circumstances (Goldberg, 2022). Simply put, if you have had a share in creating, for example, a self-defence situation (such as provoking your assailant) or the presence of a mental disorder (such as inducing a psychosis through culpable substance use), you can no longer successfully invoke the relevant ground for negation of criminal liability (Goldberg et al., 2021). The Dutch excuse of mental incapacity in which prior fault can play a role is

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2. Based on the same data that was used for this chapter, the authors have published a different article (see Goldberg et al., 2024) whereby the perspective was more general and less based on the questions raised by the Thijs H. case. This data was collected by students enrolled in the elective Seminar Behavioural Expertise in Criminal Cases (2023/24), which is part of the ambition of the Groningen Centre for Empirical Legal Research to provide law students with empirical research skills, and set up by the authors in association with the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP), who provided the possibility to access the complete files of all forensic behavioural assessments in criminal cases in the Netherlands.

called '*ontoerekeningsvatbaarheid*', referred to here as 'non-accountability' (see also footnote 1).

The criteria for non-accountability are threefold: the presence of a mental disorder (i.e. a disorder requirement), which consequently must have influenced the offending behaviour (i.e. a causality requirement), ultimately leading to the normative decision that no responsibility should be attributed to the defendant (i.e. the accountability requirement). This last requirement contains, as mentioned, a cognitive and a volitional prong (Nauta et al., 2024). Courts often rely on behavioural experts to assess the disorder and causality requirements, who advise on accountability (full, diminished, or none) and treatment. Although this advice is not legally binding, courts follow the expert's advice in the majority of cases (Goldberg et al., 2024). In the Netherlands, accountability is graded rather than dichotomous as in Anglo-American jurisdictions (Van der Wolf & Van Marle, 2018), rendering diminished accountability a common recommendation. Moreover, in this third criterion anterior culpability may play a role: if the defendant had prior fault, for instance due to substance use, it may negate non-accountability.

Despite the important role of experts in cases of mental impairments, instances of substance use and intoxication have a somewhat unique position, as experts are instructed not to discuss prior fault due to the normative nature of prior fault. Specifically, Supreme Court jurisprudence established two factors in assessing prior fault, one of them being voluntariness and awareness of substance ingestion and the other foreseeability of consequences. Voluntariness is generally assumed, unless evidence suggests otherwise, such as being forced to use a drug or unknowingly consuming a spiked drink. Therefore, foreseeability was originally the key criterion. In the 1981 *Culpa-in-causa* case, a defendant stabbed his grandmother while in a cocaine-induced psychosis (Supreme Court of the Netherlands, 1981). Although the psychosis caused severe mental impairments, the Court of Appeal held him accountable as they were self-induced. The Court used a threefold argumentation to prove prior fault. They argued that the defendant was familiar with the effects of cocaine and had experienced hallucinations before; that it is a fact of common knowledge that illegal substances could affect moral reasoning; and that the defendant had previously experienced violent fantasies of bank robberies and firearms. Thus, the defendant:

...must be deemed to have had such an insight into the dangers of cocaine and its effect on his mental faculties that it must be judged that the pathological disturbance of his mental faculties – occurring at the time of the commission of the proven offence – should be blamed on the defendant, so that the acts committed in that state must be attributed to the defendant. (Court of Appeal Amsterdam, 1980)

The Supreme Court upheld the judgment. Due to the defendant's previous hallucinations and violent fantasies, and the prohibited nature of cocaine, which clearly identifies its use as risky and harmful, the harmful consequences of cocaine use could have been foreseen. In a subsequent landmark case, however, exactly these two issues (prior experiences and drug type) were different. As a result, the assessment framework that followed from this second landmark case assumed a form different from the one just discussed.

In this so-called *Cannabis-psychosis* case (Supreme Court of the Netherlands, 2008), the defendant experienced acute cannabis-induced psychosis. Judges maintained that psychosis was not a commonly known or frequently seen consequence of cannabis use. Also, unlike the defendant in the *Culpa-in-causa* judgment, the defendant had no previous negative experiences with cannabis. Nevertheless, the defendant knew that the use of cannabis had an effect on one's general mental state and, therefore, could have known that this drug could affect functioning in such a way that risky behaviour could arise from it (Court of Appeal's-Hertogenbosch, 2006). The Supreme Court upheld this judgement: the fact that the occurrence of a psychotic state is not a generally known or frequently occurring consequence of cannabis use does not affect prior fault arguments. Hence, the Supreme Court in this case interpreted the foreseeability requirement in a much broader and objective sense than it had previously done. After all, the defendant does not have to foresee any concrete negative consequences, for example due to earlier similar experiences. It is sufficient to assume that one could have known that the substance influences the general psychological state, even in cases such as cannabis, which is legally tolerated in the Netherlands, or at least not unequivocally prohibited. As a result, the *Cannabis-psychosis* case seems to set a much lower requirement for the attribution of prior fault: voluntary consumption seems sufficient, as there is no further need for concrete foreseeability of risky behaviour. As a result, substance use thus seems to be seen as a form of abstract endangerment that is sufficiently culpable to constitute prior fault (Goldberg, 2022, 2024).

We can understand that all voluntary substance use is, in principle, a form of prior fault, in order to avoid under-criminalisation by providing a reason (and precedent) to find responsibility for (potentially unwanted, but harmful) consequences of voluntary substance use. Moreover, considering all voluntary substance use to be sufficient for prior fault is also an easily applicable criterion and thus efficient for the judiciary. Yet reality is more complex: after all, there are a wide variety of reasons and causes for substance use, which may be overlooked when focusing solely on voluntary intoxication as a requirement. For instance, there seems to be an intuitive difference between the defendant who uses recreationally, the defendant who uses due to a very severe addiction, and the defendant who uses substances to self-medicate an underlying disorder. An

abstract foreseeability requirement, as was formulated in the *Cannabis-psychosis* case, would be satisfied in all these circumstances, although one may feel that the level of (anterior) culpability differs (Goldberg, 2024). Consequently, further examination of the time of the substance use is necessary to understand whether this prior behaviour is truly culpable.

Based on the challenges identified in this section, two issues are key in our subsequent empirical study. The first is whether the lawyers and behavioural experts stay in their (disciplinary) lanes. We use two levels of analyses here, by identifying, on a more superficial and quantitative level, whether *behavioural* experts refrain from using *legal* terminology in their conclusions. Then, more in-depth and qualitative analyses cover whether behavioural experts adhere to empirical reasoning. Because we qualify the development in the Supreme Court jurisprudence as a move from empirical, concrete foreseeability, towards more normative, abstract general foreseeability, it is interesting to see if experts still use arguments related to concrete individual foreseeability. The second issue considers the assessment framework of non-accountability. Since we believe that prior fault should be assessed using criteria equivalent to non-accountability or diminished accountability (the equivalence thesis: see Goldberg et al., 2021), and since cognition and volition are now key features of the accountability assessment, we analyse whether prior fault reasoning also addresses these two capacities. In other words, we investigate if there is overlap between the assessment criteria of accountability and prior fault.

3 DATA AND METHODOLOGY

3.1 Case File Analysis

We employed a case file analysis of behavioural expert witness reports, which were carefully selected and pseudonymised by the Netherlands Institute of Forensic Psychiatry and Psychology (NIFP), leading to a sample of 217 files in which a substance use disorder had been diagnosed.³ About a third of the reports came from the Pieter Baan Centre⁴ (hereafter referred to as PBC, $N = 65$, 30%), and the remaining cases ($N = 152$, 70%) were outpatient multidisciplinary assessments by a psychologist and a psychiatrist (hereafter referred to as ‘duo reports’). To

3. The selection process included all ($N = 943$) multidisciplinary outpatient and clinical PBC reports from 2021, from which all addiction-related cases were extracted. PBC reports were coded first, followed by as many outpatient reports as possible to match PBC numbers. Due to time constraints at the NIFP, the final number of files analysed was determined by available research time rather than file availability.

4. This is the NIFP’s observation clinic, allowing the defendant to be examined but also observed in order to aid the expert witness report. PBC placement is requested particularly in cases where defendants may be uncooperative.

increase the internal validity of the case file research, a codebook was drawn up with variables concerning the nature of substance use, addiction and other psychiatric disorders, as well as advice on attribution and possible intervention frameworks.

3.2 *Structured Case Law Analysis*

The relevant judgments were collected via Rechtspraak.nl, the open-source database of verdicts in the Netherlands, by search string containing the terms prior fault, addiction and behavioural expert witness reports, and setting a time frame covering the period January 2013 up to October 2023,⁵ resulting in 1,049 cases. Similarly to the case file analysis, a codebook was used containing 13 variables, including information on the offence, potential disorders, the type of substance addiction, and the judge's arguments regarding accountability and prior fault. Of the total number of verdicts, after coding, 740 cases were found to involve an addicted defendant as well as contain an expert witness report. This sample included mainly first-instance cases ($N = 644$, 87%) and some Court of Appeal cases ($N = 96$, 13%).

Importantly, the behavioural reports in the verdicts are not necessarily the same reports as those examined in the case file analysis, although they may overlap. Due to the anonymised nature of both the verdicts and the behavioural reports, it is not possible to compare them directly. The study was approved by the Ethical Review Committee of the Faculty of Law of the University of Groningen under *inter alia* the condition that the files were pseudonymised by the NIFP and studied at its offices in Utrecht. Encrypted file numbers were used in the database, and the analyses were conducted on an aggregate level, meaning no conclusions may be drawn about individual cases or verdicts.

4 RESULTS OF THE CASE FILE RESEARCH

4.1 *Quantitative Findings Regarding Addiction and Substance Use Information*

The sample contained only cases with complex psychopathology, meaning that their symptoms can be classified under several different psychiatric labels; a phenomenon referred to as comorbidity in medical terminology. All individuals involved had a diagnosed substance use disorder (possibly in remission), as this was the selection criterion, but the 141 defendants (on whom 217 reports were written) in the sample regularly had a mental disorder in addition to a

5. This time frame was set for two reasons: first, recent case law is most relevant as the subject of addiction and substance use changes within society, and, second, this keeps the number of judgments manageable.

substance use disorder ($N = 136$, 96.5%). Given the prevalence of comorbidity of mental health problems among defendants (Bloem et al., 2021), it is not entirely unexpected that almost half of the defendants from this sample suffered from a comorbid psychotic disorder (such as schizophrenia) and about 40% with a personality disorder. Moreover, a vast majority of individuals were considered to be (or have been) addicted to multiple types of substances ($N = 78$, 55.3%). The type of substance varied, but the sample contained (among others) a cannabis use disorder for 104 individuals and an alcohol disorder for 66 individuals: 73.8% and 46.8% of the sample, respectively. Aside from the presence of substance use disorders, about half of the defendants were intoxicated during the offence. Poly drug use was also frequent at the time of the offence: in 17.7% ($N = 25$) of the sample, the defendant was under the influence of two or more substances.

The impact of coexisting substance use and comorbid disorders on expert opinions about accountability can be inferred from how often it is mentioned in reports. There are 129 experts who do not mention the substance use disorder in the accountability advice (59.4%) and 88 experts who do (40.6%). With regard to discussing intoxication at the time of the offence, we found that 54.5% of experts ($N = 118$) mention substance use, compared to 95 experts (43.8%) who do not.

Regarding the final accountability advice, most experts argue that the defendant should be held diminished accountable (see Table 1). While about one in five defendants is considered non-accountable, the defendant is considered fully accountable by very few experts. A close scrutiny of those full accountability cases clearly shows that these are predominantly cases containing only addiction as a diagnosis (i.e. no other comorbid disorders). Other cases, in which (some degree of) diminished accountability or non-accountability is advised, almost always concern defendants with an additional disorder, which the expert also explicitly addresses.

It is also interesting that there are 24 cases in which the experts do report on substance use at the time of the offence but still advise non-accountability. In the majority of these cases, prior fault is not discussed. In five reports, the expert does actively refute a prior fault argument, for example on the basis of a lack of foreseeability of the (often psychotic) consequences of substance use. It is worth noting that there is a non-significant difference in the frequency of the non-accountability advice in duo reports versus the PBC reports: in 25.7 to 15.4% of cases.⁶

6. χ^2 (2, $N = 214$) = 2.587, $p = 0.274$. For the chi-square test, the accountability opinion was converted into a three-point scale instead of the original five-point scale, with the few observations for the categories of strongly and slightly diminished accountability added to the category diminished accountability.

Table 1 **Accountability Advice by the Experts in the Case File Research, Differentiated between PBC Reports and Duo Reports**

	PBC		Dual Reports		Total	
	N	%	N	%	N	%
Accountability advice						
Non-accountable	10	15.4	39	25.7	49	22.6
Strongly diminished accountable ^a	2	3.1	5	3.3	7	3.2
Diminished accountable	43	66.2	95	62.5	138	63.6
Slightly diminished accountable	2	3.1	1	0.7	3	1.4
Fully accountable	6	9.2	11	7.2	17	7.8
No advice	2	3.1	1	0.7	3	1.4
<i>Total</i>	<i>65</i>	<i>100</i>	<i>152</i>	<i>100</i>	<i>217</i>	<i>100</i>

a For more information on these intermediate possibilities of strongly- and slightly diminished accountability, and why they are rarely mentioned, see Mebius and colleagues (2023).

4.2 *Qualitative Findings Regarding Addiction and Substance Use in Accountability and Prior Fault*

When it comes to ‘staying in one’s lane’, the reports have been screened for using normative arguments when discussing prior fault. In none of the reports was the exact term *culpa in causa* used. Nor did experts use more objective, general terms to underpin the individual’s knowledge of the possible dangerous effects of certain substances; even when the words ‘should have known’ or ‘ought to have known’ were used, this generally referred to knowledge based on individual experience with regard to frequent use (i.e. a subjective and empirical perspective).

Yet experts do discuss, using empirical and behavioural arguments, and thereby not exceeding their area of expertise, whether the defendant had a degree of prior fault in creating or exacerbating the circumstances. Such arguments are usually addressed in the defendant’s favour: for example, experts discuss reasons why the defendant cannot be held responsible for consuming substances. For example, in a case where the defendant was charged with multiple offences, a psychiatrist states that

it is relevant that people with psychoses are often inclined to use drugs to unwind. The defendant himself also stated that he used cannabis and cocaine because of his psychotic symptoms. For this reason, the defendant cannot be held (entirely) responsible for his decision to use drugs.⁷

7. Case 201-psa: a psychiatrist reporting on a 36-year-old defendant.

Thus, the temporal sequence in which the various disorders and symptoms manifest themselves and their interaction may be important for (the advice regarding) responsibility: although drug use may trigger or exacerbate psychosis, (pre-)psychotic symptoms may also have triggered self-medication (see also Goldberg, 2022).

Not only are other mental disorders discussed as a reason for substance use, but underlying addictions are also repeatedly cited as a reason not to hold the defendant (fully) accountable for using substances. For instance:

Based on his [addiction] disorder, the defendant has had difficulty resisting his cannabis cravings, despite fully being aware – due to his experience with the substance – that it has a negative effect on his capacity to think clearly. Inherent to the nature of a substance use disorder, he therefore cannot be held entirely responsible for blowing....⁸

Similar reasoning is evidenced in the following example, whereby the psychologist indicates that the defendant could have known that he might react ‘atypically’ to substance use. However, the defendant is

unable to resist his need for the effects of substance use (distraction, attenuation, stimulus seeking) due to his personality disorder – especially the impulsivity, limited tolerance towards frustrations and a tendency for immediate need satisfaction in his drug use – and his predisposition towards addiction.⁹

In the foregoing examples the experts mention the specific knowledge, and thus concrete foreseeability that the defendant had, but also address the substance use disorder as a (possible) reason why the defendant cannot be held fully accountable for substance use. An opposing argument, however, was found by a psychiatrist, reporting on a violent crime, who stated that “the absence of a personality disorder means that the defendant can in principle be held responsible for developing a cocaine and alcohol use disorder.”¹⁰ The psychiatrist continued the report by also addressing the defendant’s responsibility for the ensuing intoxications and further impulsive acts.

Because the last example involves an expert witness report on a serious violent crime, one may wonder to what extent the severity of the offence may (consciously or unconsciously) have played a role in determining the degree of accountability. The results do suggest this to be the case, by looking at the opinions on accountability compared between all cases of at least one (attempted) homicide

8. Case 116-psy: a psychologist reporting on a 21-year-old defendant.

9. Case 55-psy: a psychologist reporting on a 41-year-old defendant.

10. Case 15-psa: a psychiatrist reporting on a 38-year-old defendant.

versus all other, non-homicidal offences (see Table 2). Among defendants charged with homicide (among others), almost 18% of the experts recommended full accountability, compared to only 2.8% of other offences. This is a significant difference.¹¹ However, this finding can also be explained from its correlation with the presence of a personality disorder that explains both addiction and violence.¹²

Table 2 **Accountability Advice by the Experts in the Case File Research, Differentiated between (Attempted) Homicides and All Other Offences**

	(attempted) Homicide		Other Offences		Total	
Accountability advice	N	%	N	%	N	%
Non-accountable	16	21.9	33	22.9	49	22.6
Strongly diminished accountable	1	1.4	6	4.2	7	3.2
Diminished accountable	43	58.9	95	66	138	63.6
Slightly diminished accountable	0	0	3	2.1	3	1.4
Fully accountable	13	17.8	4	2.8	17	7.8
No advice	0	0	3	2.1	3	1.4
<i>Total</i>	<i>73</i>	<i>100</i>	<i>144</i>	<i>100</i>	<i>217</i>	<i>100</i>

Interestingly, substance use does not always negate a non-accountability advice. A psychiatrist explains: “In the days before the offence, the defendant’s delusions were increased due to heavy cannabis use and sleep deprivation, on top of the existing severe psychotic condition.”¹³ In this case, therefore, there seem to be pre-existing psychotic symptoms, which become aggravated by substance use. The same applies to an opinion of the PBC, which refers to cannabis and truffle consumption as reasons for the deterioration of the defendant’s psychosis. This fact “could not, in my opinion, have been foreseen by the defendant”, states the expert.¹⁴ Addiction can also exacerbate underlying psychotic vulnerabilities. In a PBC report, the experts also recommended non-accountability, explaining that

11. The chi-square test suggests a significant difference between the distribution of accountability opinions among defendants suspected of (among others) (attempted) homicide versus other defendants (χ^2 (2, $N = 214$) = 14.882, $p < 0.001$). Also for this chi-square test, the original five-point scale was converted into a three-point scale.

12. Possibly, such a personality disorder is a *confounder*, i.e. a factor that is related to the violent offence and also to the accountability opinion, and can thus explain the relationship between the two factors. Indeed, when tested, having a personality disorder significantly affects the accountability advice. In this sample, defendants with (among other things) a personality disorder are considered completely insanity-prone in only 4.9% of cases ($N = 4$), compared to 33.8% of defendants without a personality disorder ($N = 45$): χ^2 (2, $N = 214$) = 28.123, $p < 0.001$.

13. Case 47-psa: a psychiatrist reporting on a 22-year-old defendant.

14. Case 777: a PBC report on a 28-year-old defendant.

the severe impairment in cannabis use puts further pressure on the defendant's sense of reality, but also reduces his ability to regulate emotions and aggression and his ability to control himself.¹⁵

These examples, as well as all data, together suggest that psychotic symptoms are the core of non-accountability. Even if there is concurrent substance use, whether or not stemming from an underlying addiction, which has exacerbated the psychotic tendencies, it does not negate the fact that the defendant had already been experiencing distortions in perceptions. Hence, these are not clear-cut cases (such as described for the standard case law in paragraph 2) of psychosis induced solely by substance use.

In short, behavioural experts seem to use two types of arguments to motivate a lack of prior fault. The first is a lack of insight ('unable to foresee'): a cognitive argument. More common, however, is the use of a volitional argument, in which underlying addictions and other disorders are used as evidence on which to argue that the defendant had limited behavioural alternatives ('unable to limit himself').

5 RESULTS OF THE STRUCTURED CASE LAW ANALYSIS

5.1 *Quantitative Analysis on the Accountability Judgment and Deviations from Expert Witness Advice*

Like the expert report sample, the case law analysis contained predominantly complex cases with (relatively) serious charges and/or charges for multiple offences.¹⁶ While addiction was a selection criterion, most cases involved a comorbid mental disorder: only 7.7% (57 judgments) featured substance use disorder alone. Intoxication at the time of the offence was also common, occurring in 71.2% ($N = 529$) of cases. Nevertheless, only a few judges (12% of case, $N = 89$) use the term 'prior fault' or 'culpa in causa'.

The case law analysis shows that about 10% of defendants, i.e. 71 cases, are considered non-accountable in this sample (see Table 3), despite the presence of an underlying addiction. A more detailed analysis of these cases reveals some interesting findings. In one case, the judge deliberately deviates from the advice of both experts, both of whom considered the defendant accountable through an explicit prior fault reasoning. The judge, however, disagrees and deviates, but, unfortunately, does not elaborate on the reasons why (Court of First

15. Case 816: a PBC-report on a 29-year-old defendant.

16. Evidently, the influence of sampling is very strong here. By selecting for the presence of behavioural reports, lighter offences are automatically excluded, with the consequences for the external validity of this study.

Instance Amsterdam, 2019). In some cases, psychosis was caused by not taking anti-psychotic medication (correctly), either with or without concurring substance use. In one of these cases, the judge emphasised “that the defendant’s medication non-adherence is clearly related to his underlying mental health problems” and is therefore not relevant for prior fault (Court of First Instance Noord-Holland, 2011). One particular judge was also inclined to consider the substance use as a method of (inadequate) coping, and therefore symptomatic of the underlying problem. However, in the majority of the 71 cases where a non-accountability verdict is reached, the judge does not address any form of *culpa in causa* at all, rendering it unclear what the role of addiction and possible substance use is in these judgments.

Table 3 Accountability Judgments in the Case Law Analysis Sample

Accountability decision	N	%
Non-accountable	71	9.6
Strongly diminished accountable	25	3.4
Diminished accountable	531	71.8
Slightly diminished accountable	26	3.5
Fully accountable	45	6.1
No advice	42	5.6
Total	740	100

In only a small percentage of cases (see Table 4) does the court deviate from the expert(s)’ opinion. It is striking that in this small subgroup of cases ($N = 42$) in which the court deviates, prior fault seems to be disproportionately featured: in about a third of this group ($N = 15$, 35.7%), the judge mentions prior fault. In the full sample, prior fault was ‘only’ discussed in 12% of cases. Furthermore, it stands out that when this small subgroup of cases – whereby the judge deviates from the experts – is compared with the full dataset, the type of offence committed appears to be the more serious. In the small subgroup, about 25% of the offences (among others) are homicides, and another 21.4% are attempted homicides ($N = 11$ and $N = 9$, respectively). In the full dataset, the number of homicides is 12.6% ($N = 97$), and the number of attempted homicides is 135 (18.2%). Thus, possible reasons for deviating from the advice might be the severity of the offence, in addition to the degree of prior fault.

Table 4 Degree in Which Courts Follow the Advice of the Expert Concerning Accountability in the Case Law Analysis

	Psychiatrist		Psychologist	
Following expert's opinion	N	%	N	%
No	27	3.6	33	4.5
Yes	425	57.4	561	75.8
Not applicable ^a	242	32.7	94	12.7
Unknown	46	6.2	51	6.8
<i>Total</i>	<i>740</i>	<i>100</i>	<i>740</i>	<i>100</i>

a These cases involved inconclusive expert advice, often due to the defendant's refusal to cooperate. The numerous 'non-applicable' cases for psychiatrists are explained by many reports being authored solely by psychologists.

5.2 *Addiction and Substance Use in the Motivation of the Accountability and Prior Fault Verdict*

The qualitative analysis of the courts' motivations reveals two interesting trends regarding the influence of substance use or addiction on accountability verdicts. First, in the vast majority of cases, judges discuss the defendant's behaviour – and impairments therein – from a predominantly cognitive perspective, mainly leaving a volitional perspective aside. Second, judges tend to underpin foreseeability with arguments regarding the individual's concrete knowledge, even though the standard jurisprudence allows them to motivate foreseeability in more general, normative terms. By using empirical arguments to motivate concrete foreseeability, we notice inconsistencies in the judges' arguments. These two trends are discussed and explained in more detail in what follows.

5.2.1 *A Predominantly Cognitive Focus*

Judges often refer to the defendant's concrete knowledge about the (negative) effects of substance use as an argument for prior fault.

The defendant stated that he knew from the previous use of alcoholic beverages and drugs that the combination of these substances would have a negative effect on his behaviour. Nevertheless, after drinking heavily and using drugs, he went out onto the streets despite the fateful consequences. (Court of First Instance Oost-Brabant, 2016)

However, even if the substance use has a different effect than it did in previous instances, the current assessment framework has a simple solution. Courts can always rely on the argument that it is common knowledge that the effects of substance use may vary individually or differ depending on the specific

circumstances. Even in cases where the defendant himself has no experience with the drug and thus does lack concrete prior knowledge of such effects, he can be blamed for not knowing about such effects even though he could have known:

The defendant had never used speed before and therefore did not know what effect speed would have on him and for how long. He stated that at the time of consumption, he did not know that using speed could lead to psychosis. However, he could easily have known this, by (for example) looking on the internet. (Court of Appeal Arnhem-Leeuwarden, 2017)

A final variation of the cognitive criterion stands out, thereby complementing the trinity: the defendant knew; or he could have known; and otherwise he *should* have known; that substance use can have negative consequences. The judge regularly refers to it being a ‘fact of common knowledge’ that the effects of substance use can vary from person to person and vary according to the situational circumstances, ensuring that any defendant could effectively always have known about possible negative effects of substance use.

Individuals with severe substance use disorders typically retain cognitive capacities but struggle with volitional control. They are aware of substance effects through experience, yet their main challenges are cravings to use and difficulty quitting. Despite the frequent acknowledgment of these impairments by experts, as mentioned in Section 4, judges rarely address these volitional features. Occasionally, cravings and impairment of choice or will are mentioned by the courts:

The excessive substance use leading up to the offence should be placed in the context of the defendant’s disorders. Based on these disorders, or at least the structural addiction and possible other underlying problems, the defendant has reduced control over his substance use and must be assumed to have reduced freedom of choice in this context. (Court of First Instance Amsterdam, 2022).

Yet in this case, too, the court’s final conclusion still emphasised the defendant’s cognitive ability, which remained unimpaired. As such, although volitional impairments are mentioned, they do not seem to be a decisive feature.

5.2.2 *Constructing Prior Fault: The Role of Treatment History*

Courts seem to rely on arguments related to an individual’s concrete foreseeability, i.e. specifying why the defendant specifically could have foreseen negative consequences. However, in proving concrete foreseeability, inconsistent reasoning was found regarding the role of the defendant’s treatment history. On the one hand, the defendant may be blamed for failing to seek help for his substance use problems, thereby ‘taking the risk’ of causing harm to others (e.g. Court of

First Instance Rotterdam, 2021). If this train of thought is followed consistently, however, we would expect that if the defendant did undergo treatment, it would weigh in his favour. Yet this is not necessarily the case:

The defendant can be blamed to some extent for failing to seek help for his cannabis and alcohol dependency after aborting previous outpatient treatment, which he underwent for a short period of time; even though, apparently, he did not consider the possibility that his substance use could lead to a psychosis, which is a risk that was generally known to him. (Court of First Instance Amsterdam, 2022)

Here, enrolling in treatment once is not sufficient: after aborting treatment, the defendant should have continued to seek help. In another case, the defendant had completed a treatment programme but can be blamed for “seeking help for addiction only once” (Court of First Instance Rotterdam, 2017).

While these different lines of reasoning seem consistent when addressing them separately, they are not convincing when combined. Not seeking any help, enrolling but then discontinuing treatment, and completing a course of treatment are all arguments that reflect negatively on the defendant. Similar trains of thought can be found outside our current sample, whereby an addicted defendant is sometimes considered to have heightened responsibility, because his addiction made him extra aware of the risks of substance use.¹⁷ Hence, following such an argument, it is not far-fetched to believe that an extensive treatment history may also be indicative of a very high level of understanding and knowledge about the potential negative consequences of use. Yet what it also seems indicative of, although not reflected by the courts’ judgments, is the defendant’s inability to stop using substances, reflecting a severe impairment of volitional capacities. Intuitively, the courts seem to be reasoning towards a particular goal, considering defendants responsible for the addictive behaviour. Whether this would be the case due to his lack of treatment needs (thereby ‘taking the risks’) or due to his having gone through a treatment programme (‘the risk was generally known to him’) seems to be largely irrelevant. However, many reasons could explain the lack of active help-seeking or treatment discontinuation. Seeking the behavioural expert’s advice by the court – considering the empirical nature of these claims – seems appropriate and represents a better alternative than automatically assuming that reasons for failed treatment would be the defendant’s disinterests or ‘acceptance of risks’.

17. As, for example, in the Tolbert case (Court of Appeal Arnhem-Leeuwarden, 2007): “Given his years of intensive amphetamine use, the defendant knew what the risks of his drug use could be.” Yet knowledge of substance use is not the problem in addiction: craving and relapse is. Hence, a volitional addiction would have been appropriate.

6 DISCUSSION

This study reveals that substance use, addiction and accountability cases are often more complex than the standard jurisprudence outlined in paragraph 2 suggests. Cases frequently involve addiction alongside other mental disorders during self-intoxication. Only a few of these complex cases result in prior fault reasoning, either in court or (more implicitly) among experts. Prior fault arguments typically apply only when severe mental issues, often of a psychotic nature, are self-induced and would otherwise justify non-accountability. In most cases, however, prior fault arguments are not necessary, as diminished accountability is already available as an outcome that can balance responsibility with the individual's limited insight or control at the time of self-intoxication.

When a pre-existing psychotic disorder influences self-intoxication (e.g., as self-medication), experts and courts often have no issue assuming non-accountability despite substance use or addiction. However, if judges do deviate from expert advice regarding non-accountability, this is often based on prior fault reasoning, particularly in serious offences. This suggests that prior fault reasoning helps maintain accountability in such cases and prioritise societal norm confirmation. The file study also indicates that experts may be equally influenced by offence severity when assessing responsibility. But similarly to the severe Thijs H. case, in prior fault cases, a more normative approach can be considered somewhat of a 'trick' for legal practitioners to come to harsher consequences than they would by taking a more behavioural, individual approach.¹⁸ As mentioned in the first paragraph, 'trick' is the word used to describe the experience of medical (or behavioural) experts of having their expert opinion, tailored to the individual, bypassed by legal practitioners on the basis of more general or procedural reasoning (compare Haan, 2023).

Key differences emerge in regard to how experts and courts justify their assessments. Behavioural experts focus on the individual's concrete foreseeability of substance use effects, relying on empirical evidence such as past experiences and personal capacities. As such, they stay in their disciplinary lane. Courts, supported by standard jurisprudence, extend this reasoning normatively to 'could (and therefore should) have known.' However, when concrete foreseeability can be substantiated, judges still emphasise it, even though the broad, abstract foreseeability criterion no longer requires this. However, when constructing prior fault, they sometimes seem to overstep their expertise into more empirical areas, such as treatment history. This can lead to contradictory arguments. In such cases,

18. Also, Goldberg's chapter in this volume (Chapter 12) shows how a legal perspective on addiction leads to harsher consequences for the individual than a behavioural (disease) perspective.

experts' advice should be sought, or these arguments should be avoided, as they are not necessary in the broad assessment framework. Such arguments suggest a purposeful reasoning towards prior fault; a whiff that the broad assessment framework gives to the issue of self-intoxication anyway. If the Thijs H. ruling encourages both experts and judges to focus on their respective areas of expertise in accountability cases, behavioural experts are likely to be better equipped to report on concrete foreseeability than their legal counterparts. However, beyond prior fault, we foresee a continued discussion on the disciplinary nature of non-accountability, and as long as the disciplinary boundaries of accountability remain unclear, concerns about sticking to one's own trade will persist.

In addition to cognitive arguments on knowledge and foreseeability, behavioural experts regularly present volitional arguments, while judges typically focus on cognitive issues. This puts individuals with addiction at a disadvantage, as their impairments are primarily volitional. The current framework for prior fault was developed before there was a clear framework for non-accountability. Following the Supreme Court's Thijs H. ruling, it is now clear that non-accountability involves both cognitive and volitional elements. Hence, based on the idea of anterior culpability, it seems reasonable to apply an equivalent assessment regarding preceding moments of self-intoxication. In other words, if a disorder causes such a loss of control that non-accountability may apply, it seems reasonable to extend that reasoning to moments earlier, such as during self-intoxication. The question of whether a person was capable of acting in accordance with his (concrete or abstract) understanding of the risks allows more room for assuming diminished or non-accountability in the (comorbidly) addicted defendant. Although it is not necessarily the case that addiction completely removes control (e.g. depending on the context of use), complex cases may demonstrate enough volitional impairments to meet the criteria for non-accountability. This approach would encourage a more meaningful dialogue between experts and judges, requiring judges to give more weight to the volitional arguments presented by experts.

This research also shows, however, that while behavioural experts, possibly influenced by their prevailing view of addiction as a mental disorder, see some room for excusability based on addiction, the law explicitly and diligently seeks to link addiction to accountability. Moreover, there is a long-standing view in the literature about extending anterior culpability to the moment the person first used drugs, known as *culpa in causa squared* (see Bijlsma, 2011; Verkes & Fechner, 2022). Hence, we do not expect changes in the assessment framework to drastically alter case outcomes but rather to encourage more consistent dialogue between experts and judges regarding addiction in these cases.

7 CONCLUSION

This research shows that the one-sided (merely cognitive) legal approach to prior fault does not match behavioural/empirical findings related to mental disorder and addiction, and in doing so also does not fully match the recent case law on non-accountability from the Thijs H. case. Similarly to this case, our empirical research shows that a more normative approach – in cases of prior fault, addiction and (diminished) accountability – allows for ‘tricks’ and harsher consequences for the individual when the severity of the offence seems to require these. Finally, it also highlights inconsistencies in reasoning outside one’s own (mainly behavioural instead of legal) field of expertise. Due to this addition to a ‘jurisprudence of consequences’ (Miller, 1965), legal development related to (prior fault, addiction and) accountability as well as the dialogue between behavioural and legal practitioners could profit.

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INVESTIGATING AND PROSECUTING CRIMINAL ACTIVITY COMMITTED OUTSIDE THE EU: THE ABILITY OF EPPO TO ACT AND THE MS OF FORUM

Andrew Zuidema

In 2017, the EU created the European Public Prosecutor's Office (EPPO) with the adoption of the EPPO Regulation (2017). The EPPO is "responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union" (2017, Art. 4). These financial crimes are those that are provided for under the PIF Directive (2017). The EPPO Regulation provides the various situations where the EPPO will have the competence to handle these criminal offences. Additionally, the EPPO Regulation (2017, Art. 26(4)) provides criteria on the member state (MS) of forum that must be used by the EPPO. The MS of forum is the place/jurisdiction where a person will be prosecuted in. This is especially important for the EPPO as it has no jurisdiction of its own from the EU but relies on the MS own jurisdiction.

The EPPO Regulation is not only concerned with allowing the EPPO to handle cases that take place within the MS territory but also regulates how the EPPO can handle extraterritorial criminal activity as well (Art. 23(b)-(c)). In this regard, legal research has examined how the Regulation should be understood and what this will mean for the EPPO. However, the Regulation is applied by the EPPO, not by academics. It is vital to understand how the EPPO sees its obligation under the Regulation and the impact its decision has on cases. This will be accomplished through empirical research: conducting interviews with key actors within EPPO. Therefore, how does doctrinal legal research understand EPPO obligation in extraterritorial cases compared to how the EPPO actually operates?

In order to answer this question, this chapter will examine the following: first, the chapter will provide the legal framework for this issue. This will be done by examining the EPPO Regulation and how legal research has perceived its effects on the EPPO's ability to handle extraterritorial cases. Second, the chapter will provide the methodology that was employed to gather the empirical data along

with who the respondents were for this study. The study involved interviews with core experts from the EPPO – European Prosecutor, European Delegate Prosecutor, EPPO’s legal service – on how the EPPO implements the EPPO Regulation. The results of this will be presented in the results section. This will provide information on how the EPPO sees its obligation and the effects that the respondents see when understanding their obligations under the Regulation.

Following this, there will be a discussion on the difference with the analytical framework based on academic thoughts on the implication of the EPPO Regulation against EPPO’s understanding. The potential effects of this on cases that could potentially be handled by EPPO will also be discussed. Thus, this chapter ultimately engages with the book’s central question, ‘how does empirical research help us to understand the effects of law; and how can we incorporate these findings into a general ‘jurisprudence of consequences’?

2 LEGAL FRAMEWORK

2.1 *Competence of the EPPO*

The EPPO is allowed to handle only cases that fall within its competence under Articles 22, 23 and 25 of the EPPO Regulation (2017). These competences are called material competence, territorial and personal competence, and exercise of competence. The condition of material competence is met whenever someone’s actions satisfy the following: (a) they constitute a criminal offence according to national law, and (b) they can be genuinely linked to the definition within the PIF Directive (Brodowski, 2021, p. 146). The Regulation (2017, Art. 22) also provides that the EPPO may tackle other criminal offences; however, they must be interlinked with PIF offences and must not be related to national direct taxes.

Territorial and personal competence is present to ensure that an MS will have jurisdiction for the EPPO to operate in and also the persons who can be investigated by the EPPO. There are three factors that can be used, only one of which is needed to grant the EPPO competence (Brodowski, 2021; EPPO Regulation, 2017, Art. 23; Herrnfeld, 2021a, 2021b). The first is that the offence was committed in whole or in part within one or more MS. While this is an important component for the EPPO to gain competence, it does not apply in situations that are being examined herein, namely extraterritorial commitment of the offence. The second gives the EPPO the competence to handle cases where the suspect is a Union national of a participating MS as long as there is one participating MS that has established jurisdiction over that person. The MS of nationality does not have to be the MS that has established jurisdiction (Herrnfeld, 2021a, pp. 175-176). This could occur in situations where an MS applies their jurisdiction extraterritorially to their permanent residents, for example.

The exercise of the competence of the EPPO is the final competence criterion. This criterion is focused on ensuring that the EPPO handles the serious PIF offences, and it has two elements. The first is that the damage incurred is at least €10,000 (unless there are Union interests at stake) (Zuidema, 2023, p. 390) and the second, namely the preponderance element, is that compared to other offences the PIF offence should be the focus of the criminal activity, and the EU should be the main victim (Zuidema, 2023, pp. 390-391). This ensures that the EPPO focused on the more serious criminal activity (Herrnfeld, 2021b).

The EPPO must assess the foregoing to determine if they have competence and to initiate an investigation “in accordance with the applicable national law, [if] there are reasonable grounds to believe” that an offence within their competence has been committed (EPPO Regulation, 2017, Art. 26(1)). This means that national standards are used, which can differ between MS; this means that the same facts in different MS may result in whether reasonable grounds criteria have been met (Herrnfeld, 2021b).

2.2 *MS of Forum for the EPPO*

The EPPO Regulation (2017, Art. 26(4)) provides that

a case shall as a rule be initiated and handled by a European Delegated Prosecutor from the Member State where the focus of the criminal activity is or, if several connected offences within the competences of the EPPO have been committed, the Member State where the bulk of the offences has been committed.

However, if it is ‘duly justified’, the EPPO may deviate from the territorial element, in the following order of priority:

- (a) the place of the suspect’s or accused person’s habitual residence;
- (b) the nationality of the suspect or accused person;
- (c) the place where the main financial damage has occurred (EPPO Regulation, 2017, Art. 26(4)).

This provision is known as the MS of forum criteria (Zuidema, 2023). It is designed to resolve situations where more than one jurisdiction is applicable; in other words, if more than one MS jurisdiction applies, Article 26(4) provides the tie-breaking rule (Herrnfeld, 2021c, p. 219).

In cases that involve extraterritorial situations, the first criterion – territorial principle – is inapplicable, and instead the other criterion would play a more prominent role. Academically, we provide that habitual residency (in criminal law) occurs whenever a person becomes a permanent resident in another MS (Guild et al., 2014, p. 186), nationality is self-explanatory to those that are nationals

of an MS (Herrnfeld, 2021c, p. 223), and then financial damage. Financial damage is against the EU institutions, with the appropriate jurisdiction determined based on which institution has suffered and where it is located (Wasmeier, 2015, p. 148; Herrnfeld, 2021c, p. 223).

2.2.1 *Duly Justified*

The MS of forum elements above cannot be used whenever the EPPO wishes; rather, the EPPO must ‘duly justify’ any decision to use an MS of forum other than those where the focus of the offence has predominantly taken place (EPPO Regulation, 2017, Art. 26(4)). Herrnfeld (2021c) and Panzavolta (2018) note that various reasons may be available to the EPPO to duly justify a decision. However, there are potential concerns from Luchtman (2018, p. 158), Panzavolta (2018, p. 79) and Sicurella (2023, p. 27) that the term ‘duly justified’ will not prevent the EPPO from engaging in forum shopping or taking arbitrary decisions when determining the MS of forum.

2.2.2 *General Interest of Justice*

In some instances, there may be a requirement that a case MS of forum must be re-evaluated and changed to another MS. This is allowed under the Regulation (2017) if the case is in the general interest of justice (Art. 26(5)). Caeiro and Rodrigues (2020), Giuffrida (2017), and Panzavolta (2018) provide that the EPPO cannot claim a general interest of justice simply because it would be in the interest of the EPPO but rather that the interests of others must be taken into account. These interests are the interests of the suspected person(s), due account of the state of the investigation, and ensuring that the reallocation of a case does not prolong any proceedings. Due to the potential detrimental effects on defence, such a decision to change the MS of forum must occur as early on in the investigation as possible.

2.3 *MS of Forum as a Competence Element?*

Interestingly, Herrnfeld (2021c, p. 217) stated that under the EPPO Regulation, the EPPO “can only initiate an investigation if also one of the criteria set out in [Art. 26] paragraph 4 [EPPO Regulation] is [also] met”. If this is the case, this would mean that even if the EPPO has competence under the EPPO Regulation, it would be unable to handle the case if an MS of forum is inapplicable. This would affect the ability of EPPO to act in these situations and potentially cause persons suspected of criminal conduct to be outside the reach of the EPPO.

To answer the various questions, this chapter employs both doctrinal legal research methods and empirical legal research methods. The doctrinal legal research method is primarily based on the literature; it relies on how doctrinal legal research has answered these questions or the issues that have been raised. While case law is a valuable resource, to date only one case has been issued involving the EPPO itself, *GK and Others (Parquet européen)*, which is outside the context of this research. The empirical legal research method consists of semi-structured interviews conducted, with key actors working at the EPPO. The empirical work will examine how the EPPO understands the terminology and whether this is similar to that found in legal research – as illustrated by doctrinal legal research within the legal framework presented previously.

Qualitative semi-structured interviews with key actors. This method allows the researcher to obtain in-depth information about the research topic based on the respondents' experience and expertise (Geertz, 1973; Hennink et al., 2020, p. 10). Furthermore, it allows the researcher to engage with and ask clarifying or follow-up questions based on the respondents' answers, unlike structured interviews that are predetermined (Ruslin et al., 2022). As is often customary in semi-structured interviews, the questions put to the respondents were open-ended. Such questions allow the respondents to share their perspectives, an exercise that was supported by active listening and probing by the researcher to explore relevant issues that arose during the interview based on inductive interpretation (Hennink et al., 2020, pp. 23, 128, 131-132).

The respondents were chosen using the purposive sampling method. This method, also known as judgment sampling, is a means of selecting respondents for an interview. It is a non-random selection of persons, based on what the researcher wishes to know and thereby selects the individuals who "can and are willing to provide the information by virtue of [their] knowledge or experience" (Campbell et al., 2020, pp. 653-654; Etikan et al., 2016). Thereby, this method was employed to ensure that the chosen respondents had the required qualities, knowledge and expertise that will produce useful and valuable information (Campbell et al., 2020, pp. 653-654; Hennink et al., 2020, p. 92; Kelly, 2010). The interview questions were based on two central themes: how the EPPO determines when it has the competence to handle an investigation and how the EPPO determines the MS of forum. The selected respondents work directly on these issues, either as prosecutors or as legal advisors for the EPPO.

The *verstehen* perspective was employed to understand the terminology from the three respondents' viewpoints and experience and the meaning they assign to them. Instead of adopting a purely positivistic view that treats subjects as mere objects of study, this research embraces an interpretivist perspective, which acknowledges that while individuals are shaped by their environments, they

also actively construct these environments through their interpretations of them (Hennink et al., 2020, pp. 11, 17-18; Webley, 2010, pp. 930-931). Thereby, the persons interviewed provide meaning and context to their environment, allowing for an in-depth understanding of how they interpret and navigate it.

The question then turns to a simple issue: what qualifies the person interviewed to provide an understanding of the terminology under review and give meaning to it? Respondent 'Holden' is a European prosecutor, and in this capacity the respondent is *ex officio* a member of the College of the EPPO, which provides oversight over EPPO prosecutorial tasks and guidelines on the implementation of the EPPO Regulation. Additionally, 'Holden' is a member of at least one Permanent Chamber, whose task is to oversee and direct European delegated prosecutors' (EDPs') criminal investigations with the Chamber having a direct obligation to use and understand the terminology under review (EPPO Regulation, 2017, Art. 26(4)-(5)). Likewise, respondent 'Avasarala' is a European delegated prosecutor. The task of an EDP is to conduct criminal investigation and prosecution for the MS in their respective MS (EPPO Regulation, 2017, Arts. 26-28, 36). The EDP also has the ability to directly use the additional criteria for choosing an MS of forum, and the EDP works with the Permanent Chamber whenever a decision is taken on potentially reallocating a case or merging/splitting a case (EPPO Regulation, 2017, Art. 26(4)-(5)). Finally, respondent 'Drummer' is a member of EPPO's Legal Service. The Legal Service

has a horizontal role within the organisational structure of the EPPO, providing legal advice to the College, the European Chief Prosecutor, the European Prosecutors ... on the interpretation of the legal framework under Union law regulating the activities of the EPPO. (EPPO Annual Report 2023)

Within the study, it can be noted that there are only three persons partaking: 'Holden', 'Avasarala' and 'Drummer.' While this may seem to limit the applicability of the study due to their limited number, the persons selected for the study are the primary persons who must apply the EPPO Regulation and its effects on MS of Forum choice. They are hence the core experts, best suited for determining how the EPPO will act. They are the decision makers. During the interview, respondents also freely explained when their answer was based on how the EPPO has acted versus their own beliefs – based on the experience working at EPPO – regarding how the EPPO would act.

The respondent's participation within the study was entirely voluntary. The respondents were informed that if they desired, they would be able to refuse to answer questions or withdraw from the study at any moment and would not be required to provide a reason to use this right. This publication was also sent to the respondents to ensure that any statements or quotes used therein correctly reflect what they shared during the interview. This also allowed the

respondents to clarify or correct any misunderstandings within their responses. To ensure the confidentiality and anonymity of the respondents and the data, all of the respondents' personal information has been stored in a separate password-protected platform away from the respondent's responses. The respondents' responses do not contain any identifiers that could link the data back to them. Only the author and the research team had access to the research data. The research team consisted of the author's supervisors and one student assistant. Every respondent was informed about their rights on data protection, confidentiality and anonymity, and General Data Protection Regulation (GDPR) guidelines were followed. Additionally, permission to record the interviews was also requested and granted by the respondents. The respondent's rights and the purpose of the study were given to each respondent and the respondent was required to sign a written consent form, a copy of which was provided to the respondents.

It should be noted that this study took place after the EPPO had been in operation for only one year, having commenced operations on 1 June 2021. This means that EPPO's understanding of its obligations may have changed. Likewise, not every area of interest was fully covered –for example, the meaning of bulk or focus under the Regulation – hence the study's limitation to extraterritorial issues. It would be advantageous for the study to be repeated, first to ascertain whether the EPPO sees its understanding differently and, second, to expand the study to include elements that were not reviewed.

4 RESULTS

4.1 *Competence of the EPPO*

The EPPO requires that it has competence under the Regulation and that there is a MS with jurisdiction. After all, as Holden notes, “[If] there’s no MS with jurisdiction, you cannot exercise competence”; likewise, they state that “[If] a MS has jurisdiction, if it is a PIF crime, I don’t see how we can reject the case”. This shows the interlink between the two elements. First, all the competence requirements under the EPPO Regulation must be met, and there must also be a MS that has established jurisdiction over these criminal acts. When the EPPO is deciding whether it has competence, Holden provides that

the rules for competence are constantly saying according to its transposition to the national rights. So, it might vary a bit from country to country, but in any case, we will have to look at the criminal activity as a whole ... We will have to in certain cases, to sum up the whole criminal activity, because you might have part of the criminal activity in Portugal, part of it in Germany, but it's the same criminal activity. Borders do not change what humans can do. In these cases, and mostly in the VAT fraud cases, we put this together. Because it's one activity split according to several countries.

Holden, along with Drummer, noted that this application is due to the EPPO being a single office, which is not 'bound by the borders of the MS' when determining whether it is competent. Holden further elaborated that individual EDP may determine that – while the MS may have jurisdiction – elements of the competence criteria are not met. However, the Permanent Chamber overseeing the case will be able to see the complete picture.

Avasarala concurred that the Permanent Chamber's role is to oversee the EDP's and inform him if he must investigate. However, Avasarala did provide that they will inform the Permanent Chamber when their national law lacks jurisdiction. Holden noted that in such cases the Permanent Chamber will have the EDP "go in with the investigation, [but] when you write the indictment" you handle the part applicable to your MS.

However, while competence and MS of jurisdiction seem to be separate issues when determining whether EPPO has competence, the EPPO must ensure that an MS has established jurisdiction "because in the end, you will bring the case to a national court, so you will have to comply with the national rules". Avasarala highlighted this element, that they have to decide

Well am I competent? Is my court competent? So, from the beginning on, I have to look, can I find some offence in my own legislation that I can put forward to my judge? And when I do, will the judge say, well, I am competent to judge that? Because if not, then I would have to say, well, you can appoint me, dear Permanent Chamber, but I'm going to give it back because I am not competent in any other country, and for my own court, I will not be competent and I cannot investigate something that is not an offence in [my MS].

Therefore, the EPPO determines competence on two fronts. The first is the criminal activity within the scope of what the EPPO was created for: Avasarala noted, "[W]e are in place for the EU budget, to protect the EU budget. So, this is ... why we exist." At the same time, is there an MS(s) that has jurisdiction of these alleged offences and persons? Only if both the elements are present can the EPPO act.

When the EPPO is assessing the above, the EPPO does not necessarily need to know for certain that all the elements are present but is satisfied merely with knowing that there are reasonable grounds that they are. Drummer and Avasarala provide that the test of reasonable grounds is done based on what national systems determine is reasonable to open an investigation, since the case is investigated/prosecuted within the national court system. Avasarala further provided that the national judge will decide whether this standard is met, and regardless of what the EPPO believes, it is the national law that determines whether that has been met. Reasonable grounds are a national standard. Drummer notes that this could be a "source of fragmentation among the MS because it is essentially a test of national law" when the EPPO would have met this requirement. The EPPO must "trust on what [they are] told and then you just need to have reasonable grounds to believe

that things are this way” (Holden). As the investigation continues, it provides a clearer picture of whether the EPPO can continue, since ‘your competence depends’ on it.

The consequences of not knowing whether EPPO’s competence is met, or whether it is reasonable to assume it is, is that the EPPO cannot act (Avasarala). Holden notes that this does not automatically mean that the case is ignored. It depends on the reason. In situations where the facts of the case are unclear – to the point where it is unreasonable to assume the EPPO will have competence – the case must remain with the national authorities:

You can always leave the case with the national authorities until the amount of the damage is more quantified. And actually, this is an experience that we have in the Permanent Chambers. Sometimes the case is not evoked because the amount of the damage is totally unknown [competence requirement]. So, we do not evoke, and we ask the national authorities to refer the case back to us when they have more information.

Thus, while the EPPO may not have reasonable grounds to believe that its competence is present, this can always be reassessed after more information can be provided from a national investigation (Drummer). Additionally, Holden reflected that when a case is sent to the EPPO via whistleblowers or private persons, they would also send it to the national authorities if the situation were not clear.

In this case, we would just send the case to the national authority saying that, “well, we have nothing on which we can ground our exercise of competence, so you take it.”

However, Drummer provides that if a case is referred to the national authorities from whistleblowers, then it may be the “death of a case because they are not too interested either and don’t start digging, so we never see the case again”. Holden notes that “[it] could happen, but it’s the risk”.

However, there are situations where the EPPO lacks competence. Holden recalled a case they had overseen:

There was a crime committed in a third country with no connections, the guy was a local from that country. It was misappropriation of EU funds, and we considered that the jurisdiction was Belgian. Luckily, for this guy, the kind of contract he had with the commission do not qualify him as a Union staff. So, we just referred the case back to the Belgian authorities.

Holden elaborated that the EPPO Regulation does not allow the EPPO to have competence for criminal activity committed abroad for those who are not EU staff, even if they work with the EU. This issue can arise when handling extraterritorial cases, where only some persons are covered. This means that the EPPO is strictly

bound to the Regulation (Drummer). The consequences of unclear situations or persons not being within EPPO competence is that the EPPO cannot act.

However, when the EPPO does have competence, there is a need to determine the MS of the forum to handle the case in. Both Holden and Avasarala conveyed that Article 23 (EPPO Regulation, 2017) is used to both see if there is competence and provide the EPPO with potential MS of forums. This is important in extraterritorial cases, as MS laws do not apply to every person who commits the offence in general (Avasarala). Avasarala further provided that in cases where more than one jurisdiction is available, according to Article 23, the rules under Article 26 are used to determine where the EPPO goes.

4.2 *MS of Forum Rules for the EPPO*

Under the EPPO Regulation (2017), the EPPO is limited to choosing an MS of forum to territory, the habitual resident of the suspect, the nationality of the suspect or where the financial damage occurred (Art. 26(4)). Drummer explained that territory is the primary starting point for the EPPO and described the other criteria as ‘fall back criteria’ that the EPPO has whenever territory is either not enough or inappropriate as an MS of forum. Whether a situation is extraterritorial will depend on the MS, as the meaning of territory within the EPPO Regulation is determined by national law (Avasarala). Therefore, where a case is extraterritorial depends on the MS. However, regardless of how territory is defined by the MS, this article focuses on situations that involve acts that cannot be considered to have been committed on the MS territory.

Therefore, the EPPO would have to make use of the other criteria provided for under the EPPO Regulation, such as habitual residence, nationality or where the main financial damage has occurred. Habitual residence and nationality were not discussed with the respondents as I found them to be self-explanatory. Additionally, the Court of Justice has already determined that a person is a habitual resident (for criminal law) when they are a permanent resident (C-123/08 *Wolzenburg*, ECLI:EU:C:2009:616, paras. 66-74), whereas the nationality of a suspect is simply the MS where a person is a citizen. Main financial damage, however, was discussed with the respondents.

The extent of financial damages under Article 26(4)(c) EPPO Regulation (2017) is a very broad criterion for the EPPO (Drummer). However, its use is only as a ‘fall-back criterion’ by the EPPO. The reason for its broad application is that the nature of the crimes EPPO has competence for (PIF-offences) requires that Union money is at stake (Avasarala). As the Commission (and other Union institutions) is located in Brussels, this means that Belgium is theoretically always an MS of forum of last resort under the MS of forum criteria, according to Holden. Therefore, if Belgian jurisdiction can apply to the person, the case can be handled in Belgium under the EPPO Regulation.

4.2.1 *Duly Justified*

When the EPPO decides to deviate from the territorial principle, which is needed in extraterritorial cases, they must duly justify their decision. While this must be applicable in cases that occur extraterritorially, Drummer provides that the EPPO has to duly justify its decision when they move down the list. Additionally, these criteria are not weighted by the EPPO; it is required to strictly follow the list in order. In order to look at other criteria, however, the EPPO is required to duly justify its decision.

Holden strongly explained that duly justify is meant to prevent two things – arbitrary decisions or engaging in forum-shopping. This is the main role it plays in determining the MS of forum. Holden elaborated the difference between justifying a decision (generally) and duly justifying a decision under the EPPO Regulation. They provided that it would be possible for someone to justify an arbitrary decision or choice to use forum-shopping, ‘but not duly justify’ that decision. The element of duly justifying is what prevents those types of decisions from taking place.

Holden, Avasarala, and Drummer provided different reasonings that would meet the standard of ‘duly justified’: interest of the case, interest of the victim, protecting the EU budget, etc. Avasarala further explained that a decision is duly justified whenever the EPPO is unable to handle a case in a MS jurisdiction even though the MS of forum rules state that the case should go there: for example, the MS of forum rules provide that the case should be where the accused has permanent residency (for an act committed abroad), but that the MS lacks jurisdiction over that person. The EPPO is unable to handle the case in that MS as that MS lacks jurisdiction. Therefore, the EPPO must ‘move on’ to another criterion. Rather, duly justified requires, according to Holden and Avasarala, that the EPPO is able to provide good reasons to the court that they came to a certain conclusion on the MS of forum, while at the same time ensuring that those decisions are not based on forum-shopping or taken arbitrarily.

4.2.2 *General Interest of Justice*

However, there may be a requirement that the EPPO must redecide on the MS of forum since ‘the risk would be to have an unfair outcome in some way’, according to Drummer. This is the meaning of the term ‘in the general interest of justice’: the requirement that must be met for the EPPO to re-decide the MS of forum. Holden underlines that the ability to re-decide the MS of forum is important, as restricting this ability can lead to improper decisions and be detrimental to uncovering the truth. Furthermore, Avasarala provided that the general interest of justice takes a holistic view of the total case, the ‘whole package’. When deciding the need to redecide the MS of forum, the EPPO examines the interest of not only the defendant but also of society, the victims, and general deterrent behaviours. There is a need to allow the MS of forum to take place “because the truth is important,

what happens to society is important, what happens to the victim is important, [and] what happens to the defendant is important" (Avasarala). Thus the ability to change jurisdiction is not about allowing the EPPO an advantage, but to ensure that justice prevails.

However, this then brings up the question of when and how the EPPO can actually change the MS of forum. As already noted, the various interests and the need to ensure justice is the main reason why the EPPO should consider a new MS of forum. Unlike duly justified, the EPPO would have to reason more profoundly in order to evoke the general interest of justice requirement (Holden). Holden and Drummer provide that the EPPO should generally stay with the chosen jurisdiction; however, if the reason or interest at stake would harm justice, then a change in the MS of forum is required in order to prevent a miscarriage of justice. Thereby, the respondents have indicated that while many issues may arise that could be used to argue to change the MS of forum, the EPPO must ensure that these reasons have a strong impact on the general interest of justice rather than minor issues.

4.3 *MS of Forum as a Competence Element?*

Herrnfeld (2021c) had stated that even if EPPO had competence, the EPPO must ensure that the jurisdiction meets one of the criteria under the MS of forum rules under Article 26(4) (EPPO Regulation, 2017). Herrnfeld wrote that this may be difficult to achieve in cases where there is universal jurisdiction by an MS. However, while the EPPO has competence, none of the MS of forum rules seem to apply.

To tackle this matter, I had asked the respondents the following hypothetical case about an Irish national who is subject to the Staff Regulation of the EU and who works for the European External Action Service (EEAS). However, when not abroad for the EEAS, he lives in Ireland. If this national commits a PIF offence abroad while employed by the EEAS, would the EPPO have jurisdiction and, if so, which MS of forum to prosecute in? Belgium authorities have ensured that any person subjected to the Staff Regulation or to the Conditions of Employment (Art. 23(c)) can be investigated and prosecuted under Belgian criminal law (*Voorafgaande titel van het Wetboek van Strafoordering*, Arts. 10ter(4) & 12bis).

When addressing this issue, Holden verified that the EPPO competence criteria are fulfilled, since the EPPO can act only if they have competence. In particular, it was clarified that the person is covered under Belgian law, thereby providing the necessary jurisdictional element. In this situation, both Holden and Avasarala provided that "if it is a PIF crime, I don't see how we can reject the case". Their focus was on whether my example fulfilled the jurisdiction element under Article 23. If jurisdiction was fulfilled, then the EPPO would have the duty to take the case and act.

As Holden and Avasarala had stated, the EPPO is involved only with PIF offences, which are offences against the EU budget. The EU budget is in Belgium (Holden and Drummer). Drummer elaborated that the EPPO can handle cases in Belgium due to the broad application of the meaning of main financial damage – which is the EU budget by the Commission. In fact, Drummer notes that financial damage is used by EPPO whenever a case involves third states (non-participating MS or non-EU states), as the other forums are generally unavailable. However, it was made clear that just because there is a broad application of main financial damage, it does not mean that the EPPO can automatically use Belgium as a jurisdiction. Rather, the other MS of forum criteria must be checked, and only if it is possible to duly justify the decision can the EPPO use this criterion. This means that according to both Holden and Drummer, the MS of forum rules do not prevent the EPPO from acting, since the limitations of Article 23 EPPO Regulation (competence criteria) would be a hindrance rather than the MS of forum rules. In other words, MS's may not have established jurisdiction, or the person accused of the crime is listed under Article 23 (EPPO Regulation, 2017).

Avasarala, however, had a different perspective on the issue. While Avasarala stated, throughout the interview, that in order for the EPPO to act it must have competence, MS of forum rules are required only when there is more than one MS that has jurisdiction. The MS of forum rules are, as Avasarala stated, meant to resolve conflicts between various applicable jurisdictions, as allowed by Article 23, that could be chosen. This also means that if there is only one jurisdiction available, this is the jurisdiction the EPPO will handle the case in.

5 DISCUSSION

5.1 Competence

Within the literature, it is understood that the EPPO must have the competence to handle a case. This was stated by the respondents throughout the interviews. The EPPO is limited in its scope to those offences provided for by the EPPO Regulation and are capable of being investigated and charged under national law. It was expected that the EPPO obeys the law; however, it is always important that this is checked. After all, it could have been that the EPPO had a different understanding. An interesting element from the findings is the way in which the EPPO determines whether the conditions to have competence are met. The respondents review the entire criminal activity, across the MS and elsewhere, to see if all the competence elements are present, and then have the EDP handle parts of the criminal activity that can be done within the EDP MS.

The findings have shown that there are issues when EPPO is verifying whether it can investigate criminal activity. Reasonable grounds criteria have a reliance on national law, which can cause fragmentation on when the EPPO can act in different

MSs. Likewise, if the EPPO is unable to show reasonable grounds, the case must be returned to the national authorities which can have effects on the case. Depending on whether the national authority wishes to investigate further, their decision can affect whether the EPPO will ever get the case again. For example, if there is unknown information – that if the EPPO knew would mean they could investigate – and the national authority refuses to investigate further, this information will not become available. This would prevent the person committing the offence from facing justice.

Tied in with the issue of competence is the fact that the EPPO, while responsible for tackling offences against the EU budget, is limited in extraterritorial cases. The EPPO has the ability to handle those cases only if the person committing the offence is either a Union citizen from a partaking MS or EU staff. This causes an effect, as the foregoing example showed, that persons who commit these offences abroad cannot be investigated by the EPPO. While it is possible for another state to potentially handle the case, the EPPO is unable to. This situation will hold true even if MS had established universal jurisdiction over PIF offences, as this limitation is not based on national law, but on the EPPO Regulation. Additionally, they must ensure that national law provides them with a basis for handling the case. It is up to the national judge to decide whether they agree with the EPPO that there is jurisdiction. The consequences of not having jurisdiction or competence are that those who potentially commit PIF offences may not be investigated or prosecuted.

5.2 *MS of Forum*

Just as in academic work, the respondents provided that the EPPO must apply the rules of MS of forum in strict order. While there are academics who worry that the EPPO would still be able to engage in forum-shopping or take arbitrary decisions, as duly justified may not provide the guarantees necessary to prevent this, the respondents disagreed. Rather, what was shown was that the purpose of the term ‘duly justified’ was to prevent forum-shopping and arbitrary decision-making by the EPPO. According to the respondents, this was the term’s main purpose. Additionally, the respondents provided various reasons that could be used to duly justify a decision, similar in nature to what was proposed in the literature. The EPPO takes the stance that the MS of forum is changed only when absolutely necessary, and that, in general, a case must remain in the MS chosen, unless there are overriding reasons to change the MS of forum, as discussed previously.

5.3 *MS of Forum as a Competence Element*

The interesting element (compared to the literature) is how the respondents reacted to the question of whether the EPPO is prevented from having competence

if only the MS of forum criteria are unfulfilled. The prosecutors are adamant that if EPPO has competence, they are obliged to take the case and act. This implies that the MS of forum rules cannot and will not prevent the EPPO from having the competence to act. The MS does not have the jurisdiction (a competence criterion) to prevent the EPPO from acting. Drummer highlighted that there would never be a situation where this could occur. As noted by the other respondents, in extraterritorial cases only those persons who are Union citizens or EU staff are covered if there is also an applicable jurisdiction. Union citizens should be covered by their own national law already (PIF Directive, 2017, Art. 11(1)(a)), and EU staff, as a jurisdiction of last resort, is in Belgium. This is because Belgian law provides jurisdiction over EU staff and the main financial damage will always be felt in Brussels, as this is where the EU budget is from. Therefore, if the EPPO has competence – meaning that the case took place on an MS territory (no issue) or by one of the two categories of persons listed – the EPPO will fulfil the MS of forum elements anyway. Therefore, there is no tension.

However, Avasarala had another view, namely that if the EPPO has competence and there is only one MS with jurisdiction, then the MS of forum rules do not need to be applied. Avasarala's view was very practical, as the EPPO need only ensure that it has competence and determine which MS that competence can be exercised in. If this means more than one MS, then determine the correct one based on the MS of forum rules, and if there is only one MS there is no need to make that determination. Interestingly, the way the EPPO is structured based on competence and the broad application of main financial damage means that the MS of forum rules will always be upheld. Take, for example, EU staff. Belgium has ensured that its jurisdiction applies to EU staff. This means that if an EU staffer commits a PIF offence, Belgian law applies. Also, Belgium is where the main financial damage is always felt. If there is only one MS with jurisdiction, that jurisdiction is Belgium. This fits within the MS of forum rules.

Likewise, if the offence is by a Union citizen and there is only one jurisdiction available, this should be the MS whose citizen has committed the offence. This fulfils the MS of forum rule Article 26(4)(b). Finally, if the EPPO has competence as the offence took place in whole or in part on an MS, and only one MS has jurisdiction, this fits within the MS of forum criterion. This is because the very first criterion is that cases are handled in the territory of the MS where the offence predominantly took place. Therefore, Avasarala's understanding does not negate that the MS of forum rules are unfulfilled but that it is automatically determined as it is the only jurisdiction.

6 CONCLUSION

This study examined the difference between how doctrinal legal research understands the EPPO obligation in investigating and prosecuting extraterritorial

cases under the EPPO Regulation versus how the EPPO key actors understand their obligations in such cases. This study has highlighted the importance of conducting empirical research, including the consequences deriving from it. The study highlighted the similarities and difference between what is understood within legal research versus practice. Elements from the respondents showed that their understanding of how to implement the Regulations are the same as how academics understand it. The limitations provided by the EPPO Regulation do prevent the EPPO from investigating some PIF offences. This is interesting as the purpose of the EPPO is to handle that type of cases.

A rather interesting element was the concern that academics had in regard to the application by the EPPO of the MS of forum criteria. As noted, the EPPO finds that the main purpose of the rules and standards within the MS of forum is to prevent an accused from being subjected to forum-shopping or arbitrary decision-making by the EPPO. The EPPO knows of the effects those types of decisions can have and that the purpose of duly justified is to prevent them from taking those types of decisions. Additionally, while academics have wondered if there will be issues that can arise with EPPO being unable to determine an MS of forum based on the Regulation, the EPPO does not see this as a factor. Rather, it is the limitations within their competence that prevent the EPPO from acting (lack of an MS with jurisdiction or person accused is not covered by the Regulation). This is not, nor will be, an issue of applying the MS of forum rules. However, according to the prosecutors, 'if it is a PIF crime, I don't see how we can reject the case'.

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FIT FOR THE PURPOSE? THE USE OF ADMINISTRATIVE LAW AGAINST ORGANISED CRIME

Albertjan Tollenaar and Benny van der Vorm

1 INTRODUCTION

In many countries the governments identify organised crime as a serious threat to the public order as it threatens citizens, businesses and institutions and therefore undermines the economic welfare.¹ The crime stems from international drug trafficking, human trafficking and exploitation. Organised crime becomes visible in high-profile incidents, such as the assassination of a criminal defence lawyer in 2019, a murder of a journalist in 2021 and an attempt to kidnap a Belgian minister in 2022. Incidents like these fuel the debate on strengthening the legal framework, with special attention to administrative actors.

Over time, administrative bodies are increasingly taking on responsibilities that traditionally fall within the purview of the public prosecution (Prins, 2016). This gradual shift is justified with the idea that administrative law might be more effective as it provides an immediate solution. It is further driven by the growing complexity and reach of undermining crime (Huisman, 2017; Tops & Van der Torre, 2024),² where criminal networks exploit legal and administrative loopholes.

As a result, municipalities and other administrative bodies are empowered to address aspects of organised crime proactively. Measures like administrative closures of properties linked to drug production or money laundering illustrate how these bodies are stepping into roles once exclusive to the public prosecution. This expanded role of administrative bodies reflects a strategic response to organised crime, underscoring the need for an integrated approach where prevention, enforcement and prosecution overlap to counter criminal infiltration more effectively.

This trend is evident not only in the Netherlands but also in other countries, such as Belgium (Weber & Töttel, 2018) and Australia (Ayling, 2014).³ In all

1. <https://www.consilium.europa.eu/en/policies/eu-fight-against-crime/>.

2. There is an ongoing debate on the concept of 'undermining crime'.

3. Bill DOC 55 1381/001 and in Australia, several licences have a 'fit and proper' test.

these cases, a similar rationale can be observed: administrative bodies collaborate with law enforcement agencies to address organised crime, employing tools like property closures and asset seizures traditionally managed by the judiciary. This shift reflects a broader, cross-border strategy to strengthen the administrative response to organised crime, recognising that tackling such deeply embedded criminal networks requires both judicial and administrative action.

This raises the question of how well this role shift aligns with the core functions of administrative bodies. Are these institutions adequately equipped to take on tasks that are traditionally managed by judicial authorities? In other words: does administrative law provide an effective solution to combat organised crime, or are there limitations that hinder its impact? With this question we intend to add to a 'jurisprudence of consequences' as we try to enhance the understanding of the effects of the particular administrative law system that aims to combat organised crime.

To answer these questions we will first reflect on the actual problem, namely the main characteristics of organised crime (Section 2). We will then describe the development of the legal framework to tackle this problem (Section 3), followed by a theoretical reflection on the problems of collaboration (Section 4). This theoretical framework helps us to identify potential effects or lack of effects of the actual object of our study: the Dutch Integrity Screening Act (*Wet Bibob*) (Section 5). We will try to show the effects of this act by using secondary data (existing evaluation reports) alongside some newly gathered primary data. Further details on the sources of empirical data are provided in Section 5.3. This contribution concludes with some general remarks (Section 6). In the final section (Section 7), we offer some overarching reflections on the significance of this case for the 'jurisprudence of consequences' and propose a research agenda for the future.

2 ORGANISED CRIME

Organised crime is a phenomenon that is not clearly defined in criminological literature (Finckenauer, 2005; Paoli, 2022). Often, it involves drug-related offences, encompassing the production and trafficking of drugs. However, it can also encompass human trafficking, arms trafficking and various forms of fraud (Pardal et al., 2023, p. 5). In his review article Finckenauer identifies the main characteristics that constitute a definition of organised crime. The first is that the criminal activities are indulged in by groups that are non-ideological in the sense that they lack a political agenda of their own. This distinguishes them from, for example, terrorist groups that wish to overthrow the existing political order. A second characteristic is the presence of a structure or hierarchy, in which leaders or bosses and those that are actually executing the orders from above, for example, commit the homicide or plant the bomb. This group operates with a degree of

continuity, remaining independent from individual actors. That means that if an individual actor is prosecuted and put behind bars, the enterprise might just continue. Another characteristic is that this group uses violence or threat of force, which is not only aimed at potential enemies but is also applicable to the group itself. Membership is rather restricted, and force is frequently used to reinforce group cohesion. The reports on the functioning of the so-called 'outlaw motor gangs' with its internal violent structure are a good example of this.⁴

The main concerns of organised crime relate to their external activities: illegal enterprises (e.g. related to gambling, prostitution, drug trafficking), penetration of legitimate business and potential corruption of public institutions. The infiltration of the legal economy is visible when the organised crime invests illegal profit into enterprises, thereby creating an unfair level playing field. In particular, small-scale enterprises, like cafés or barber shops with an abundance of cash, are threatened by this phenomenon. In addition, real estate investments create opportunities to penetrate into legal business. To realise these goals (both the criminal activities *and* the penetration of the legal business), it is sometimes necessary to bribe public actors that should function as a safeguard.

It is important to note that these elements of organised crime are based on the literature (Van Duyne, 2004). Organised crime, as such, is not defined in the law. Instead, what is often defined in the law is the membership of a criminal organisation. In the Netherlands membership of a criminal organisation carries a prison sentence of up to 6 years (Art. 140 Dutch Criminal Code). Criminal law, however, appears to be a difficult and not always effective response to combat these forms of organised crime (De Vries, 1995; Keulen, 2007).

3 ADMINISTRATIVE LAW AS A LEGAL RESPONSE

In this context it is not surprising that the legislature increasingly relies on mechanisms of administrative law as an alternative means of disrupting organised crime (Van Heddeghem et al., 2002). In this section we will discuss the main features of administrative law, resulting in an overview of potential difficulties that might impede its effectiveness.

Administrative law is characterised by its focus on the relationship between government bodies and citizens. Administrative bodies include entities at various levels of government responsible for implementing the laws and decide on individual matters, for example in the form of granting a licence or subsidy or sanctioning with notices or orders if the public order is threatened. By issuing permits, these bodies can ensure that the activities meet legal standards and conditions, fostering a controlled environment while upholding the rights of

4. <https://nscr.nl/factsheet/outlaw-motorcycle-gangs/>.

individuals and businesses. This regulatory approach helps balance individual freedoms with societal interests, although it also raises questions about efficiency, transparency and potential limitations in addressing complex issues such as organised crime.

The operation of administrative bodies is governed by legislation. This means that the legislature both empowers and limits administrative bodies. This is especially relevant if the administrative action restricts the freedom of the individuals.

The legal response to organised crime shows a shift towards more administrative law (Tollenaar, 2023). This resulted in an expansion of the types of sanctions that administrative bodies can impose. Traditionally, administrative bodies have had the authority to enforce administrative coercion, a means of maintaining public order. This power enables them to take direct action to prevent or mitigate disturbances to public safety, health and order, often without needing prior judicial approval.

In recent decades, there has been a shift towards alternative enforcement measures, including administrative fines and the preventive revocation of permits. These tools provide authorities with greater flexibility to address a wide range of infractions proactively, reflecting a broader strategy to maintain order and prevent escalation before situations call for more severe intervention. The expanding use of such administrative actions underscores the evolving role of administrative bodies in safeguarding public interests while still necessitating oversight to ensure fair and proportionate application.

This shift presents new challenges for administrative bodies, including the need for greater capacity, specialised expertise, access to new information sources and the establishment of robust protective procedures. With a broader mandate, administrative bodies must enhance their resources and expertise to handle complex enforcement tasks that traditionally fell under criminal jurisdiction. This includes the integration of diverse data sources, such as financial records and criminal intelligence, to identify risks proactively and make informed decisions. Moreover, to ensure fairness and legal integrity, it is essential to develop robust procedures that protect citizens' rights, especially in the context of preventive measures and sanctions. Balancing swift enforcement with due process thus requires both structural adjustments within administrative bodies and a careful approach to safeguarding transparency, accountability, and citizen protection in this expanded enforcement role.

4 THEORETICAL FRAMEWORK: CHALLENGES OF NETWORK MANAGEMENT

The new challenges administrative bodies face require collaboration with other organisations, like the police and public prosecutor or, for example, the tax office. The information is thus gathered using a network (De Bruijn & Ten Heuvelhof,

2017). The network approach, commonly used to analyse organised crime operations (Bouchard, 2020), can also be applied to those tasked with combating it – public bodies such as administrative authorities, police, prosecutors and other enforcement agencies. These actors play a vital role in sharing information and coordinating efforts to address the potential threats posed by criminal activities. This can be seen as a network. Assessing and influencing the effectiveness of networks remains a challenge (Provan & Milward, 1995; Provan & Milward, 2001; Provan & Kenis, 2008).

In collaborative networks, a primary concern is that the participating organisations often operate with distinct missions, structures and operational procedures. As participation expands, each entity introduces distinct policies, resources and constraints, adding to the network's structural complexity (Klijn & Koppenjan, 2014). This complexity intensifies when the organisations hold varying values, making alignment even more challenging. For instance, administrative law, when used to combat organised crime, primarily aims to restore public order rather than punish offenders. This divergence in objectives can lead to friction within the network, as the priorities of law enforcement agencies may not always align with those of administrative bodies. For example, prosecutors may be reluctant to share sensitive information with administrative bodies if it risks compromising an ongoing criminal investigation.

In managing the complex network of often-conflicting interests, coordination through effective 'network management' is frequently proposed as a solution. However, Hovik and Hanssen emphasise the significant challenges involved in coordinating such diverse stakeholders. Their research demonstrates that successful network management must be flexible and adaptive, tailored to the specific needs and structures of each network. This flexibility is essential, as the diverse goals, resources and constraints of participating organisations add layers of complexity that standard management approaches may not adequately address (Hovik & Hanssen, 2015).

A primary challenge in network management is defining the role and authority of the network manager. A network manager is the person or organisation that attempts to govern the processes in the networks (Klijn et al., 2010, p. 1065). Network managers may assume various roles based on the network's needs: a 'convenor', who fosters collaboration and alignment among members; a 'mediator', who facilitates conflict resolution; or a 'catalyst', who identifies and promotes value-generating opportunities within the network. In many cases, an effective network manager will need to embody all these roles to varying extents, dynamically adjusting their approach to foster cohesion, address conflicts and drive the network towards its goals. This multifaceted role demands both strategic oversight and operational flexibility, highlighting the necessity of managers who can seamlessly adapt to different functions to address the network's evolving needs (Hovik & Hanssen, 2015, p. 510).

5 NETWORK MANAGEMENT AND THE INTEGRITY SCREENING ACT (WET BIBOB)

5.1 *Background of the Integrity Screening Act as a Legislative Response to Organised Crime*

As mentioned in the introduction, ‘organised crime’ is seen as a major policy challenge. In the early 1990s, pressure to target the highest levels of organised crime in the Netherlands led some specialised crime squads to employ inadmissible investigative methods. In 1993, this resulted in a major scandal, the dissolution of the crime squad and the resignation of the ministers of Interior and Justice. More importantly, in 1995, Parliament launched an inquiry into police methods in the context of the nature and extent of organised crime (Bovenkerk, 1996; Fijnaut et al., 1996).

This inquiry became a major public event during which reputations were made (or broken) and which had many legislative consequences for the fight against ‘organised crime’. A key aspect relevant to our study involves (a) business sectors vulnerable to organised crime infiltration and (b) the integrity of public administration when dealing with licensed enterprises linked to organised crime.

The main findings were that some sectors are adjacent to organised crime, such as the transport sector, which goes without saying, as a central aspect of the organisation of contraband trade is transport. Bars, restaurants and clubs have also been mentioned in relation to ‘organised crime’ due to potential protection rackets, although supporting evidence for that risk was thin. In general, it had to be conceded that in the Netherlands ‘organised crime’ did not hold social and economic sectors ‘in its grip’: there was no octopus having its ‘tentacles in everything’.

A few months after the Parliamentary Commission’s report was issued, on 10 October 1996, the Minister of Justice sent a letter to Parliament advocating for enhanced powers for local authorities to vet applicants for services such as licences and permits. This empowerment would avoid the dual position of, on the one hand, fending off ‘organised crime’, while, on the other hand, facilitating crime by issuing licences and permits to the same criminals when they intend to operate in upperworld business sectors. This would affect the integrity of the public administration. Another aim is to prevent the intertwining of underworld and upperworld, particularly if the authorities play a facilitating but unwitting role by providing licences or, worse still, subsidies.

However, it soon appeared that the intended reach of the law broadened considerably. ‘Organised crime’ got a second position: the law should address *all* systematic and structural serious criminal activities if these activities would be furthered by obtaining licences and permits. Furthermore, the proposed

administrative law instrument would strengthen the integrity of the authorities by enabling them to avoid deals with serious criminals (of any sort and calibre).

This was to be elaborated and refined in the coming 5 to 6 years because in 1996, the Minister of Justice initiated an inter-ministry project group that picked up earlier proposals for further legislative preparation. Concerning the sectors at risk, the ministers took a shortcut by adopting all the sectors mentioned in the report of the Parliamentary Commission, even if there was no evidence of a connection (infiltration or otherwise) to 'organised crime' beyond a few anecdotes. These concerned mainly the city of Amsterdam with its flourishing half-criminal sex industry and tolerated hash outlets, the 'coffee shops' which the town council tried to clean up. The Bibob Act was submitted to Parliament on 11 November 1999.

5.2 *The Aim of the Bibob Act*

The Bibob Act has an important role to play in the fight against organised crime. The purpose of this law is to prevent public administration from inadvertently facilitating organised crime through mechanisms such as permit issuance and subsidies (Tollenaar & Van der Vorm, 2023). Administrative bodies can refuse or revoke permits if there is a serious risk that the decision will be used to benefit from criminal activities ('a-ground') or to facilitate future criminal offences ('b-ground'). In addition, it is also possible to refuse or withdraw a permit on the basis of Article 3, paragraph 6, of the Bibob Act. Failure to fully complete the Bibob form or provide requested additional information is considered a serious risk of abuse under Article 4(1) and (2) of the Bibob Act.

In the years following the enactment of the Bibob Act, the scope of the act has been gradually expanded. This means that it can be applied in a wider range of situations. Initially, it covered only a limited number of municipal permits and public contracts in a few sectors, but eventually it was extended to all municipal permits and all public contracts. Additionally, the number of national licensing systems in which the administrative authority can apply the act has gradually increased.

5.3 *Effectiveness of the Bibob Act*

The expansion of the Bibob Act is related to the expectation that it provides a promising tool to combat organised crime by allowing administrative bodies to deny or revoke permits, grants or contracts if there is a serious risk of criminal influence. However, its practical application has fallen short of expectations. To

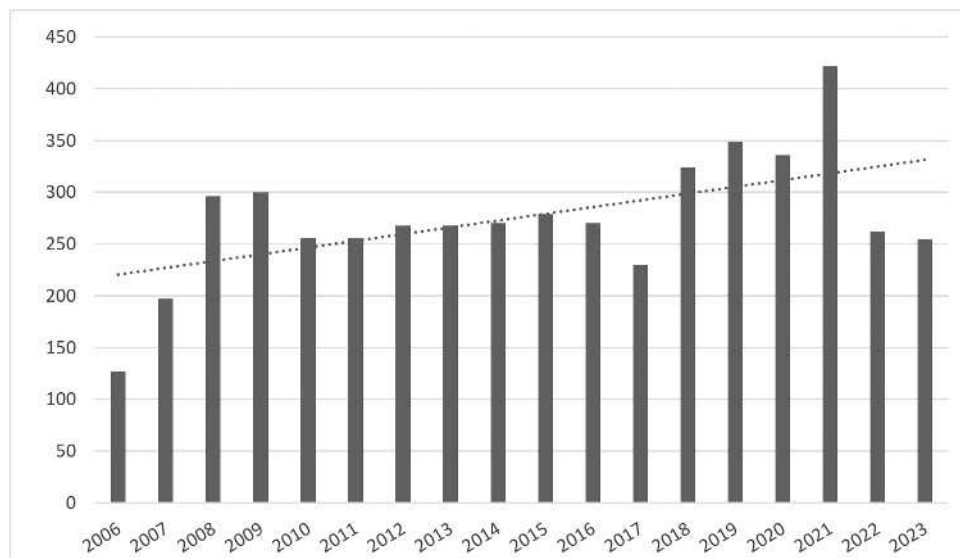
evaluate the effectiveness of the Bibob Act, we analysed existing reports and data published by the Ministry of Justice.⁵

Two primary indicators can be used to assess the effectiveness of the Bibob Act. First the use of the act by administrative bodies. Evaluation studies indicate that nearly all relevant administrative bodies have established policies defining when and how the Bibob Act should be applied (Kuin et al., 2020). This policy also follows the entire scope of the Bibob Act, meaning that the administrative bodies have established policy for all areas for which they can use this act and vet the applicant or the holder of the permit.

A second indicator is the actual use of the Bibob Act in individual situations. To assess this use we took the number of cases in which the National Bureau Bibob issued an 'advice'. This agency is part of the Ministry of Justice and can be approached by the administrative authorities to assess the degree of 'danger' posed by potentially criminal influences. This advice is based on information that is open only for this National Bureau Bibob and the specific expertise of this bureau. It is not mandatory to ask for an advice, but since it is very likely that administrative authorities apply for such an advice, this forms a reasonable indicator for the actual use of the Bibob Act.

The number of advisory reports can be derived from the annual report of the National Bureau Bibob. Initially, legislatures anticipated that the Bureau would be consulted at least 500 times annually. So this number is the intended effect of the Bibob Act. The actual number of advisory reports has consistently fallen short of this benchmark, as reflected by the graph in Figure 1. Notably, this underuse persists despite the Act's scope having been expanded to cover a broader range of cases, theoretically enabling its application in more situations. The discrepancy between the expected and actual usage suggests that administrative bodies may encounter barriers in applying the Bibob Act effectively, whether due to operational limitations, lack of awareness or possible reluctance to use the Act's provisions fully.

5. <http://www.justis.nl>, more particularly, the site of the Landelijk Bureau Bibob (National Bureau Bibob) that keeps records of the number and sort of advices.

Figure 1 The number of advisory reports issued by the National Bureau Bibob

Source: Annual reports National Bureau Bibob, compiled by the authors

A third indicator of the effectiveness of the act relates to the actual content of the assessed 'danger'. Does it indeed refer to 'organised crime', or is it applied mainly in situations of less importance? This is mainly a qualitative indicator, so we took a few examples in which the administrative authority used the act to intervene with organised crime. While there are instances where the Act has been used against high-profile criminal networks,⁶ it is more commonly applied in cases involving minor offences, such as tax violations by small business owners. For example, a violation of tax regulations by a partner in a small restaurant or grill room may trigger the Act's application.⁷ Although such offences are certainly unlawful, they fall short of the public perception of organised crime, which typically involves violent, large-scale criminal activities like gang-related shootings or bombings.

Moreover, minor tax violations or administrative infractions are generally within the expertise of the Internal Revenue Service or other regulatory agencies, raising questions about whether the Bibob Act is the appropriate tool for these cases. The focus on lower-level offences may divert resources from addressing the complex, high-risk criminal enterprises the Act was originally intended to combat,

6. ABRvS 20 juli 2011, ECLI:RVS:2011:BR2279, AB 2012/7, noot A. Tollenaar and Rechtbank Midden-Nederland 11 september 2024, ECLI:NL:RBME:2024:5262. Both are related to Holleeder, a well-known criminal, once convicted of kidnapping Heineken.

7. ABRvS 13 september 2023, ECLI:NL:RVS:2023:3473 and ABRvS 13 september 2023, ECLI:NL:RVS:2023:3480, Gst. 2023/87, noot B. van der Vorm.

suggesting a misalignment between the Act's use in practice and its intended purpose.

The main conclusion is that the Bibob Act is not as effective to combat organised crime as the legislature expected. It is implemented largely 'on paper' (as reflected in policy documents) rather than in practice (given the relatively low number of advisory reports) and not necessarily in situations where it combats organised crime effectively.

5.4 *The Networks that Assist in the Application of the Bibob Act*

The question is, what might explain this limited use? Why do municipalities, in particular, not make greater use of the Bibob Act? In the evaluation reports of the act the most explanatory factor mentioned is the insufficient administrative capacity within administrative bodies to implement it fully. Properly applying the Bibob Act requires significant expertise, resources and capacity, which many administrative bodies lack (Kuin et al., 2020).

A key challenge is that administrative bodies often struggle to access the relevant information needed to assess potential risks. Such information is often sensitive, as it may not yet have led to a conviction or formal sanction. It mainly concerns observations and information that has not yet resulted in a conclusion.

To address this issue, Regional Intelligence and Expertise Centers (RIECs) were established. These centres serve as collaborative networks where municipalities, public prosecutors, police, tax authorities and national inspectorates coordinate efforts by sharing information and developing strategic approaches to combat organised crime. However, the establishment of RIECs has introduced additional challenges. This is the second challenge in the application of the Bibob Act: there is no clear example or model in the way the actors collaborate and how they share information or support each other. Some RIECs provide direct assistance, assuming tasks from municipalities with limited capacity or expertise, while others merely offer information or issue advisory reports on request. The application of the Bibob Act then fully relies on the administrative bodies, who have another focus and aim for different interests than just to combat organised crime.

5.5 *Analysis: A Need for a Better Network Management?*

Given the observed shortcomings in the application of the Bibob Act, redesigning the organisational framework supporting its implementation may be beneficial. Insights from network management literature indicate that a significant gap exists in the current management structure, particularly regarding the lack of a clear network manager. In other words, it is unclear who is ultimately responsible for orchestrating efforts to combat organised crime comprehensively. Recognising this, the Dutch government has launched numerous initiatives to encourage

administrative bodies to take an active role, providing incentives to promote awareness of organised crime issues and nudging these bodies towards assuming a more proactive management role that leverages the full suite of tools, including the Bibob Act.

For the Bibob Act specifically, administrative bodies are arguably the most logical choice as network managers. However, their limited capacity poses a significant barrier to fulfilling this role effectively. Auxiliary structures, such as the Regional Intelligence and Expertise Centers (RIECs), could potentially fill this gap, yet their performance in network management roles has been inconsistent. Some RIECs operate primarily as ‘convenors’, bringing parties together, while others act as ‘mediators’, focusing on resolving conflicts within the network. This variability in roles and expectations can hinder a cohesive approach to applying the Bibob Act effectively.

To optimise the use of the Act in combatting organised crime, a more explicit and standardised role for RIECs could be established, ensuring that responsibilities are clearly outlined to support administrative bodies in exercising their full range of competencies. By defining the RIECs’ role as network managers more prominently, these centres could facilitate consistent support for administrative bodies, enabling them to address organised crime with greater coordination and effectiveness.

6 CONCLUSION

Is administrative law fit for the purpose of combating organised crime? The short answer is, not really. Administrative law is fundamentally ill-suited to addressing organised crime, as its core objectives differ significantly from those of criminal law. Administrative law primarily aims to ensure regulatory compliance, uphold public order, and manage government operations lawfully and fairly, rather than to combat serious criminal activity.

The complex and clandestine nature of organised crime requires rigorous investigative methods and specialised knowledge, which are typically beyond the resources and mandate of administrative bodies. Dealing with organised crime therefore demands in-depth investigative resources, highly specialised law enforcement skills, and a deep understanding of criminal structures – capabilities typically found within criminal justice institutions rather than in administrative agencies. As a result, administrative bodies often lack the resources necessary to deter and dismantle organised crime. The network structures that have emerged as a result are too diverse and unstructured to meet this capacity demand effectively.

Moreover, the structure of administrative legal protections brings up an additional barrier to effectively combating organised crime. In the administrative system, individuals and organisations have the right to appeal decisions, sometimes through multiple layers of review. While these protections are essential

to guard against arbitrary government action, they can delay or even obstruct efforts to counter organised crime. Administrative bodies must follow formal procedures and respect due process, which criminal organisations can exploit to evade or postpone enforcement actions. Combined with limited capacity and expertise of administrative bodies, as mentioned in this article, these procedural safeguards make administrative law a weak tool in confronting the sophisticated tactics of organised crime.

Ultimately, administrative bodies are tasked with combating organised crime yet remain ill-equipped, relying on tools that are often applied in contexts unrelated to organised crime. In this context, the designation of the Bibob Act as a central instrument in tackling subversive crime appears somewhat misplaced.

7 SOME OVERARCHING REFLECTIONS

A ‘jurisprudence of consequences’ aims to provide a reflection on the role of empirical information in assessing the impact of laws and legal decisions. In our case, which examines the administrative law approach to combating organised crime, we observed the high ambitions of the legislature in designing the Bibob Act. This act was expected to serve as an effective tool for administrative authorities to counter organised crime. The persistence of this expectation is evident in the act’s gradual expansion over time.

However, empirical data shows that these intended goals were never fully realised. Administrative authorities struggle to apply the act effectively due to a lack of capacity and expertise. The primary explanation for this shortcoming is the absence of a uniform and supportive network that actively assists authorities in implementing the act.

From the perspective of a ‘jurisprudence of consequences’, this case demonstrates that law enactment alone does not drive change; effective implementation requires a well-structured support system, often necessitating collaboration among multiple organisations with differing, and sometimes conflicting, priorities. Therefore, future research should focus primarily on the challenges of implementation rather than the law itself. After all, a law that is not implemented is nothing but a dead letter.

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THE CONSEQUENCES OF ADMINISTRATIVE DECISIONS IN REGULATING MARKETS WITH PUBLIC INTERESTS: THE EFFECTS OF OPEN NORMS IN ADMINISTRATIVE LAW

Marin Coerts

1

INTRODUCTION

In the Netherlands, administrative bodies possess discretion to independently regulate markets that have public functions, such as telecommunications, public transport and electricity sectors. They may intervene in the business activities of licence and concession holders by imposing obligations as conditions attached to the licence or concession, in the context of service provision. The competence of the administrative body to impose such obligations is often based on ‘open legal norms’, which are legislative provisions formulated so broadly that further interpretation is required before they can be applied to specific situations.¹ This is consistent with a noted development in administrative law literature, whereby legislators increasingly delegate to administrative bodies the task of fleshing out open legal norms, rather than crafting them directly in legislation.² While this delegation enables tailored regulation by administrative bodies, private parties may experience uncertainty and ambiguity in consultation and application procedures when applying for the licence or concession, especially when the imposed service-related obligations do not align with their actual business operations in practice.

This chapter seeks to address the following questions: What are the effects of open legal norms on, first, the way administrative bodies use their discretionary power to impose service-related obligations on private parties in regulated markets and, second, on the actions of private parties that must comply with these

1. The term ‘open legal norm’ is widely discussed in the literature; for an overview, see the contribution by Pool, Strohmaier, Adriaanse and Broekema (Chapter 3) in this volume.
2. The concept of the ‘retreating legislator’ was first introduced by Struycken (1910), and later analysed in a more modern context by Van Wijk (1974), and subsequently by Van Ommeren (2012).

obligations when obtaining the licence or concession? Additionally, how can empirical research provide insights into how administrative bodies should exercise discretionary power and inform legislative decision-making to shape the statutory framework governing administrative discretion in imposing such obligations? By examining the specific objectives that administrative bodies aim to achieve, the extent to which they can impose obligations, and the experiences of licence and concession holders subjected to these obligations, this contribution highlights the central theme of this volume, 'Towards a Jurisprudence of Consequences'. It emphasises the effects of legislation and explores how empirical research can enhance our understanding of these effects within a legal system, offering insights that legal decision makers can integrate into their reasoning and practices.

This research concentrates on three specific legal areas as units of analysis – telecommunications law, public transport law and electricity law – where government intervention is driven by clear public interests. Based on 26 semi-structured interviews with representatives of government organisations and licence and concession holders, the study examines the effects of open legal norms in the Netherlands and highlights an increase in rule-making by administrative bodies. Alongside this increase in rule-making, the analysis identifies two relevant factors that result from open legislative norms: private parties *share information* with the administrative body on how to serve public interests, and open legislative norms also impact how the administrative body *balances interests* when determining the regulatory framework for service provision by licence and concession holders. Based on the empirical data, this study outlines a legal reflection, incorporating a normative approach grounded in legal principles of good governance, to identify specific focus areas for administrative bodies when imposing obligations on private parties. In this sense, empirical findings can provide practical depth to how administrative bodies interpret and apply legal principles, particularly the principles of due care and proportionality. The findings illustrate how and when administrative bodies conduct (thorough) research, how and to what extent knowledge shared by private parties seeking to obtain a licence or concession is integrated into administrative decision-making, and which factors are considered in the proportionality assessment of potential obligations. Based on the empirical data, this study also examines the role of the legislature by identifying whether additional statutory guidance is needed to clarify the scope of administrative discretion when imposing obligations.

In this chapter, I will first outline the framework of market regulation within which open legal norms exist in Dutch administrative law, including the concept of discretionary power granted to administrative bodies (Section 2). The following section covers the methodology (Section 3). The research is based on two research methods; a legal analysis of the existence of open norms within public transport

law, telecommunications law, and electricity law and an empirical analysis of the handling of these norms by administrative bodies and the responses of licence and concession holders. In the next section the findings of both the legal and the empirical research are described (Section 4). In the subsequent discussion, I address the long-standing debate surrounding the impact of open legal norms, incorporating empirical insights alongside considerations for the administrative body and the potential need for clearer legislative guidelines (Section 5).

2 ANALYTICAL FRAMEWORK

Historically, regulated markets offering essential services, such as electricity and gas, telecommunications, postal services, public transport and mining were predominantly state-owned. At the end of the 20th century, these sectors were privatised, based on the belief that private entities could deliver these services more efficiently (Szyszczak, 2007; WRR, 2012). However, potential market failures have provided governments with a strong justification to intervene in market operations and introduce measures aimed at increasing overall welfare and protecting citizens (De Grauwe, 2020; Kates 2014; Posner, 1974; Wilkeshuis, 2010). In the Netherlands, specifically, a variety of licensing and concession frameworks have been established to regulate certain economic activities in light of the public interest.³ Examples include frequency licences for mobile telecommunications and electricity supply licences and public transport concessions, which are implemented to improve sectoral governance, address market imperfections and protect consumers.

By granting a licence or concession through an administrative decision, the administrative body makes an individual exception to a general prohibition. This framework results in a dependency of private parties on obtaining the licence or concession necessary to carry out the activities to which the granted right pertains. Conversely, administrative bodies are dependent on private parties to deliver essential services and thereby serve public interests after these parties have obtained the required licence or concession and become holders. These interests can include safeguarding consumers against excessive prices or unfavourable conditions, ensuring high-quality and accessible infrastructure, and promoting the efficiency and reliability of essential services.⁴

Since the government retains ultimate responsibility for safeguarding public interests, it imposes service-related obligations on private parties through

3. See also Parliamentary Documents II 1999/2000, 27 216, nr. 3; Parliamentary Documents II 2001/2002, 27 216, nr. 12.

4. See the report of both the SER (2010) and the WRR (2000) regarding the concept of public interests.

administrative decisions granting the necessary licence or concession. Administrative bodies derive their authority to formulate regulations and exercise their power from sector-specific legislation (Van Ommeren & Huisman, 2013). However, when imposing obligations, these bodies are dependent not solely on their formal powers but also on the degree of latitude the legislature has allowed in the exercise of those powers (Duk, 1988; Huisman & Jak, 2019; Schlössels, 1998).⁵

By granting decision-making discretion, the legislature partially relinquishes its primacy over the exercise of certain powers. There are various reasons for the legislature to introduce open norms into the law, from which this discretion arises (Klap, 1994). The presence of open norms can, for example, be attributed to the inherent difficulty of anticipating all potential conditions, as well as the evolving nature of public interests, thus avoiding the need for constant legislative amendments. Aside from the impracticality of specifying all possible factual scenarios in the law, such specificity is also not always desirable. The discretion granted to administrative bodies allows them to actively respond to societal and economic developments. Discretion enables the administrative body to adopt a tailored approach and to engage in broader policymaking, providing the flexibility and efficiency to establish its own standards and to implement necessary market regulation measures (Schlössels & Albers, 2023).

In exercising its discretionary power, the administrative body has to consider the legal consequences of a decision and is required to weigh relevant interests when determining the substance of its decision (Klap, 2007). Particularly in the context of market regulation, the content of the obligations imposed should account for the interests of the private parties involved, as these entities must be able to ultimately deliver an essential service to the public. Gathering and considering the interests of these private parties ideally ensures that administrative decisions align with practical realities and fundamental legal principles, including the principle of due care, which requires that administrative bodies carefully investigate the relevant facts and weigh the affected interests, and the principle of proportionality, which dictates that obligations imposed on private parties must be suitable, balanced, and must not exceed what is necessary to achieve the intended public interest objectives (Van Wijk et al., 2014).

5. See several case law examples such as ABRvS (Administrative Jurisdiction Division of the Council of State) 23 August 2017, ECLI:NL:RVS:2017:2234; ABRvS 20 September 2017, ECLI:NL:RVS:2017:2552; ABRvS 1 November 2017, ECLI:NL:RVS:2017:2942; ABRvS 22 November 2017, ECLI:NL:RVS:2017:3233.

3 DATA & METHODOLOGY

This study conducts both classical/doctrinal legal research and empirical legal research. Classical legal scholarship describes and reconstructs positive law based on legal sources, particularly statutes and case law (Smits, 2016; Tjong Tjin Tai & Verbruggen, 2022). By employing empirical methodologies, the results not only demonstrate how obligations are shaped within legal frameworks but also reveal their practical effects in the ‘real-world’ context (Bijleveld, 2019), highlighting the ‘jurisprudence of consequences’ by revealing the effects of legal decisions. Ideally, these findings can help legal decision makers refine legal reasoning for future obligations in similar regulatory contexts.

This study focuses on the consequences of sector-specific legal frameworks, including public transport law, telecommunications law and electricity law. These sectors were selected as case studies (Gerring, 2007; Yin, 2009) due to the presence of a clearly defined public interest in the provision of essential services, as well as the mutual dependency between the government and private parties in promoting those interests. The empirical component of this study is based on 26 semi-structured interviews conducted with subject-matter experts. Participants were recruited via email invitations, using a combination of the researchers’ professional networks, publicly available profiles and snowball sampling methods. Informed consent was obtained before the interviews were conducted. Table 1 shows the legal domains and the organisations with which the interviews were conducted.

Table 1 Number of Organisations by Legal Domain

	Rail Transport	Electricity	Telecommunications	Total
<i>Government Bodies</i>	6	2*	2*	10
<i>Licence and Concession Holders</i>	5*	8 (including an industry association)	3*	16
Total	11	10	5	26

**In these sectors, all parties were interviewed.*

Table 1 shows that the 26 represented entities consist of 10 government bodies and 16 licence and concession holders. The government bodies in the electricity and mobile telecommunications sectors are the Ministry of Economic Affairs and the Authority for Consumers and Markets (ACM) or the Dutch Authority for Digital Infrastructure (RDI). In these domains, the ACM and RDI are also the authorities responsible for issuing licences on behalf of the ministry, although the ACM also holds independent powers in the electricity supply sector. In the rail transport

sector, five administrative bodies are involved: the Ministry of Infrastructure and Water Management and four provinces, with an additional (independent) regulator, the ACM. The ministry and the provinces are responsible for granting concessions in this domain.

The table indicates that, for *rail transport*, all active market participants were interviewed, although not all administrative bodies participated. The response level of administrative bodies in this market reached 62.5%. Nevertheless, the representativeness and validity are higher because most administrative bodies collaborate on railway policy. As a result, the participating administrative bodies were able to provide insights into concession awards conducted jointly with other administrative bodies. *Electricity supply* remains incomplete, as only seven licence holders and one industry association were interviewed, representing a response rate of 10.7%. This low response rate is attributable mainly to non-responsiveness or claims of limited availability due to other commitments. Although the interviewed parties may not provide a comprehensive view of the sector, the participating licence holders are diverse in terms of company size and years of market activity. Finally, in *mobile telecommunications*, all active parties were interviewed, ensuring the highest level of representativeness and validity within this legal domain.

The individuals interviewed for this research were selected because they are considered experts in their respective fields. For the purpose of this study, an expert is defined as an authority within a particular domain who possesses deep knowledge on a specific subject (Meuser & Nagel, 2009). The interviews were conducted with both policymakers and legal professionals within administrative bodies, operating at both central and provincial levels, as well as with professionals such as managers and advisors employed by concession and licence holders active in 2021 in the sectors of mobile telecommunications, electricity supply and rail transport. Given that some interviews were conducted in groups, a total of 13 experts from administrative bodies and 20 experts from concession and licence holders participated. These group settings were organised at the request of the interviewees.

The semi-structured interview questions addressed several topics, including the process for establishing obligations by administrative bodies and the rationale behind specific policy decisions. Licence and concession holders were asked about the extent to which they feel involved in the process of formulating obligations and whether their input, in their view, leads to adjustments.

During the coding of interview transcripts, no predetermined code list was applied; instead, the codes were derived inductively from the interview data.

The data was analysed thematically in several phases (Braun & Clarke, 2006). For this study, relevant themes included ‘underlying reasons for the imposition of obligations’, ‘support for the imposition of obligations’ and ‘the involvement of licence and concession holders in formulating obligations’. In the initial phase, interview transcripts were coded in detail, resulting in a large volume of codes. In a subsequent phase, these codes were merged into overarching categories by examining the similarities and differences between them. Codes or code groups that appeared across multiple sectors and that were deemed significant were identified as ‘relevant factors.’ They include ‘information sharing’ and ‘balancing of interests.’ These factors are treated more elaborately in Section 4, where they are linked to the identified themes and examined sectors. This analysis helps uncover patterns that contribute to clarifying and interpreting the existing legal frameworks. Ultimately, these insights can provide a foundation for further theoretical development regarding the regulation of markets through legislation and subordinate regulation.

4 RESULTS

This section presents the findings of the empirical-legal study based on the three selected case studies. It begins with the findings from the classical legal analysis of the types of open norms present in authorising statutes and the corresponding powers granted to administrative bodies (4.1). This is followed by both a legal and an empirical analysis of how the administrative bodies navigate these norms in practice through specific policy choices (4.2). Finally, the empirically identified effects of open norms and the administrative body’s legal actions based on them are examined in relation to the actions of licence and concession holders (4.3).

4.1 *Open Norms in Statutes*

When permitted by legislation, administrative bodies have the authority to develop and implement their own regulatory policies with the aim of safeguarding the public interest that justified the introduction of the licensing or concession system. The extent to which the administrative body can exercise this discretion depends on the specific legal basis and the statutory requirements that the conditions imposed by the administrative body must meet. Three variants of statutory provisions granting administrative bodies the authority to impose conditions on a licence or concession are identified.

4.1.1 *Fixed Statutory Provision*

The legislature has established specific obligations that *must* be attached to granted licences or concessions, binding the administrative body to these requirements without the authority to deviate from them. This binding framework is partly

evident in rail transport concessions and electricity supply licences, where certain obligations are prescribed by statute. For instance, within the electricity supply sector, national statutes require the reliability of electricity provision and consumer protection, with the details of these obligations elaborated by administrative bodies in subordinate regulation.⁶ The rail transport sector has binding national statutes that address subjects such as fare regulation, punctuality and the involvement of consumer organisations.⁷ Nevertheless, administrative bodies retain discretion in regard to how these subjects are operationalised – for example, how punctuality is enforced – and may impose more specified conditions on the concessions or licences.

4.1.2 *Objective-driven Statutory Provision*

The legislature outlines the objectives and general conditions for imposing requirements in the legislation without explicitly stating how the objectives that led to the regulation in a particular sector should be achieved. In the case of the mobile telecommunications sector, the administrative body is empowered through national statutes to establish obligations that align with the statutory objectives and fall within the established parameters. These parameters are detailed in subordinate regulation as subjects, allowing administrative bodies to impose obligations in concretising decisions of general scope, such as those aimed at the efficient use of frequency spectrum or setting standards for services and technologies.⁸ The administrative body retains decision-making discretion to draft obligations for licence holders and to decide the content, level of detail and specific wording of the obligations, provided they adhere to the defined objectives and parameters.

4.1.3 *Open Statutory Provision*

The legislature has not specified the exact conditions or constraints that should apply but has merely established *that* conditions may be imposed, without explicitly specifying the nature of those conditions or the objectives they are intended to achieve. This framework is partly evident in the rail transport sector and electricity supply sector, where administrative bodies may impose additional conditions in subordinate regulations or individual concessions,⁹ alongside those already prescribed in statutes or (higher) regulations.

6. According to Art. 95b, Electricity Act 1998 (see also Parliamentary Documents II 2003/04, 29 372, nr. 3, p. 4) and Arts. 2 and 3 of the Decision on Electricity Supply Licence for Small Consumers of 8 May 2011, nr. WJZ / 3003019.

7. Art. 32(2), Passenger Transport Act 2000.

8. See also Art. 3.14(2) of the Telecommunications Act, in conjunction with Art. 17 Frequency Degree 2013.

9. See Art. 95e of the Electricity Act 1998 and Art. 32(1), Passenger Transport Act 2000.

4.1.4 *Interim Conclusion*

The legal sectors examined demonstrate that the legislature grants administrative bodies the authority to draft subordinate regulations elaborating and interpreting statutory provisions to decide which obligations should apply to licence and concession holders or to decide how these obligations should be formulated. When statutory provisions merely specify the subjects or parameters to which the conditions may relate, such conditions are considered 'open', allowing the administrative body to interpret and shape these obligations. However, as shown previously, there are multiple forms of statutory authority and resulting in administrative discretion, leaving administrative bodies with guidelines of varying specificity regarding the content of obligations that can or must be imposed. This discretion includes the authority to impose additional obligations through subordinate regulations or individual conditions attached to licences and concessions, even if these are not derived explicitly from the law.

4.2 *The Policy Choices of the Administrative Body*

Since open norms exist in different forms, granting administrative bodies discretionary powers to formulate and impose conditions, the next question is how administrative bodies exercise their discretion in establishing regulations and exercising their powers. This question is examined using both classical legal research methods and empirical methodologies. First, a general trend concerning the increase in regulatory measures will be discussed, followed by an analysis of the specific obligations imposed on a sectoral level based on open legal norms.

4.2.1 *An Emerging Trend*

The legal analysis of sector-specific legislation reveals that the objectives for imposing regulations in all the studied sectors are framed by the legislature – either in statutory provisions or in explanatory memoranda – in broad terms, such as consumer protection, reliable service delivery and the promotion of quality and sustainability.¹⁰ Based on these objectives in the *rail transport* and *mobile telecommunications* sectors, a noticeable trend has emerged: more rules and increasingly stringent and extensive obligations have now been imposed in both subordinate regulations and within individual concessions as compared to the beginning of this century. This shift, observed by comparing older regulations with newer frameworks, shows that administrative bodies are increasingly imposing

10. For the objectives of legislation in the sectors studied, see the letter from the minister regarding a reliable energy supply – *Supply and Delivery Security of Energy*, and also Parliamentary Documents II 2002/03, 29 023, nr. 1; *Nota Mobiele Communicatie 2019*; and for the rail transport concession, see *Nota Mobiliteit 2004*, p. 50, and more recently: Parliamentary Documents II 2012/13, 29 984, nr. 384, p. 2; Appendix 3 to Parliamentary Documents II 2019/20, 29 984, nr. 899.

more obligations on licence and concession holders.¹¹ This trend was not only identified in legal texts but was also corroborated by both administrative bodies and private parties during the interviews.

4.2.2 *Studied Sectors*

The obligations in the *electricity supply* sector mandate the provision of a service and refer to statutory provisions. However, they do not impose such significant obligations as to prevent licence holders from delivering their own products or services. The legal and empirical research indicates that licence holders in this sector retain relatively greater freedom to conduct their activities as they see fit, provided they comply with statutes and subordinate regulations regarding which conditions may (or may not) be imposed on end-consumers, what information must be shared with end-consumers, and ensuring that end-consumers are not refused by the electricity provider.¹²

In contrast, the obligations in the *rail transport* and *mobile telecommunications* sectors have evolved beyond merely ensuring a minimum level of service, increasingly focusing on improving the quality of networks. Obligations related to the deployment of newer, faster technologies over a broader range, the provision of more comfortable transportation options, and the use of sustainable practices are examples of this trend. While these obligations align with the objectives of the sector-specific legislation, the legal and empirical findings show that they are no longer concerned with merely ensuring minimum service delivery but are now focused specifically on how the service is performed, thereby limiting the operational freedom of licence and concession holders. When asked why the administrative bodies impose such obligations, the response received points to political objectives or the belief that the same level of quality would not be achieved otherwise.

4.3 *The Impact on Actions of Licence and Concession Holders*

When obligations affect the business operations of licence and concession holders, certain factors become particularly relevant for private parties and their interaction

11. Compare the concession for the main rail network 2025-2033 with the Rail Transport Concession 2005-2014, and, for example, Arts. 3, paras. 1, 3 and 4 of Appendix 1 to the Decision of the State Secretary for Economic Affairs and Climate Policy of 6 March 2020, nr. WJZ/20062913, concerning the choice of auctioning instrument for mobile communication licences in the 700, 1,400 and 2,100 MHz bands and the determination of the licences to be auctioned (*Stcrt.* 2020, 13729) compared to the Regulation of the Minister of Economic Affairs, Agriculture, and Innovation of 22 December 2011, nr. WJZ/10146523, concerning the application and auction procedure for licences for frequency space in the 800, 900 and 1,800 MHz bands for mobile communication applications (*Regulation on Application and Auction Procedure for 800, 900, and 1800 MHz Licences*).

12. See, among others, Art. 95b(1), 95c, 95lc, 95k and 95m of the Electricity Act 1998.

with administrative bodies. This section addresses two factors that were clearly evident from the interviews in all three sectors empirically studied. These include the *sharing of (market) information* by private parties with administrative bodies and the *balancing of interests* by administrative bodies when determining the regulatory framework for the business activities of private parties. Based on these factors, several patterns have been identified between the themes and the sectors studied.

4.3.1 *Sharing of Information*

Across *all sectors*, privatisation in the past century has enabled the interviewed licence and concession holders to accumulate considerable knowledge and experience in regulated markets. The holders expressed a willingness to actively share this information with administrative bodies through consultations, meetings and review sessions, recognising their societal role in providing essential services and their interest in improving the content of the obligations and ensuring their alignment with practical realities. A recurring pattern is the misalignment of expectations regarding the use of shared market information. Administrative bodies rely on market information to shape regulatory decisions, yet discrepancies in how both parties perceive its relevance and application can lead to tensions.

In the *electricity supply* sector licence holders note that opportunities for information exchange have become less frequent and more formalised in recent years. Conversely, administrative bodies claim to provide sufficient opportunities for licence holders to provide input on the content of the obligations, revealing a mismatch in expectations between the parties. In the *mobile telecommunications* and *railway transport* sectors, licence and concession holders also indicated that existing opportunities during the rule-making process to influence obligations regarding how services must be delivered to end-consumers have limited impact. It is primarily in cases of identifiable errors that the interviewed licence and concession holders say they can successfully advocate for adjustments by the administrative body during the rule-making process.

As a consequence of imposing obligations, interviews indicate that licence holders in the *electricity supply* sector may provide incomplete information, while concession holders in the *rail transport* sector may strategically withhold information to avoid the imposition of (even) stricter conditions. There is a notable lack of trust on both sides, and as a result, the administrative body may fail to gather all relevant market information and insights, which are crucial for ensuring that the conditions imposed are appropriately aligned with practical realities.

4.3.2 *Balancing of Interests*

Administrative bodies in *all sectors* actively seek to regulate the activities of licence and concession holders to address market imperfections, manage wealth

distribution and safeguard public interests, including consumer protection and ensuring the highest possible quality and accessibility of services and products. Interviewed administrative bodies in the *mobile telecommunications* and *rail transport* sectors express the view that such public interests would not be adequately served without the imposed obligations. While administrative bodies impose conditions to ensure the protection of public interests, licence and concession holders across *all sectors* emphasise the need for flexibility to decide how the regulated activities are carried out. This flexibility would enable them to operate efficiently and innovatively, thereby contributing positively to public interest objectives.

In the *electricity supply* sector, licence holders reported limited scope for implementing innovative approaches to delivering public services when such innovations conflict with legislative provisions. Although the administrative body acknowledged the potential value of such innovations, it emphasised that these proposals could not be accommodated due to the potential risk of conflicting with statutory and subordinate regulatory provisions. In the *mobile telecommunications* sector, the balancing of interests by the administrative body in determining the content of obligations appears more pronounced, as it has greater discretion to define specific obligations than in the *electricity supply* sector. However, licence holders in the *mobile telecommunications* expressed concerns that the imposed obligations are not always suitable and necessary. They argued that during consultations, they proposed alternative measures that would still serve public interests with regard to matters such as quality, safety, affordability and equal treatment of end-consumers. In such cases, however, the administrative body determined that its own approach to safeguarding the public interest was more appropriate than the alternatives suggested by these licence and concession holders. Similarly, in the *rail transport* sector, several concession holders noted that they did not understand why certain conditions existed. They perceived that administrative bodies adhered to their own policies and that too many demands were being imposed, limiting their ability to conduct activities in what they believed to be a more effective manner.

This pattern highlights a fundamental challenge in regulatory decision-making: administrative bodies must balance public interest objectives with the operational realities of licence and concession holders, yet these actors feel that their perspectives are not fully considered, contributing to a climate of mistrust. As a result, tension arises over how obligations are formulated and whether they provide sufficient flexibility for market actors to meet regulatory goals most effectively.

5 DISCUSSION

The findings highlight recurring patterns regarding the establishment of obligations, the nature of the obligations, and their impact on licence and concession holders, providing practical depth to how administrative bodies interpret and apply the legal principles of due care and proportionality. The following legal reflection draws on these principles to assess how empirical insights can enhance our understanding of how the law operates in practice and to identify key focus areas for the legal reasoning of decision makers, based on the studied sector-specific legislation and the actions of administrative bodies. First, two considerations are highlighted for administrative bodies when formulating obligations: (1) the importance of knowledge-sharing and effective communication with the parties involved, as part of the principle of due care, which requires administrative bodies to gather and assess all relevant facts and interests and (2) the need of conducting a thorough proportionality assessment of the obligations to be imposed (5.1). Thereafter, the role of the legislature will be discussed, specifically in regard to how empirical insights can inform whether additional statutory guidance is needed to clarify the scope of administrative discretion in imposing obligations related to service delivery and in determining and prioritising specific public interests (5.2).

5.1 *Considerations for Imposing Obligations*5.1.1 *Knowledge-Sharing and Effective Communication*

A cornerstone of effective market regulation is that governments must possess adequate expertise before deciding to intervene in markets that have public functions (Van Damme, 2017). To acquire this expertise, the administrative body has to conduct thorough market and other types of research, employing methods such as public hearings and (market) consultations (Hoekema et al., 1998; OECD, 2003; Shipley & Utz, 2003) and collaborating with relevant parties to gather accurate information or strengthen its internal capacities, thereby addressing existing knowledge gaps (Baarsma, 2010).¹³ The empirical results show that licence and concession holders seem to possess the necessary knowledge, but this information must be effectively communicated to the administrative body. Although some sectors legally mandate the application of these methods, and while administrative bodies stated that they are already conducting such research, challenges related to practical implementation emerge in regard to how

13. See Art. 3:2 Dutch General Administrative Law Act (Awb). That the administrative body has an active duty to investigate is also evident from case law (see e.g., ABRvS 5 July 2023, ECLI:NL:RVS:2023:2590, JOM 2023/313). The more significant the decision is for the legal position of the interested party, the more certain the administrative body should be of its case (ABRvS 15 February 2023, ECLI:NL:RVS:2023:579, JOM 2023/68).

administrative bodies assess, interpret and integrate market information into decision-making. Interviews reveal that licence and concession holders expect more interaction with administrative bodies, believe that regulatory research could be improved, and argue that their input should be given greater consideration to ensure that conditions align more closely with operational realities.

As effective compliance with conditions begins at the policy formulation stage (Simon Thomas, 2022), this empirical research highlights the importance of engaging with licence and concession holders when drafting these conditions, as they are, ultimately, the parties required to comply with them. While these holders may have strategic incentives for shaping obligations, legal decision makers must acknowledge that bridging the gap between policy and practice is essential in order to ensure that obligations are both effective and enforceable. Simultaneously, more involvement would offer licence and concession holders the opportunity to seek clarification on the meaning of specific conditions, thereby reducing uncertainty that exists in practice and fostering broader support for regulatory measures (Harlow & Rawlings, 2009; Stoter & Huls, 2003). The empirical insights suggest that a more consultative approach in drafting regulations could help administrative bodies refine the legal reasoning underpinning obligations, improving both their precision and enforceability.

5.1.2 *The Proportionality of Obligations*

In administrative law, the principle of proportionality requires that adverse effects on one or more stakeholders resulting from an administrative decision must not be disproportionate to the objectives that the decision seeks to achieve.¹⁴ This includes ensuring that obligations imposed by the administrative body are necessary and cause minimal harm (Schlössels, 2022).¹⁵ Furthermore, when multiple options are available to achieve the desired outcome in the public interest, the administrative body should choose the most suitable and least burdensome method for the licence or concession holder.¹⁶ The requirements of suitability and necessity are in legal literature often linked to the efficiency or effectiveness of a measure (Buijze, 2009). However, this study reveals that the subjective nature of these concepts allows administrative bodies considerable discretion, raising the question of whether obligations imposed truly reflect an optimal balance between legal requirements and practical feasibility.

14. See Art. 3:4 (2) Awb.

15. And in case law ABRvS 2 February 2022, ECLI:NL:RVS:2022:285. According to the Division, the framework outlined in this judgment applies to all *Awb* decisions with policy discretion.

16. Parliamentary Documents II 1988/89, 21 221, nr. 3. See also ABRvS 4 november 2020, ECLI:NL:RVS:2020:2607.

Empirical legal research can challenge normative assumptions about effectiveness (See Dez's contribution in this volume). The studied cases demonstrate that licence and concession holders in the rail transport and mobile telecommunications sectors have expressed concerns that the conditions imposed are not always feasible, well considered, or efficient, suggesting that less burdensome methods were available. This raises the question of whether certain obligations fail to meet proportionality standards in practice.¹⁷ However, meeting the proportionality requirements is challenging, as it cannot always be conclusively determined that the public interest would be equally well served by less burdensome obligations (Gerards, 2007).

To meet the proportionality principle – and in light of the empirical findings on how obligations are imposed in practice – this study emphasises that, for regulatory obligations to be effective, it is essential in the context of market regulation that administrative bodies conduct thorough research, justify their decisions in terms of efficiency or effectiveness, carefully explore alternatives, and ensure that government restrictions serve a legitimate purpose without unnecessarily hindering innovation. In adherence to the principle of proportionality and justification, and to safeguard both the quality and the effectiveness of obligations, administrative bodies must explicitly indicate how alternatives were explored, which interests were weighed, and to what extent licence and concession holders were involved in the process. This study emphasises that if the administrative body chooses to adhere to its own approach, it should convincingly explain why these conditions are considered essential for safeguarding the public interest, why this approach is deemed the most effective, and why licence and concession holders would otherwise fail to deliver services of comparable quality.¹⁸

5.2 *A More Directional Approach in Legislation?*

A further consideration is whether legislation should provide more specific guidelines for administrative bodies in regulating markets. As interviews only reflect practical experiences, they do not automatically necessitate statutory reforms (Niemeijer & Ter Voert, 2024). However, they do provide insights into how statutory and regulatory frameworks function in practice, revealing how

17. See also the case law of the Court of Justice of the European Union (CJEU), which has established that it may be sufficient for a measure to be considered 'not superfluous' (CJEU 12 January 2006, C-504/04).

18. Cf. CBB (The Trade and Industry Appeals Tribunal) 20 December 2022, ECLI:NL:CBB:2022:821, AB 2023/38, with commentary by C.J. Wolswinkel, para. 4.2, where it was cleared that restricting the competition requires the administrative body to carefully prepare such a decision and provide a robust justification. See on the principle of justification regarding the introduction of a licensing requirement: ABRvS 3 maart 2021, ECLI:NL:RVS:2021:461, and on the justification for certain conditions, for example ABRvS 7 juni 2017, ECLI:NL:RVS:2017:1520.

conditions based on open norms are established and applied. These empirical insights can, in turn, enhance legislative reasoning by identifying ambiguities in existing statutory provisions and highlighting areas where additional statutory guidance could strengthen legal certainty.

The legal analysis in the studied sectors reveals that legislation articulates public interests in broad, open-ended terms, granting administrative bodies significant discretion in formulating obligations. Empirical findings suggest that this broad discretion may contribute to uncertainty and, in some cases, subordinate overregulation, raising concerns about whether the statutory framework provides sufficient legal clarity regarding the scope and limits of administrative authority. Instead of relying on general objectives that justify the imposition of obligations, a more structured statutory framework – such as a clearly defined set of legal grounds for imposing conditions – could provide greater certainty and consistency in regulatory decision-making. By explicitly defining specific public interests in legislation or explanatory memoranda, the legislature could establish clearer boundaries for administrative decision-making, explicitly outlining which interests should be considered, prioritised and weighed when imposing conditions.

This study further reveals that the legislature employs different statutory approaches – specifying the obligations themselves, outlining their content or establishing general parameters that indicate the permissible subjects for conditions. While these statutory provisions provide administrative bodies with a framework for formulating obligations within subordinate regulations and allow for flexibility in adapting conditions to specific contexts, empirical analysis of how administrative bodies navigate these frameworks in practice offers unique insights. This study reveals the distinct effects of different statutory provisions and underscores the importance of empirical research in assessing their impact on subordinate regulations and licence and concession holders, as well as determining whether statutory objectives are effectively achieved.

If the legislature determines that statutory objectives are not being achieved effectively or seeks to improve legal certainty and clarity based on observed effects, it could explicitly define essential obligations to be incorporated into licence and concession conditions or determine whether specific sectors would benefit more from objectively driven statutory provisions – while providing a clearly formulated rationale for such legislative choices. Alternatively, the legislature could assess whether a statutory framework that combines general parameters with minimum requirements would provide clearer and more effective guidelines for regulating markets with public functions. While this study does not advocate codifying all potential licensing conditions in legislation – recognising that excessive codification may hinder administrative bodies from accommodating

innovative proposals from licence and concession holders, as can potentially occur in the electricity supply sector – it does recommend that the legislature consider exploring these options, carefully balancing the need for clear guidance with the flexibility required to adapt to sectoral developments and practical realities.

6 CONCLUSION AND FINAL REMARKS

Through obligations attached to licences and concessions, administrative bodies aim to safeguard certain public interests via market regulation. The central questions addressed in this contribution focused on the effects of open legal norms on the way administrative bodies use discretionary power to impose obligations on private parties in regulated markets, and, furthermore, on the actions of private parties that must comply with these obligations in the context of service provision. Additionally, the question was how empirical research can contribute to providing insights into how administrative bodies should exercise discretionary power, and how it can inform legislative decision-making to shape the statutory framework governing administrative discretion in imposing obligations. The answers to these questions offer insights into whether and how legal decision makers can use empirical legal research to identify key focus areas for improving legal reasoning.

This research examined three specific sectors – electricity supply, mobile telecommunications and rail transport – where government intervention is driven by clear public interests and where legislation across all sectors grants administrative bodies varying degrees of discretion through open legal norms, allowing them to establish their own conditions for market regulation. The findings on the various legislative provisions across these sectors underscore the broader theme of a ‘jurisprudence of consequences’, specifically in the context of rulemaking by administrative bodies as legal decision makers. The empirical research highlights the practical effects of various statutory frameworks and demonstrates that administrative bodies utilise the discretion provided by the legislature to further specify the content of conditions and impose additional obligations through subordinate legislation and individual licence and concession conditions, aiming to serve specific public interests. In two sectors, the administrative body seems to be increasingly imposing conditions, thereby limiting the operational freedom of licence and concession holders. This shift has sparked a debate in practice about whether the administrative body should be setting such detailed requirements and the extent to which it can impose such significant obligations.

This contribution sheds light on the challenges revealed through empirical research concerning information sharing by licence and concession holders and the balancing of interests by administrative bodies. When significant obligations

limit the operational freedom of licence and concession holders, compelling them to invest and operate differently from the way they would in the absence of such obligations, empirical findings give practical depth to how administrative bodies interpret and apply legal principles and emphasise the importance of stakeholder involvement in formulating these conditions. Such findings highlight the importance of the need for administrative bodies to carefully balance relevant interests, align policies with practical realities, acquire practical knowledge, explore alternatives and consider less restrictive means to safeguard public interests. These steps require administrative bodies to conduct thorough research into ‘real-world’ conditions to assess the potential effectiveness of their measures and to provide a well-reasoned justification for considering the chosen approach suitable, balanced, and necessary. This approach is relevant not only for the studied sector-specific legal frameworks but also for broader regulatory contexts where governments can impose significant obligations on private parties without explicit statutory bases. Consequently, this legal-empirical study contributes a generalisable ELS approach to assessing the impact of legislative and regulatory frameworks and leverages empirical insights to enhance the suitability of those frameworks.

An empirical study such as this inevitably has limitations. While it would be ideal to make definitive recommendations to legislatures and administrative bodies guaranteeing that specific approaches in formulating statutory provisions and in administrative decision-making would improve the content of obligations and communication among involved parties, this cannot be conclusively asserted based on the methods and findings of this research. The empirical results reflect the perspectives and experiences of specific parties, influenced by their background and motives. This does not imply that these perspectives are universally applicable or free from competing interests. As such, the empirical findings must be interpreted with caution, regarding both their content and significance. Moreover, the proposed considerations are based largely on expectations derived from legal and empirical findings. To confirm the effects of potential changes in administrative or legislative actions, further legal and empirical research would be necessary – not only by academics but also by legal decision makers themselves – when formulating obligations.

This chapter provides insight into whether the trend of legislative retreat – a development that has been ongoing for some time – warrants further attention, and, if necessary, reconsideration to provide more clarity and certainty for administrative bodies and licence and concession holders regarding which interests may be served by conditions and what conditions may be imposed and within what parameters. While the complete elimination of open norms is not advocated here – due to the advantages they can offer – this empirical-legal

study highlights the role of the legislature in assessing the effects of these open norms and determining whether statutory objectives are effectively achieved in practice. By integrating empirical insights into legislative decision-making, statutory frameworks can be refined to ensure that administrative bodies operate within clearer boundaries, ideally, reducing uncertainty that persists in practice regarding the scope and limits of their discretion to impose obligations on licence and concession holders.

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INDIVIDUAL NEEDS AND FAMILY OBLIGATIONS: CONSEQUENCES OF HOUSEHOLD MEANS TESTING IN GERMAN AND DUTCH SOCIAL ASSISTANCE

Barbara Brink and Mira Holzmann

The objective of income support schemes in social security is to lift individuals out of poverty, alleviate poverty and reduce overall exposure to risk. Social assistance constitutes an important part of this protection, providing a means-tested minimum income to all members of society or to selected groups to meet a minimum standard of need, financed through taxation (Bahle & Wendt, 2021; ILO, 1942). Serving as the safety net of last resort for individuals and households with limited or no personal resources, social assistance schemes are designed to reach (only) those who are most in need of financial assistance. This implies clear decisions have been made regarding the protection to be provided and the extent of its provision (van Oorschot, 2002). For this purpose it uses means testing, a method to allocate resources to claimants based on the financial resources of the applicant or the household that the applicant is part of (van Oorschot, 2002). The means test is a mechanism to target those in need, assisting in differentiating between those who are deemed deserving and those who are deemed undeserving, increasing the efficiency of governmental spending (Spicker, 2011). As a consequence, when alterations are being made to the conditions of the test, access to social assistance is automatically relaxed or tightened (Bahle & Wendt, 2021).

When an individual applies for social assistance, the eligibility is assessed based on whether the claimant is considered part of a household, as this influences the assumed living costs and access to shared resources. When one is part of a household, this becomes the 'claiming unit' (Van Oorschot & Schell, 1989), referred to as the unit of assessment from here onwards.

Since household composition affects the determination of financial need, the legal definition of a household – and the criteria used to establish whether an individual's circumstances align with this definition – forms a crucial factor

in access to social assistance. It is therefore important to know what counts as a household. Even though the way households are defined plays a crucial role in determining access to social assistance, the legal conceptualisation of the household, particularly in social security law, remains relatively unexplored (Brink & Bouwmeester, 2024). Consequently, the implications of the household definition for individuals seeking support remain unclear. However, understanding its impact is crucial for evaluating goal attainment (cf. Miller, 1965), including not only access to social assistance, but also the identification of poverty and the provision of a safety net. To address this gap, this chapter answers the following research question: how do social assistance schemes define the household, and what are the consequences of these definitions for individuals' access to state support and, in turn, their financial independence within the households?

2 METHODS

This study adopts an empirical legal approach focused on the analysis of legal texts. It is informed by 'jurisprudence of consequences' (Miller, 1965), which emphasises the need to understand the real-world effects of law, both in its formal definitions and in its application through legal rulings. While drawing on this tradition, it is important to note that the 'jurisprudence of consequences' relies on empirical inquiry. We therefore also draw on developments in empirical legal studies that examine law within its societal context (e.g. Van Boom et al., 2018). While empirical legal studies provide valuable insights into how law operates in practice, a complementary focus on theory-building is needed to uncover the deeper normative structures underpinning legal rules and their societal effects. Meaningful engagement with both traditions thus requires a combined focus on empirical research and theoretical development. Accordingly, for this study we incorporate insights from family law scholarship (e.g. Fineman, 2009; Huntington, 2013) to theorise the household concept. We show that the household means test serves as both an eligibility criterion and a mechanism reinforcing expectations about family responsibilities.

These theoretical insights are explored through an empirical analysis of the legal definitions and operationalisations of the household concept in two social assistance schemes: the Dutch Participation Act (*Participatiewet*) and the German Citizen's Income (*Bürgergeld, Sozialgesetzbuch II*). The Netherlands and Germany represent established European welfare states. Both social assistance schemes serve a similar function as safety nets, providing means-tested assistance to individuals and households lacking sufficient income. Also, both schemes centrally regulate means-tested support but are implemented at the decentralised level. The case selection was also influenced by practical considerations, as both countries offer relatively accessible legal, administrative and policy documentation, and the

researchers possess the necessary language skills to conduct document analysis effectively. The two cases therefore offer an analytically rich and practically feasible basis for an in-depth empirical study of household definitions in social assistance.

By analysing legal texts and supporting policy materials, we explore the role of the household definitions in calculating entitlement and benefit levels in these schemes, focusing on their immediate legal consequences for individuals seeking support. A closer look at these schemes allows us to identify the categories used to assess household composition and the rationales behind these distinctions, thereby clarifying how seemingly technical legal decisions about the household and the classification used shape eligibility and access to social assistance but at the same time codify normative expectations and influence real-world outcomes, establishing and reinforcing broader social norms about financial dependency within households and its relationship to state support. This way the study provides insight into the household's role: structuring eligibility for social assistance while simultaneously codifying normative ideals about financial interdependence, family responsibilities, economic support structures and the role of state support, actively shaping financial obligations within households.

We acknowledge the comparative limitations of the two social assistance schemes under discussion. Differences in legal provisions and benefit calculation thwart a direct comparison but do not detract from the central focus of this study: the conceptual and practical use of the household as a unit of assessment. The role of family and other relationships within this unit, and the legal and social implications of household-based means testing, can be studied without requiring fully comparable policies. In both schemes, household composition directly determines eligibility, engaging fundamental questions of who should be entitled to what forms of support and on what basis.

The chapter opens with an exploration of the household concept as a legal construct, using insights from family law theory (Section 2), followed by a description of the analytical strategy used (Section 3). The subsequent paragraph examines the diverse methods of distinguishing various household members in the two social assistance programmes, along with the rationales underpinning these distinctions (Section 4). It then discusses the consequences of the categories used (Section 5).

3 THE HOUSEHOLD AS A LEGAL CONSTRUCT

The use of the household as the unit of assessment in means-tested social assistance reflects a fundamental rationale: state support is intended as a supplement to family support rather than as a primary source of income security (e.g. Fineman, 1999). While income security schemes are chiefly designed to protect the individual, they impose mutual obligations within households, shaping

both individual access to support and the way households function as economic units. In this social assistance, the household means test assumes that cohabiting individuals – particularly those in marital or marriage-like relationships – share resources and provide mutual support, making their combined income a relevant measure for assuming need. The household means test thus reflects broader societal and policy expectations regarding the roles of the family, partnership and cohabitation in providing care and financial security.

This assumption has been examined in poverty research, which highlights variations in how households are used as units of assessment and their impact on poverty measurement outcomes (cf. Iceland, 2000). A critique on using households as a metric is the assumption of full income pooling within the household unit, as there is evidence many household members do not pool or share their resources equally (Berthonnet, 2023; Daly, 2018; Guio & Van den Bosch, 2020; see also Wasoff & Dey, 2000). This raises important questions about the accuracy of social assistance assessments, especially in the context of diverse household structures and financial arrangement (c.f. Daly, 2018).

Another perspective on the role of the household means test comes from family law scholarship, which explores how legal frameworks shape family structures and responsibilities (Bunting, 2015). While social assistance schemes are not explicitly designed to regulate family life, they function similarly to family law by defining financial obligations between household members (c.f. Daly & Scheiwe, 2010). This raises the question of whether the household test serves merely as an administrative tool or whether it operates as a mechanism of social control, institutionalising norms about who should support whom and under what conditions.

Although the concept of a household refers to people living in the dwelling, its use generally lacks a consistent definition and frequently overlaps with the notion of family (Ellickson, 2008; Yotebieng & Forcone, 2018). The term family often refers to people related by birth, marriage or adoption, without requiring shared residence. However, family notions in policy often rely on the nuclear family model, whereby a household consists of a (cohabiting) couple and their indwelling children (Fineman, 2002).

While the ideal of the traditional family remains central in many legal and policy frameworks (Fineman, 2002), contemporary societal trends challenge this model. The increasing trend of unmarried cohabitation, delayed marriage, higher divorce rates and multiple partnerships over a lifetime have given rise to a growing diversity of household structures (Adema, 2012). Single households, single parents, blended families and non-traditional partnerships are increasingly common. Yet social security policy and law remain anchored in traditional family ideals, assuming resource-sharing and economic interdependence within households.

Although social security law has adapted to societal changes, these adaptations have largely expanded, rather than replaced, traditional family assumptions. A study on the household means test in Dutch social assistance illustrates how the recognition of same-sex and informal partnerships reflects a responsiveness to evolving definitions of intimate relationships. While the form of partnerships has, including these relationships ultimately reinforces the enduring policy assumption that partners are mutually responsible for one another's financial well-being. (Brink & Bouwmeester, 2024). Rather than questioning whether societal changes affect the core premise that state support should only supplement family support this recognition reflects an effort to preserve that premise by adopting it to changing household realities.

A distinguishing characteristic within the marital and familial relationship is the legal obligation for spouses to provide mutual financial support, alongside broader societal norms of familial solidarity (Wasoff & Dey, 2000). This obligation, stemming from the marital contract, has been questioned as spouses owe each other care and support, even beyond the explicit terms of a marriage contract (Goodin, 1985). The expectation of care extends beyond formal legal duties, reflecting deeply embedded norms about caregiving, financial interdependence and the division of labour within families. The assumption that families serve as a unit of protection, care and support (Daly, 2018) underpins many aspects of social security law, strengthening the case for justifying state intervention only after familial resources have been exhausted (Fineman, 1999).

This rationale is embedded in the household means test, which assumes that cohabiting related individuals – for example in romantic relationships or extended family arrangements – pool resources and benefit from economies of scale (Brink & Bouwmeester, 2024). The distinction between cohabiting related individuals and unrelated housemates is crucial: while cohabiting relations are expected to mutually support one another, unrelated individuals sharing a residence are not presumed to do so. However, this assumption remains largely unsupported by empirical evidence, as studies suggest that full pooling and equal sharing of resources is not the norm (Berthonnet, 2023; Daly, 2018; Guio & Van den Bosch, 2020; see also Wasoff & Dey, 2000).

The household definition can be seen as a legal instrument that codifies family relationships and institutionalised expectations about financial interdependence. The law plays a crucial role in constructing these norms, shaping how societies perceive which relationships deserve legal recognition (Fineman, 2009). As such, it determines where financial responsibility lies – within the relationship itself or with the state. While legal frameworks respond to evolving family patterns, they often reflect stabilised ideals rather than fluid social realities (e.g. Brink & Bouwmeester, 2024).

The household means test is not merely an administrative tool for assessing eligibility in social assistance (see Spicker, 2005; Van Oorschot, 2002); it is

embedded in assumptions about financial interdependence, family responsibility and the role of the state in providing support. By defining who is considered part of a household and who is not, social assistance policies determine where financial responsibility lies – within the household unit or with the state (Fineman, 1999). These definitions do not merely classify living arrangements but also shape access to financial support and reinforce specific social and economic expectations.

While theoretical perspectives highlight the rationale behind means testing – such as the assumption that state support should supplement, rather than replace, family support – the practical implementation of household definitions determines whether this rationale functions as intended, and for whom. This analysis explores two case studies to demonstrate how household classifications influence individual access to benefits and reflect broader policy choices regarding financial dependency and familial obligations.

4 HOUSEHOLD MEANS TESTING IN THE NETHERLANDS AND GERMANY

4.1 *Households in Social Assistance in the Netherlands*

The Dutch General Social Assistance Act was introduced in 1965. This act introduced a state responsibility to provide social assistance. The right to social assistance ensured that the protection would no longer be a favour but a right. The minister responsible, Marga Klompé, attached considerable importance to this emancipatory notion of the social assistance act, with a view to ensuring that welfare recipients would no longer have to be inferior to other citizens (Brink & Vonk, 2020). Since 1965 this scheme has undergone a series of smaller and major changes, the most recent of them being the adoption of the Participation Act (Participatiewet) in 2015, after integrating the social assistance scheme earlier in the Work and Assistance Act (Wet Werk en Bijstand) in 2004. However, the main goal of the scheme has not changed – providing financial help to those who cannot support themselves. Even though there is a state responsibility, it has been emphasised from the start that the individual is, and remains, responsible for their own means. As a consequence, an assessment takes place to determine whether people can or cannot provide for themselves. If there is a partner, an assessment takes place of the (nuclear) family's need, as it was argued that the family is central to one's means of subsistence: "[t]he person will have to be considered in the totality of his relationship to his environment and in particular in his relationship to the family to which he belongs." As a result, the degree of assistance depended on the joint resources of the family members and on the joint needs.

The Participation Act uses the concept of *gezin* (nuclear family), which is made up of a married couple, a married couple with their dependent child(ren) or a single parent with his or her dependent child(ren). Complementary to this,

it defines a joint household (*gezamenlijk huishouden*) as two persons who have their main residence in the same house and show that they care for each other by contributing to the costs of the household or otherwise. Those two persons can be spouses (or registered partners) but also unmarried persons making up a household. An exception is made for a relative in the first degree (by birth, *bloedverwant*, or by marriage, *aanverwant*) or a relative in the second degree if this relative is in need of care. Determining whether there is mutual care can be a challenging task. This joint household is deemed to exist if the persons concerned have their main residence in the same dwelling and 1) have been married to each other or have been regarded as married during the 2-year period preceding the application for assistance, 2) from their relationship a child has been born or recognition has taken place of a child of one by the other, 3) they are mutually obliged to contribute to the household by virtue of an applicable cohabitation contract; or 4) on the basis of a registration they are considered to have a joint household which corresponds in nature and scope to the joint household referred to. On the basis of these criteria a joint household is presumed, a joint household can also be established after it is assessed whether individuals share financial responsibilities or provide care for each other. This does not require an affectionate relationship between the two cohabitants; even friends or siblings can show care for each other. The latter process can be complex.

Similarly, determining whether individuals constitute a joint household is not simply a matter of checking whether they are registered at the same address in the Basic Registration of Persons, the Dutch population register that records residents' official addresses and civil status. Instead, this determination depends on the specific facts and circumstances of each case. As a result, local authorities may encounter difficulties in collecting sufficient evidence to plausibly demonstrate that two individuals conduct a joint household (Nummerdor-Buijs & De Wit, 2016).

Besides the joint household, the Participation Act also distinguishes cost-sharing cohabitants (*kostendelende medebewoner*). These are persons 27 years of age or older with the same primary residence as the applicant, not being the spouse (or registered partner) of that person or cohabitants with a written agreement with the applicant or a third party (provided that he has the agreement with the same person with whom the interested party has a written agreement), in which a commercial price has been agreed on (as a landlord, tenant, sublessee, subtenant or boarder), not being a relative by blood or marriage in the first or second degree of the person concerned. Cohabitants with an entitlement of study financing, attending education are exempt.

If the applicant has one or more cost-sharing co-residents, the standard per calendar month for the interested party is calculated using the following formula:

$$\frac{(40\% + A \times 30\%)}{A} \times B$$

A is the number of cost-sharing co-residents plus the person concerned and his or her partner; B is the standard for the applicant.

While the previous act, the Work and Assistance Act, used the same definition for the joint household, it did not include the cost sharing cohabitants. However, it did include the possibility for municipalities to adjust the norm for financial assistance at a lower level insofar as the person concerned has lower generally necessary costs of living than provided for in the standard or the supplement as a result of his/her living situation, including not maintaining a home (Art. 27).

4.2 *Households in Social Assistance in Germany*

Germany introduced the Federal Social Assistance Act (*Bundessozialhilfegesetz*) in 1962 as a programme of last resort for those without a social insurance entitlement or without insurance benefit entitlement (housewives or widows). Its introduction was motivated by the desire to “[help] people help themselves” (*Hilfe zur Selbsthilfe*) (Königs, 2013). The German social assistance system, known as *Sozialhilfe*, was originally not designed to provide support to individuals who were able to secure employment, as the German social security system also included an unemployment insurance (UI), referred to as *Arbeitslosengeld*, to replace income in the event of unemployment (limited in time), and an unemployment assistance (UA, *Arbeitslosenhilfe*), a less generous income replacement, in principle indefinite, means-tested and offered when UI had expired (Adema et al., 2003). However, as the eligibility criteria for UI and UA were progressively tightened, the number of unemployed persons receiving UI or UA benefits decreased. Consequently, social assistance gradually became the main source of support for the long-term unemployed.

The three-tiered system was replaced, in 2005, by what has colloquially come to be known as Hartz IV, and by Citizen’s Income (*Bürgergeld*), in 2023. Citizen income aims to secure and support livelihoods during times of crisis and creates a minimum income benefit for persons capable of working (at least 15 hours a week) and those living with someone capable of working in a community of need (*Bedarfgemeinschaft*), also called immediate household (Deutsche Bundesdag, 2022).

The amount of Citizen’s Income is determined by assessing the needs of the immediate household (section 7 (3) SGB II), taking into account the income and assets of the household members to determine the need of the applicant. An immediate household consists of an adult applicant and the spouse or partner living with the applicant, with whom a mutual will to bear responsibility for each

other can be assumed and/or children up to the age of 25, as well as the parent/s of the adult applicant and the partner of the said parent that is living in the same household. A mutual willingness to bear responsibility for each other and to stand up for each other is presumed if partners fulfil one of the following four criteria; 1) they live together for more than 1 year; 2) they live together with a child; 3) they care for children or relatives in the household; and/or 4) they are authorised to dispose of each other's income or assets (Rechtsanwalt Und Sozialrecht, 2018).

Establishing the need for such a household involves combining the total standard needs of the household members, any additional needs, housing and heating expenses, as well as needs related to education and (social) participation-related needs. This consideration occurs when the combined income and assets of the applicant and partner/spouse exceed the level of income or value that is not counted when assessing eligibility. Additionally, the income and assets of children are taken into account only to determine their own eligibility for benefits or support, and hence do not impact the eligibility or entitlements of their parents or other household members.

Besides the immediate household, Citizen's Income also takes into account the wider household (*Haushaltsgemeinschaft*). This refers to adult relatives by blood or marriage who live in the same home but are not part of the applicant's immediate benefit unit. A wider household typically includes relatives such as uncles, aunts, parents-in-law, or adult children over the age of 25, provided they share living expenses.

The calculation related to the wider household is based on the assumption that household members will support each other financially if they have the means to do so. While the total income and assets of the household are assessed, an exemption amount is applied to the income of these relatives. This exemption is calculated by subtracting twice the standard benefit rate and a proportionate amount of housing costs from the relative's gross income. Any income exceeding this exemption threshold is partially counted toward the applicant's benefits, potentially resulting in a reduction of up to 50%. In other words, if relatives within the wider household earn more than the exempt amount, the applicant's Bürgergeld may be reduced accordingly.

Lastly, there is a recognition of house sharers (*Wohngemeinschafts*). This is a collective of people who live together in shared housing and are not related by blood or marriage. The difference between a wider household and house sharing is that the wider household is 'managing from one pot' (*aus einem Topf wirtschaften*), while house sharing is simply about living together (*Quelle Anwalt*) (Rechtsanwalt und Sozialrecht, 2018). A member of a shared flat does not have to provide information on the personal or financial circumstances of their flatmates; each individual member of the flat-sharing community submits an application for citizen income independently, although one is also free to form an immediate household within the shared housing. The existence of a shared flat can be

assumed if each member has their own bedroom and contributes their share of the rent and ancillary costs. They do not assume any personal or financial responsibility towards their flatmates.

4.3 *Variation in Household Classifications and Underlying Rationales*

Having examined both the Dutch and the German systems, we note a number of important similarities and differences. The differentiation of the household in the Participation Act and Citizen's Income illustrates how household composition is defined and operationalised to determine eligibility and benefit levels. While social assistance in both the Netherlands and Germany supports individuals in financial need, household classification significantly influences whether an individual is assessed independently or as part of a collective financial unit.

The use of the household means test reflects the assumption that financial support should first come from within a household before state assistance is provided. Both systems are based on financial interdependence within marriage and cohabitation, emphasising mutual care and responsibility. This is evident in the limitation of an immediate and joint household to two cohabitants, as well as in the conceptualisation of household relationships.

In both countries, the definition of a household extends beyond the traditional nuclear family, broadening financial obligations beyond romantic partnerships. In the Netherlands, the joint household includes two cohabitants who provide mutual care, even if they are not legally or biologically related. In Germany, financial obligations remain closely tied to marriage and affectionate relationships, but the wider household concept expands financial responsibility to include extended family members such as uncles or older children living in the same household. The Netherlands does not apply this broader familial obligation in the same way.

In 2015, the Dutch Participation Act introduced a logic of cost-sharing co-residents, assuming that sharing a residence reduces individual expenses. Benefits decrease with the number of adult cohabitants unless they are immediate family or in a commercial rental agreement. The Citizen's Income also distinguishes house-sharing arrangements but does not reduce benefits for unrelated housemates who do not share financial responsibility. This marks a key difference between the two systems, as Germany considers house sharers financially independent, while the Netherlands assumes economies of scale.

The household classifications in both systems – house sharing, cost-sharing co-residents, wider household, joint household and immediate household – reflect underlying assumptions about care responsibilities and resource pooling. Table 1 outlines the categories used in the household means test, their unit of assessment, relationships considered, and the rationale for inclusion or exclusion in need assessments.

Table 1 Household Types and Associated Rationales in Means Testing in Social Assistance in the Netherlands and Germany

Household Classifications	Unit of Assessment	Relationship	Rationale
House sharing (<i>Wohngemeinschaft</i> - DE)	Individual	House sharers	Financial independency
Cost-sharing co-residents (<i>kostendelende medebewoner</i> - NL)	Individual	House sharers	Reduced costs, financial independency
Wider household (<i>Haushaltgemeinschaft</i> - DE)	Individual	Extended family	Expectation of support between family members (limited) semi-independence
Joint household (<i>gezamenlijk huishouden</i> - NL)	Household	Marriage, cohabiting partners	Duty and/or expectation of mutual care, financial dependency
Immediate household (<i>Bedarfgemeinschaft</i> - DE)	Household	Marriage, cohabiting partners	Duty and/or expectation of support, financial dependency

These classifications reflect different degrees of assumed financial interdependency within households, which in turn shape the scope of state intervention. The underlying rationales are grounded in both legal obligations and normative expectations: on the one hand, marriage- or partner-based maintenance duties enshrined in law; on the other, broader social norms regarding mutual care and support within households.

The Netherlands’ approach accommodates diverse living arrangements, aligning with contemporary social realities while still reinforcing traditional family-based support structures (see also Brink & Bouwmeester, 2024). In contrast, Germany maintains a stronger emphasis on the nuclear family, while also acknowledging extended family support through the concept of the wider household. Both systems reflect a combination of normative values, such as solidarity and care, operationalised through the concept of mutual care, and practical economic considerations, such as the pooling of resources and presumed economies of scale within shared households.

The next section will further analyse the meaning of this household classification by examining theoretical frameworks and their practical implications, assessing the consequences of defining the household as a unit of assessment.

5 DISCUSSION

The previous section explored the classification used in the household means test in the Participation Act and Citizen's Income. The analysis illustrates the impact of the categorisation on both access to and the amount of financial aid provided. A further examination of the household means test and its categorisation provides insights into its function and its impact on claimants and their households, particularly with regard to the claimants' financial (in)dependency.

The focus on the household is based on more practical rationales such as economies of scale and pooling of resources. It also reflects notions of family care and obligation, with the nuclear family (and in some degree the wider family) at its core. The German concept of financial obligation is interwoven with notions of familial obligation, emphasising the expectation of financial support from family members and expanding the concept of partnership to encompass not only immediate partners but also extended family members. In the Netherlands the concept has broadened beyond blood relations, marriage or formal partnerships. The concept reflects a care paradigm that extends beyond formal responsibilities or family ties by including non-traditional supportive relationships. They demonstrate the different ways by which to operationalise the notion of family care and obligation, deriving from the legal status of relation between, mostly, two people. As a result, different household types are assessed differently. As the access and amount of financial aid depends on the type of household, the definition of the household types has an impact on the financial aid provided to an individual.

The household means test is based on the assumption of economics of scale, pooling of resources and care. When cohabitation is established through a formal agreement, the dependency is based on the legal status of the relationship. For other types of cohabitation, administrative agencies will need to determine whether a cohabitation arrangement constitutes a household or mere house-sharing, based on the operationalisation of mutual care. This can create uncertainty for the claimant and, furthermore, may give rise to misclassification, which, in turn, could result in overspending or under-expenditure by the state, the imposition of financial penalties or unjust reduction of benefits. Means testing is complex for administrative authorities (Gough, 1994; Spicker, 2005), particularly with regard to the differentiation between types of households and is further complicated with the increasing diversity of households.

In addition to the complexity of establishing a household in the absence of a formal agreement, the assumption of shared resources or reduced costs also has an implication for the claimants. Referring back to the aim of targeting, it remains challenging to accurately account for economies of scale – particularly in relation to the ratio between shared income and housing costs – as well as intra-household inequalities, such as disparities in savings and care duties, which often

disproportionately impact women financially (see, for example, Berthonneau & Tovey, 2022; Brown et al., 2022). In other words, intra-household poverty might continue to exist when using the household means test.

The household means test does not take into account the distinction between different roles or contributions of household members. This effectively overlooks persistent gender disparities in caregiving roles and financial dependency, which can result in unequal consequences, particularly for labour market participation (see, for example, Gazso, 2009). While legislation has shifted from male-oriented and marriage-centred frameworks to more gender-neutral and couple-based policies (Daly & Scheiwe, 2010), social security policies still rely on household-based assessments that may not align with evolving family structures. In particular, emerging models such as the dual breadwinner and adult worker models emphasise individual economic responsibility rather than pooled dependency (e.g. Lewis & Giulari, 2005; Yu et al., 2021), which raises questions about whether the household means test remains suitable given these shifts and state policies aiming for full employment. The analysis thus moves beyond the formal legal classification to consider its practical effects on individuals and households, in line with a 'jurisprudence of consequences' (cf. Miller, 1965).

In summary, the use of the household notion and the classification applied in means testing have direct consequences for access to state support and financial dependency within households. Furthermore, the household means test carries implicit assumptions about the distribution of care responsibilities while not presuming labour market participation for all household members. It adds administrative complexity due to the increasing diversification of household structures, resulting in uncertainty and places greater demands on administrative capacity in eligibility assessments. All this amplifies the risk of broader consequences. These include influencing decisions regarding cohabitation, caregiving responsibilities and engagement in paid employment. As such, the household means test does not only shape eligibility criteria influencing access to financial support, the legal concept codifies normative ideals reflecting broader societal values and reinforces social norms about kinship, dependency, care and participation.

6 CONCLUSION

This chapter examines how social assistance schemes define the household and what those definitions do. Far from being neutral or technical, the definition of a household has real consequences: it shapes individuals' access to state support and, in turn, their financial independence within the household. Adopting a 'jurisprudence of consequences' perspective, the chapter focuses not only on the formal legal criteria but also on how these definitions function in practice – what they enable, restrict or assume in the lives of those subject to them. The analysis

interrogates the justification for the household means test and the categorisation used, including its reliance on principles of interdependence and economies of scale. It also considers broader institutional and societal context in which the test operates, tracing how it adapts to shifting social norms and household forms.

On the basis of this study, the following points can be made: first, the household means test in social assistance serves as an administrative tool to target financial support. While it is used as a steering tool that helps to allocate resources efficiently and effectively, it is questionable whether need can be thus determined, as it cannot be assumed that resources are distributed equally, and it is therefore uncertain whether the benefits will be received by those in need.

Second, the household means test reflects a normative view of what constitutes a fair distribution of resources. An individual's entitlement to financial support depends on the resources of others in the household, where it is assumed or can be established that people in the household are caring for each other, which underlines the premise that state support complements family support. This normative part is challenged by practical problems, as it is difficult to establish the relationship between individuals.

Third, the household means test is a social construct that reflects and reinforces ideas about family, care and mutual support and caring responsibilities. As an ideological tool, the household means test perpetuates social norms and expectations about family and care. As such, the legal rules that define households do more than allocate resources – they actively construct social realities. By codifying specific relational expectations, these definitions simultaneously reflect and reshape societal understandings of family, dependency and mutual support. The question here is how they respond to societal changes and changing perceptions of family relations.

It is clear that legal frameworks have the capacity to respond to societal change. However, household means test and the categories used do not appear to capture the complexity of contemporary household structures and dynamics. As a result, these categories are likely to pose challenges for administrators, potentially perpetuating systemic inequalities. The ongoing challenge for legislators is to create legal frameworks that uphold the aim of the schemes to provide a social safety net to meet a minimum standard of need that result in perceived fair government spending, that are flexible enough to recognise different lived experiences while maintaining administrative coherence, and that recognise the impact on financial (in)dependence within the households that they either reinforce or create.

As this study has shown, the household means test exemplifies the need for a 'jurisprudence of consequences'. Legal definitions such as household, when treated as fixed or technical, can fail to reflect the complex social realities they are meant to regulate, even as they structure access to state support and influence everyday

lives. How we define a household is not just a matter of law or policy but a matter of real consequence.

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ACCESS TO JUSTICE OR EXCESSIVE LITIGATION? NO-CURE-NO-PAY REPRESENTATION IN ADMINISTRATIVE DISPUTES

Marc Wever, Heinrich Winter and Bert Marseille

Access to justice is a cornerstone of a functional legal system and is essential for the enforcement of individual rights, the prevention of injustices, and the promotion of societal trust in legal institutions (OECD, 2025). Legal aid, a mechanism that provides low-cost or free legal assistance, plays a critical role in achieving this accessibility, particularly for marginalised and low-income individuals. Access to justice encompasses not only the right to initiate legal proceedings but also the ability to do so without facing prohibitive financial, procedural or informational barriers (Rhode, 2004).

While few would argue against the importance of access to justice and affordable legal aid, the legal system is a very costly social institution. Universal access to justice has its downsides. For some areas of law, considerable effort and expenses are devoted to it, leading to an amount of litigation that is deemed *socially* excessive (Hoadley, 1992).

In the Netherlands, the no-cure-no-pay (NCNP) legal aid model has become increasingly common, particularly in administrative cases involving property tax assessments (WOZ) and motor vehicle tax (BPM). Under this model, legal aid providers charge clients only if they win the case or secure a favourable outcome. In these cases, the client is entitled to a process cost reimbursement awarded by the administrative body or the administrative court the legal aid provider of which gets his share. The NCNP structure can lower the financial barrier for individuals who cannot afford upfront legal fees, making it a popular choice for lower-income claimants. In that respect, NCNP enhances access to justice by enabling more individuals to pursue legal claims without immediate financial risk, thereby democratising access to legal representation in administrative disputes (Van Velthoven & Van Wijck, 1996). Despite these benefits, NCNP companies

active within WOZ and BPM objections and appeals are perceived primarily as misusing the system by using procedural tools to maximise process cost compensation rather than primarily serving client interests.

The Dutch government and legal bodies do not perceive NCNP companies as a useful service to clients but as a system exploitative model, even to the point of accusing these firms of abusing procedural rights (Minister for Legal Protection, 2021). The NCNP system, while intended to lower barriers for citizens disputing tax valuations, it is said, has instead incentivised litigation for fee recovery rather than genuine tax disputes. NCNP representatives are often accused of prioritising litigation to collect procedural cost reimbursements and compensation for court delays rather than revising valuations. The sharp rise in objections and appeals in WOZ and BPM cases led the government to reduce reimbursement amounts, as the influx of cases has extended court wait times and overwhelmed judicial resources with repetitive, low-merit claims.

The legislature argues that NCNP agencies frequently use procedural tactics to maximise reimbursements, such as filing appeals primarily to generate fees or delaying information sharing to force additional legal steps. The reimbursements paid out arguably do not align with the actual costs and effort involved. Research highlights that hearings typically last less than 5 minutes per object, are often conducted remotely or in writing, and that objections can largely be automated or generated using standard texts. Additionally, there are no educational or quality requirements for employees handling these cases (WODC, 2021).

In 2023, legislation was introduced in the Netherlands to address these assumed imbalances. It amends laws generating the highest numbers of NCNP objections and appeals, primarily by reducing procedural reimbursements. Standard reimbursement rates in WOZ and BPM cases were reduced by a factor of 0.25, lowering financial incentives for bulk filings. The law also caps 'immaterial damages' for court delays at €50 per 6 months to remove incentives for extending litigation timelines artificially. Additionally, the legislation mandates that any awarded reimbursement be paid directly to the claimant rather than the NCNP agency, ensuring that claimants more carefully consider hiring an NCNP firm. This measure aims to reduce non-merit cases by encouraging claimants to engage more in their appeals and understand the financial implications of using NCNP agencies.

In this chapter we discuss the inherent tension between the promotion of access to justice and the prevention of excessive litigation. Our primary research question is the following: which consequences of the fight against excessive litigation by NCNP firms are highlighted in the debate surrounding this topic? We distinguish between the legal consequences; the consequences for the private incentives

to use NCNP companies, the consequences for the public benefits of NCNP representation, and, finally, the consequences for the social costs of NCNP firms. We focus on the current debate surrounding the role of NCNP companies in administrative law procedures related to property and motor vehicle valuations.

This chapter is structured as follows. In Section 2 we present our analytical framework. In Section 3 we discuss our data and methodology. In Section 4 we discuss our results. We end our chapter with a short discussion and conclusion (Sections 5 and 6).

2 ANALYTICAL FRAMEWORK

2.1 *A Law and Economics Perspective*

Considering that financial considerations are central to the debate on excessive litigation, a law and economics perspective is valuable as a lens through which to examine this issue. Shavell (1981), among others (Croley, 2017; Levy, 2013; Miceli, 1994; Rasquin, 2021; Rubinfeld & Polinsky, 1988), has argued that the level of litigation is often socially suboptimal due to the disparity between private and social incentives to seek access to the legal system. A primary cause of this divergence is the difference between the private and public costs associated with litigation. When individuals decide to pursue legal action, they typically consider only their own anticipated private benefits – such as the likelihood of compensation or a favourable outcome – without accounting for the broader social costs of their claims (Shavell, 1981).

These social costs include not only the expenses borne by the litigants themselves (time, money and effort that could be spent on something else) but also costs incurred by the state, courts and administrative bodies caused by the legal claim. According to Shavell, this neglect of social costs leads to excessive litigation, especially when private benefits (like awarded damages or reimbursed fees) are high relative to the personal costs of bringing a suit. In cases where personal costs are negligible, as when access to justice is free, even modest potential gains can suffice to motivate legal action.

Shavell describes this tendency of litigation to generate private gains without equivalent social benefit as a ‘negative externality’. For example, when a party files a claim (such as an objection or appeal against a WOZ decision), it usually bears only direct legal expenses, disregarding the additional costs imposed on administrative bodies and the court system. This discrepancy creates a bias towards excessive litigation because the private costs incurred by litigants do not reflect the full social costs.

The perceived benefits of litigation further diverge between private and social incentives. For instance, in the context of property valuation disputes, administrative bodies might be expected to invest in the quality of their decisions, improving valuation accuracy, or to promote alternative, informal dispute resolution methods. Such improvements would benefit all citizens who are subject to valuation decisions. However, these additional benefits are rarely a factor in an individual's decision to file suit; rather, claimants are typically motivated by the prospect of personal compensation.

2.2 *Access to Justice*

Access to justice means that individuals have the means to seek redress and hold others accountable under the law (OECD, 2025). All citizens, regardless of their financial status, knowledge and experience, should be able to effectively challenge decisions that affect their rights. Financial barriers should not prevent individuals from accessing courts, and the legal procedures available should provide timely, meaningful remedies, ensuring that rights are practically, not merely theoretically, enforceable.

While access to justice is vital for upholding the law and serving public welfare, excessive access to justice can strain judicial resources, potentially limiting access to justice for others by overburdening courts and administrative bodies. Effective policy measures should control excessive litigation without inadvertently obstructing valid claims. Policies implemented to combat excessive litigation always risk discouraging not only frivolous cases but also legitimate grievances. For example, in property tax disputes, limited access to representation may discourage individuals from challenging inaccurate valuations, thus restricting access to justice for people with valid concerns.

Deterrent measures that aim to limit litigation must therefore be carefully designed to avoid creating barriers to court access for financially vulnerable individuals or those who depend on NCNP representation. Perceiving justice as accessible only to those who can afford it could erode public confidence in the system (Rhode, 2004). Policies providing access to justice should ensure that cases with genuine merit are encouraged, while clear guidelines should deter frivolous claims. Without this distinction, deterrent measures could unintentionally restrict access for individuals with legitimate grievances, undermining the purpose of the legal system.

In addition, the legislature is not allowed to violate the principle of equality. In essence, the legislation enacted in 2023 poses additional constraints on NCNP agencies that are not applied to other areas of administrative law and to legal representatives that do not operate on a NCNP basis. This distinction is

allowed only if there is an objective and reasonable justification for the difference in treatment. However, this requirement does not mean that the assumption underlying the distinction must be empirically proven or later confirmed as fact. Instead, the assumption must be sufficiently realistic for the decision maker to have reasonably based the regulation on it.

3 RESULTS

Our analysis is based on earlier empirical research into the consequences of NCNP litigation. We therefore rely primarily on an analysis of secondary sources. These studies, mostly commissioned by the Dutch government, used both qualitative (focus groups and interviews conducted with practitioners across legal domains) and quantitative research methods (Geertsema et al., 2024). In the remainder of this chapter we focus on the role of consequences in driving the efforts of the legislature to combat NCNP legal representation in WOZ and BPM cases. We distinguish between the legal consequences; the consequences for the private incentives to use NCNP companies; the consequences for the public benefits of NCNP representation and, finally, the consequences for the social costs of NCNP firms.

3.1 *Legal Consequences: Violation of the Principle of Equal Treatment?*

So far, two legislative attempts have been made to combat the business model of NCNP agencies. Both, in essence, argue that there is a reasonable basis for treating NCNP firms differently from other types of legal aid providers in terms of the amount of procedural reimbursement they should receive for their services.

It is not surprising that NCNP representatives have raised the issue of unequal treatment in reaction to legislative efforts enacted to undermine their business model. If such an issue is raised, the courts (and the Supreme Court in last instance) must determine whether the legislature could have reasonably assumed that the cases treated differently were not, in fact, equal for the purposes of the regulation. If they are equal, an objective and reasonable justification for the difference in treatment must be provided (HR 12 June 2024, ECLI:NL:HR:2024:1060). In the first legislative attempt, the justification for the distinction between NCNP firms and ‘regular’ legal aid providers active in other areas of administrative law is, as stated in the explanatory memorandum, based primarily on complaints and concerns from (Tweede Kamer, 2023-2024).

However, as the Supreme Court states, the memorandum does not provide any concrete evidence to assess the validity of these concerns, especially regarding appeal and higher appeal costs. Additionally, the reasoning appears inconsistent

with the general policy on legal cost reimbursements. The memorandum itself states that increasing reimbursements in other areas of administrative law was intended to encourage administrative bodies to improve their decision-making and reduce unnecessary litigation. Yet in WOZ and BPM cases, the opposite approach was taken, without a clear explanation of why similar considerations do not apply. All in all, the Supreme Court ruled that the amendment of the BPB was in violation of Article 1 of the Constitution and could therefore not be applied by municipalities and courts.

In 2023, as we mentioned in the introduction, a second attempt was made by the legislature. This time an Act of Parliament was introduced to combat NCNP firms. The Act amends laws generating the highest numbers of NCNP objections and appeals, primarily by reducing procedural reimbursements, capping ‘immaterial damages’ and mandating that any awarded reimbursement be paid directly to the claimant rather than the NCNP agency, ensuring claimants carefully consider hiring an NCNP firm.

In January 2025 the Supreme Court again ruled on the question of whether these distinctions are compatible with international treaties and European Union law (HR 17 January 2025, ECLI:NL:HR:2025:46). This time, the Supreme Court has ruled that they are. According to the Supreme Court, the legislature introduced these restrictions with specific cases in mind – particularly those in which legal assistance is provided under an NCNP arrangement. The business model of these legal service providers is often based on securing legal cost reimbursements that significantly exceed the actual expenses incurred. This time the need discrepancy was supported by sufficient empirical evidence.

These restrictions are intended to prevent legal cost reimbursements from becoming so excessive that they undermine the principle that such reimbursements should serve only as a contribution toward actual legal expenses. This is a very different reason than stated earlier. However, as a result, the Supreme Court emphasised that the restrictions do not apply to cases where legal aid clearly does not follow this model. More specifically, the new rules cannot be applied if proceedings are not conducted on an NCNP basis; if no arrangements are made with the clients that the amount of any reimbursement of legal costs is paid to the attorney or to the office, and if the proceedings are not conducted in such a manner that the reimbursement of legal costs awarded far exceeds the reasonable costs incurred. Concerning the final criterion, the Supreme Court specifically mentions the use of standardised grievances that are not unique to the case at hand.

Given this limitation in scope, the Supreme Court concluded that the legislature did not impose restrictions beyond what was necessary to achieve the intended objective. The restrictions are based on an objective and reasonable justification and, therefore, do not conflict with international treaties or European Union law.

However, NCNP firms are entitled to the same reimbursements as other legal representatives if the proceedings are not conducted in such a manner that the reimbursement of legal costs awarded far exceeds the reasonable costs incurred. This requires courts and administrative bodies to assess on an individual basis whether this is the case or not, and, of course, as this concerns the application of a rather vague criterion, could lead to even more procedures about cost reimbursements.

3.2 *Consequences for The Private Incentives to Use NCNP*

The private benefits of challenging a tax decision through an NCNP company are rooted in financial relief, ease of process, and perceived expertise in handling valuation disputes. A study of the ways NCNP agencies operate (commissioned by the Ministry of Justice and Security), based on a questionnaire aimed at users of NCNP firms ($n = 490$), shows that a substantial proportion of individuals (73% of those using NCNP services and 84% of self-represented litigants) pursued an appeal because they believed the municipal property valuation (WOZ value) was too high, directly impacting their tax burden (WODC, 2021). For 35% of respondents, the impact of WOZ valuation on other taxes (e.g. income and property taxes) was a significant motivator, highlighting the potential ripple effect of a high property valuation on multiple financial obligations. A notable percentage (31% of independent challengers) felt the rationale behind valuation increases was unclear, prompting them to challenge what they perceived as unwarranted tax hikes.

On the question of why people choose to ‘hire’ an NCNP firm, many respondents (43%) found it easier to use NCNP services than to file an appeal independently. Around 36% stated they lacked an understanding of municipal valuation methods, and 26% reported feeling distrustful of municipalities, believing they would receive fairer treatment through NCNP representation.

Because assistance is provided on an NCNP basis, there are no private costs associated with hiring an NCNP firm. In fact, much of the effort usually required to pursue an objection or appeal is lower when hiring a NCNP firm, as it provides legal expertise, an appraiser if needed, writes (or, at the very least, works on) the notice of objection/appeal, shows up at the hearing, etc. Therefore, in general, the questionnaire results indicate that many claimants expect higher rewards at reduced costs.

It is clear that the legislation will likely do very little in terms of the private incentives to use NCNP services. The legislation does not include instruments that make filing an objection by themselves easier, to increase understanding of municipal valuation methods, or to enhance the level of trust in municipalities.

As many people believe they would receive fairer treatment through NCNP representation, it seems unlikely that the adopted measures will reduce the demand for NCNP services. If, however, the reduction in reimbursement fees means that NCNP firms are forced to cherry pick the ‘sure thing’ cases, this means that people who perhaps have a legitimate but not clear-cut case would likely have to litigate without the support of NCNP firms. It can be argued that legal representation in those cases is the most beneficial to litigants and access to justice, as the chance of success depends on the quality of the arguments to a greater extent than in hopeless (which will be lost either way) or sure thing cases (which would be won either way).

So what are the likely consequences to the private incentives to use NCNP assistance? Mandating that reimbursement fees are paid directly to the citizen aligns well with Shavell’s idea of making the private costs of litigation more transparent to the claimant, who must assess the value of pursuing legal action more critically. Although the measure might create some disincentives for frivolous claims, it could also undermine access to justice by placing an additional administrative burden on claimants, many of whom may not have the legal literacy or resources to pursue claims without NCNP support. This approach, perhaps unrealistically, assumes that claimants are fully equipped to understand legal complexity and financial implications (Robertson & Giddings, 2014). Consequently, legitimate claims may be abandoned simply due to procedural complexity, which conflicts with the goal of facilitating access to justice.

3.3 *Consequences for the Public Benefits of NCNP Representation*

The public benefits of NCNP firms active in the WOZ and BPM disputes have received far less attention in the public debate. Those emphasising positive effects are often commercially involved in the field themselves (Van Rosmalen, 2022). They claim that they offer individuals a risk-free way to challenge potentially inflated property valuations without upfront costs. Because fees are charged only if the appeal is successful, the model enables individuals, especially those who might otherwise lack resources or knowledge, to participate in the legal process without financial strain. Thus, NCNP firms indirectly enhance access to justice, providing a legal pathway for those who might otherwise forego appeal due to cost concerns.

Proponents of NCNP firms claim that they do not engage in frivolous litigation, as these firms perform a pre-evaluation of cases before proceeding, filtering out cases where the potential reduction in tax liability is minimal (Hoeben & Toolsema, 2021). Firms generally examine available public data and property characteristics to assess whether a valuation is likely to be inflated before initiating an objection or appeal. If the expected correction in property value is too minor to justify the

litigation costs, the firm declines the representation. This pre-evaluation process, which can result in 10%-60% of cases being screened out, helps to maintain a certain threshold of merit in filed cases, which theoretically aligns with efficient court use. It must be said that the factual basis for these claims has never been examined.

NCNP firms further argue that their work keeps municipalities accountable and exposes procedural flaws in property valuations (Geertsema et al., 2024). In principle, the model should encourage municipalities to improve their assessment accuracy. If NCNP firms consistently challenge valuations and win cases, this could serve as a corrective mechanism that prompts municipalities to refine valuation methods, improve their own service provision to citizens and better explain their valuations, benefiting not only those who object and appeal decisions but also other taxpayers indirectly.

3.4 *Consequences for the Social Costs of NCNP Firms*

The success of the NCNP model – at the very least in attracting customers – has resulted in significant social costs. WOZ- and BPM-related litigation comes with significant public spending on procedural cost reimbursements and administrative expenses for handling objections and appeals. Municipalities face costs not only from the required reimbursement of legal fees, but also from timely managing the volume of objections and appeals. Furthermore, administrative courts claim that the influx of NCNP-led cases has created a backlog in tax courts, as documented in the Dutch Judiciary's 2023 annual report (De Rechtspraak, 2024). The report indicates that NCNP cases delay rulings in higher-priority cases, crowding the system with tens of thousands of additional appeals. This congestion results in longer wait times for all cases, which reduces access to timely justice for citizens involved in socially more significant legal matters. Administrative authorities and courts clearly feel that the amount of litigation is socially excessive. Administrative authorities even go so far as to state that the number of appeals prevents them from improving their own decision-making processes and accuracy, because considerable time, effort and manpower is utilised in handling the large number of objections and appeals.

It is clear that the social costs of NCNP litigation are strongly related to the number, not the complexity, of cases. Lowering the standard reimbursement rates for WOZ and BPM cases theoretically decreases private incentives for NCNP firms to bring forward claims. However, NCNP firms could respond by increasing case volume to maintain profitability by filing more low-effort claims rather than fewer high-merit ones. This could lead to an increase in litigation volume, further straining the court system and potentially worsening backlogs. Moreover,

this approach does not necessarily encourage firms to focus on high-merit cases; instead, it merely makes each case less profitable, possibly resulting in lower-quality representation and an even greater reliance on automated or bulk filing practices to maintain viability.

By capitulating on reimbursements for damages due to court delays, the government aims to reduce the financial incentive for extending litigation timelines, a practice some NCNP firms might exploit. However, the cap may inadvertently penalise claimants who have valid claims but must endure delayed proceedings. The administrative and court system, rather than the claimant, is responsible for such delays, so capping damages due to slow court timelines could disproportionately affect genuine cases. Furthermore, rather than addressing NCNP firms' behaviour directly, this measure impacts claimants, who may now have to bear part of the cost of delayed justice, creating a disincentive for valid claims.

3.5 *One-Sided Focus on Public Costs*

In sum, although the measures tackle some aspects of private incentives to use NCNP firms, they appear less targeted at systemic reforms that might create a more effective balance between private benefits and social costs. A more balanced approach would include measures for reducing incentives for NCNP litigation and enhance mechanisms that promote only genuine claims.

For instance, instead of blanket reductions, the government could introduce differential reimbursement based on claim merit or stricter guidelines and eligibility assessments for NCNP firms. This approach may target low-merit cases more effectively without penalising valid claims. The system already offers these options to administrative bodies and courts, but they are rarely used.

Moreover, by focusing primarily on reimbursement reductions, the government might inadvertently shift litigation incentives without necessarily improving administrative decision-making accuracy, thereby contributing to litigation volume. If the decision-making quality at the administrative level can be improved, fewer cases might require litigation, thus reducing the strain on judicial resources without limiting access to justice. This aligns more closely with Shavell's principle of addressing the root causes of excessive litigation.

4 DISCUSSION

A dominant narrative has emerged in the debate over NCNP firms, portraying administrative bodies and courts as overwhelmed by a surge of low-merit cases

that offer minimal direct benefit to citizens. In this view, citizens are perceived as instruments in generating objections and appeals, and their interests are often overshadowed by the financial motives of their representatives. Critics of NCNP firms argue that reimbursements awarded under this model are disproportionate to the services provided, which largely consist of standardised grievances filled by underqualified personnel. In essence, NCNP firms are portrayed as leeches, injecting themselves into disputes where their presence serves no real purpose, in order to capitalise on the inherent flaws in the system.

After several earlier attempts, the legislature has finally managed to enact lawful legislation that curbs cost reimbursements for NCNP parties active in WOZ and BPM cases, albeit not to the extent that was envisioned. Interestingly, the Dutch Supreme Court ruled that the reimbursement reduction was acceptable, simply because the system of reimbursement was never intended to offer more than a (partial) reimbursement of costs. In essence, this means that NCNP firms are being punished for being too efficient.

This focus on the ‘improper use’ of the system – propagated mainly by administrative bodies – misrepresents the full picture, neglecting the genuine need for accessible legal pathways for citizens and the fundamental principle of access to justice. The positive aspects of NCNP firms are rarely highlighted in the discourse. The use of new business models, automation, artificial intelligence and efficient processes has enabled these firms to offer affordable and accessible legal representation to a large number of citizens. Many individuals file objections and appeals with NCNP support, and, importantly, they frequently succeed in securing favourable outcomes.

So far, little attention has been paid to the systemic issues that drive the number of legal challenges in the first place. These issues include large tax hikes, inconsistent decision quality, inadequate justifications for assessments, complex appeals processes, limited informal communication channels with authorities and a system heavily reliant on estimations. Furthermore, the relatively high rates of case annulments indicate underlying weaknesses in administrative decision-making. Another systemic issue is concerned with the way judges assess reimbursement rules. Although procedural cost reimbursement rules allow for fee moderation, judges rarely exercise this discretionary power, and when they do, such decisions are often overturned by higher courts.

The market for potential NCNP clients remains substantial, with over 8.5 million traffic fines issued annually and more than 7 million domestic properties subject to the WOZ (property tax) assessments in 2020 alone. Even if the payouts per successful case are moderate, the high success rate renders this model viable,

albeit possibly only for the largest, most innovative NCNP firms. However, if reimbursements are reduced, NCNP firms may be compelled to increase the volume of cases they handle to maintain profitability, potentially resulting in less time and attention devoted to each case. This would likely disadvantage clients, diminishing the quality of legal representation they receive. However, since it is still a free service, it is unlikely that this would deter them from soliciting the services of NCNP firms. Should NCNP firms exit the market entirely, the accessible, low-cost legal representation they provide would disappear as well. Many people do not qualify for subsidised legal aid, and the material outcomes at stake are often too moderate to warrant hiring an (expensive) legal expert or appraiser.

A 'jurisprudence of consequences' underscores the significance of examining the broader impact of judicial and administrative decisions, especially on access to justice. Public costs, public benefits, private costs and private benefits, are, ideally, all considered when discussing measures that might negatively impact access to justice. In the context of NCNP firms, only one dominant perspective has really emerged: the framing of these companies as 'cowboys' exploiting the legal system at the expense of society. Issues within the system itself are rarely if ever considered. Current decision-making and dispute resolution structures lack the robustness to manage unexpected increases in case volume effectively, highlighting, in turn, a failure to innovate or adapt to evolving needs of users. Rather than leveraging the insights gained from these challenges to improve the system for everyone, authorities rather focus on limiting forces that test its boundaries.

The dominant narrative of 'improper use' and even 'abuse' legitimises a restrictive stance towards NCNP firms, despite their demonstrable value in enabling all citizens to challenge administrative decisions with the help of a legal professional. This framing is uncomfortable, as it implies that legal assistance in low-value, high-volume areas of law, where traditional forms of legal assistance are unavailable or not economically viable, is under threat. While the importance of access to justice is often mentioned in policy discussions, little thought is given to the question of how it is to be ensured while simultaneously trying to curb excessive litigation.

This analysis suggests a need to reframe the discussion surrounding NCNP firms and their role in administrative litigation. Rather than restricting their operations, administrative bodies, courts and legislators should explore ways to enhance the legal systems resilience, encourage transparency in administrative decision-making, and ensure that citizens gain practical, accessible avenues for challenging decisions that impact their rights and interests.

While a focus on the consequences of law can offer important insights, it also has significant limitations. Emphasising measurable outcomes like budgetary savings or case volume often undervalues benefits that are harder to quantify, such as public trust in legal institutions or the symbolic value of fairness. In the section on public benefits, for instance, claims that NCNP firms enhance access to justice are acknowledged but remain underexamined, partly because such benefits are more difficult to capture in numbers. Second, even if all or nearly all relevant consequences can be measured and described objectively – such as quantifiable costs or caseload statistics – deciding which consequences are emphasised, and how they are framed, is inevitably influenced by normative perspectives. For example, the Supreme Court's validation of reduced reimbursements in NCNP cases was grounded in evidence of disproportionate legal cost claims, but this shifts attention towards financial efficiency rather than fundamental rights such as equal access to legal representation. Lastly, when the power to define and evaluate consequences lies predominantly with governmental actors – as in the studies commissioned by the Dutch state or the justifications based on municipal complaints – there is a risk that certain values or stakeholder experiences are sidelined. This imbalance may produce policy outcomes that entrench existing institutional biases, such as discouraging complex but legitimate claims, while privileging administrative convenience. Thus, consequence-based evaluation of law, while informative, must be critically assessed for what it excludes and whose interests it serves.

5 CONCLUSION

In conclusion, the debate surrounding the NCNP model in Dutch administrative litigation underscores a complex balance between enhancing access to justice and mitigating the risks of excessive litigation.

While NCNP arrangements provide essential legal support to individuals who might otherwise be unable to afford representation, or in situations where the stakes are relatively low, such as in property tax disputes, they have also led to significant increases in administrative and procedural costs. The Dutch legal system now faces a dual challenge: safeguarding access to justice for citizens with legitimate grievances while implementing measures to curb the potential for misuse of the NCNP model. Policies should strive for a nuanced approach that preserves the essential benefits of NCNP in democratising legal access while addressing procedural abuses that burden courts and administrative bodies. Ultimately, these reforms must weigh both individual and societal interests carefully to ensure that access to justice remains robust and equitable, avoiding unintended barriers that could limit the public's trust in the legal system.

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LIMIT CASES: SOVEREIGN CITIZENS AND A JURISPRUDENCE OF CONSEQUENCES

Luuk de Boer

INTRODUCTION

A handful of years before Miller published his 1965 article on a ‘jurisprudence of consequences’, Arthur Porth, in 1961, refused to file his US income tax returns by drawing on Sovereign Citizen arguments that can still be heard today in courts all around the world. Porth lost his case, and so has anyone else who denies the sovereign hold of the state over their person in a court of law. And yet exactly the same cases keep coming back, argued with exactly the same arguments, often by exactly the same people. Sixty years after Porth lost his case, Sovereign Citizen numbers are steadily growing, as the movement itself finds a footing in dozens of countries.

The Sovereign Citizen movement is puzzling and has so far largely escaped the attention of empirical legal scholars. From the point of view of a ‘jurisprudence of consequences’, however, the matter is far from trivial. Sovereign Citizens embody a wholesale rejection of the legal system – the limit consequence, one might say, of any jurisprudence. How might we account for Sovereign Citizenship, and, in turn, what light might Sovereign Citizenship shed on a ‘jurisprudence of consequences’?

Such questions are difficult to answer. This is so primarily because empirical data about these people and their concerns are all but missing (Baldino & Lucas, 2019; Sarteschi, 2021; Vargen & Challacombe, 2023), particularly in the Netherlands (De Boer, 2024a, 2024b, forthcoming; Siegel, 2024). We know next to nothing about who these people are, what motivates them to seek recourse to Sovereign Citizenship, or what segment of society they belong to, let alone what their views are on law and the legal system. We also know next to nothing about the street-level bureaucrats that engage with Sovereign Citizens on a day-to-day basis or about the kinds of concerns these legal officials bring to their interactions with Sovereign Citizens.

There is one exception to this lack of empirical data: case law. Hundreds of cases featuring Sovereign Citizens have been issued by judiciaries all over the world. What such data allow for in terms of empirical analysis differs for

each jurisdiction. Case reports in all countries disclose the topic and the verdict. American and Canadian court documents also liberally share information about the parties considered private in other jurisdictions. These can be profitably mined for demographic questions such as age, gender, marital status and even socio-economic status. Dutch and German court cases afford fewer answers to such questions. Yet for these two countries, too, one can ascertain case activity (quantity), the geographic distribution of cases, limited demographic information (gender and, to a lesser extent, age), and, still more limited, information on socio-economic status (mean income, homeownership).

This case law data, however, is as yet unexplored in scholarship. In this chapter, I explore extant Dutch Sovereign Citizen case law, using demographic data to gain provisional insights into this group of people. My research question for this chapter is as follows: what demographic and socio-economic patterns appear in Dutch Sovereign Citizen legal cases, and how might these be explained in future research? To answer this question, I begin with a treatment of the legal (Section 2) and analytical (Section 3) frameworks. Following this, the section on methodology walks through the database that has been compiled for the purposes of this study (Section 3). Based on the data drawn from Dutch case law, I present the results for case activity, the geographic distribution of cases, demographic information and socio-economic status (Section 4). In the ensuing discussion section, I connect my findings with the scarce empirical data available in secondary literature, especially on Germany, the United States and Canada. Building on existing literature, I then propose potential explanations and avenues for further research by means of which these combined data can potentially be accounted for (Section 5). A brief conclusion ends the article (Section 6).

2 LEGAL FRAMEWORK

Sovereign Citizens reject the legal system in its entirety. In theory, this means that their interactions with the law run the gamut of legal fields and can involve the private, administrative and criminal legal domain. In practice, Sovereign Citizen case activity occurs predominantly in the following situations (De Boer, 2024a; Netolitzky, 2023):

1. to avoid the obligation to pay (income) tax, fines, insurance premiums or other payment obligations;
2. to attack or obstruct government and institutional officials (often by challenging the judge);
3. to avoid prosecution in criminal cases.

This means that practically all cases feature the government as a party and predominantly fall within the domain of tax law, administrative law and criminal

law; Sovereign Citizen cases in which the other party is an ordinary citizen are rare. The first (1) category constitutes the vast majority both in the Netherlands and internationally (De Boer, 2024a; Netolitzky, 2023; Slater, 2016). Some 40% of the cases concern income tax (and often the national insurance premium). A few cases concern motor vehicle, municipal, water board or corporate taxes; cases about traffic fines are similarly frequent. Cases in which judges are challenged by Sovereign Citizens (so-called ‘wrakingszaken’) comprise approximately 25% of the total number, whereas criminal cases make up only a small percentage (ca. 5%).

3 ANALYTICAL FRAMEWORK

Sovereign Citizenship has rarely been the subject of academic attention and still more rarely of legal academic attention. The existing legal scholarship concentrates primarily on mapping the interactions between Sovereign Citizens and the legal system, covering recurrent Sovereign Citizen arguments, topics of interest, and advancing policy recommendations with which one can respond to Sovereign Citizens (US: e.g., Barrows, 2021; Kalinowski, 2018; Ligon, 2021; McRoberts, 2019; Canada: e.g., Netolitzky, 2017, 2018 and 2023; Netherlands: De Boer, 2024a, 2024b; Australia and New Zealand: Hobbs et al., 2023). Scholarship that seeks to grasp the intellectual foundations of this movement (de Boer, forthcoming; Levin, 2001; Levin & Mitchell, 1999), that interprets it as a form of legal pluralism or legal populism (Arnold & Fletcher, 2023; Harris, 2005; Koniak, 1996), or that sociologically accounts for its rise and current popularity (Fuchs & Kretschmann, 2019; Hodge, 2019; Schönberger & Schönberger, 2023; Siegel, 2024) is much rarer. Equally rare are accounts that advance such interpretations for the phenomenon as an *international* phenomenon, and not solely as a national one (De Boer, forthcoming; Hobbs et al., 2023). Altogether absent, finally, is scholarship that enlists the phenomenon of Sovereign Citizenship to shed light on larger debates in legal research, either in legal philosophy (e.g. the relationship of law to violence), legal history (e.g. the long history of states and state resistance), or in legal sociology (e.g. notions of legal consciousness or legal alienation).

The absence of empirical data has rendered such analyses impossible. In this chapter I begin by connecting Sovereign Citizenship to larger research concerns by exploring the quantitative data available in extant Dutch case law. Such data can yield patterns among Sovereign Citizen characteristics and, in due course, generate and test hypotheses explaining these patterns.

4 DATA & METHODOLOGY

The data on which this chapter is based comprises 166 cases lodged in Dutch courts by Sovereign Citizens. The earliest available cases are from 2013; the database includes cases that were published up to October 26, 2024, when the

final systematic search was conducted. Both the public database administered by the Dutch Judiciary (<https://rechtspraak.nl>) and the paid legal database InView (<https://inview.nl>) have been consulted.

Previous research has detailed the difficulties in assembling Sovereign Citizen cases (De Boer, 2024a; Griffin, 2022, pp. 63-90; Netolitzky, 2017, 2018, 2023; Slater, 2016, pp. 22-23; Smith, 2016, pp. 26-27). In contradistinction to Germany or the USA, Dutch court decisions involving Sovereign Citizens are rarely labelled as such. A simple search for 'Sovereign Citizen' ('autono*' or 'soeverein*') yields only a handful of Dutch cases, which are rarely cross-referenced with other cases. Slater (2016), on the other hand, found 530 US cases with the single search term 'Sovereign w/1 Citizen'; searching German databases with the search term 'Reichsbürger' or 'Selbstverwalter' is similarly effective (~700 hits). As in Canada (Netolitzky, 2017, 2018, 2023), the so-called 'snowball method' is most effective for the Netherlands: beginning with the secure cases of self-identified Sovereign Citizens, one can search for distinct Sovereign Citizen terminology used in those secure cases (e.g., 'levende mens', 'mens van vlees en bloed') to find more examples. Those further examples, in turn, yield more special terminology that can be used to accumulate more cases (e.g. 'motu proprio', 'Plakkaat van Verlatinghe', 'SHAEF'). At times, certain recurring Sovereign Citizen organisations ('Nationale Bond Overheid(s)zaken') or gurus recurrently helping Sovereign Citizens in court ('P. Dolleman', 'Y. Plate') yield further results. Existing scholarship on the phenomenon (De Boer, 2024a; Siegel, 2024) or other external sources, such as books written by Sovereign Citizens (e.g. Van Leeuwen, 2023) and media reports, help further identify recurring patterns, language and legal topics and sometimes specific cases. In sum, the search words 'autono*', 'soeverein*', 'levende mens', 'mens van vlees en bloed', 'motu proprio', 'Plakkaat van Verlatinghe', 'SHAEF' have all been used (including plural forms) to find cases. These searches were supplemented by additional cases found through the alternative routes described previously.¹

These court cases have subsequently been mined first for formal information (date, location, topic), and, subsequently, the texts themselves have been systematically checked for information on gender (searching for key words like 'he/she', 'his/hers'), age (searching for date of births), and socio-economic status (searching for reported income in tax cases; evidence of home ownership, leases or debts; evidence of occupation (self-employed; salaried; benefits)). The assembled data has been compiled into Excel data lists: for cases, listed in Excel on the Y-axis, I wrote down the presence or absence of this data on the X-axis. These lists were then loaded into the programming language R and converted into computer code by the author. Additional data was brought in for a map of Dutch provinces; for the province population density in 2024; and for median Dutch incomes between

1. A copy of the database is available upon contacting the author.

2013 and 2024. In all these cases, I have taken publicly available data from the Dutch Central Bureau of Statistics (<https://cbs.nl>), which publishes this data as downloadable R packages, which were subsequently matched in R with my court case data. In R, I subsequently created graphs and tables that give an overview of the collected data.

The present collection of cases is assuredly incomplete and offers, in addition, an assuredly incomplete picture of the movement at large: only 4.17% of all court cases end up being published, while still fewer disputes actually make it to court – and this is true even as the Dutch Sovereign Citizens can be characterised as litigious (Rechtspraak Jaarverslag, 2023; Van der Tak, 2024). But among the published cases, too, many Sovereign Citizen cases remain unidentified. On rare occasions, for example, I have come across self-published court documents of Sovereign Citizens which, in the Netherlands, are not attached to rulings. The corresponding, published judgment would frequently bear no trace of Sovereign Citizen language; it is carefully erased. Such erasure, in all likelihood, is the norm. Sovereign Citizen cases are normally clear-cut from a legal perspective and Sovereign Citizen arguments legally irrelevant. As a consequence, not every published judgment will include Sovereign Citizen arguments or language, making it all but certain that many cases are being overlooked. These considerations should be taken into account when assessing the results.

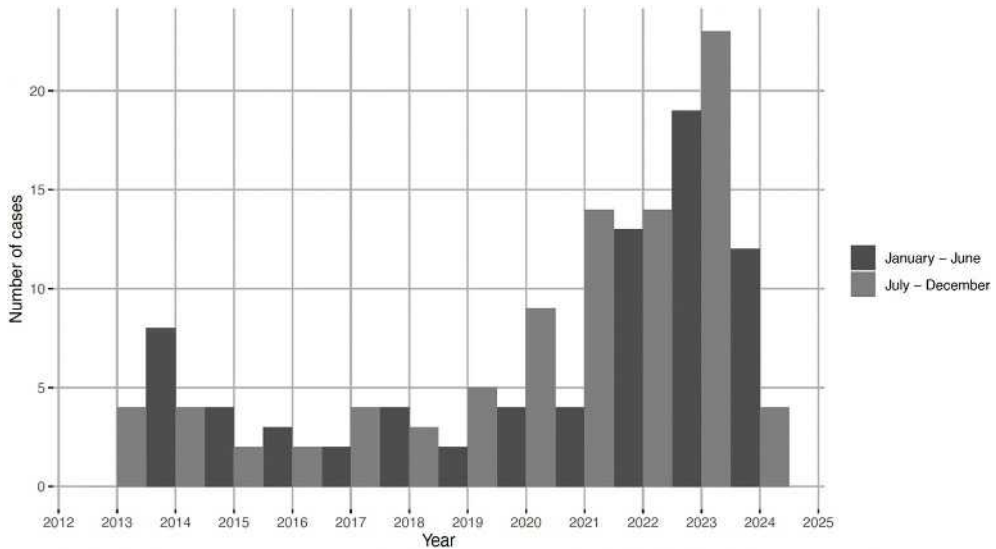
5 RESULTS

A comprehensive collection of extant case law on Sovereign Citizens in the Netherlands has yielded 166 cases, spanning the period 2013 to 26 October 2024. The results presented in this section are based on this corpus. The results cover, in turn, trends in case activity (1); geographic distribution of cases across Dutch Provinces (2); demographic information (gender and age; 3); and socio-economic information (mean income; employment; housing situation; 4). I will now present these in turn.

5.1 *Case Volume*

The case volume is presented here in blocks of 6 months (January to June and July to December in black and grey colors, respectively), particularly to ensure an accurate representation for the incomplete year 2024 (Figure 1). On the Y axis, the number of cases is plotted, which hover between 0 and 23; on the X-axis, the years have been plotted in blocks of 6 months, starting in the second half of 2012 and ending with the first half of 2025. The data clearly indicates the growth of this phenomenon in recent years, especially since 2020. Until this year, more than five cases every 6 months was exceptional, but thereafter, more than ten cases becomes the norm, with well over 40 cases in the year 2023.

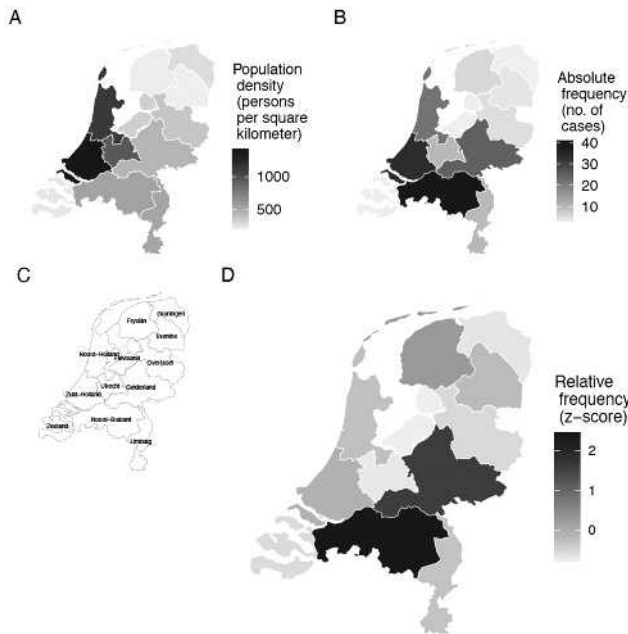
Figure 1 **Distribution of Dutch Sovereign Citizen Cases over Time, 2012-2024**



5.2 *Geographic Distribution*

The geographic distribution of cases across the Dutch Provinces shows the frequency of Sovereign Citizen cases in different regions of the Netherlands. Four maps are presented here (Figure 2), representing, and in that order, the population density of Dutch provinces (map A), the absolute frequency of Sovereign Citizen cases per province (map B), and the relative frequency of Sovereign Citizen cases per province (map D); map C is a legend map, indicating the names of all Dutch provinces. The relative frequency is calculated by plotting the number of cases per province relative to its population density. Map D is thus designed to capture the geographic distribution of cases across the Netherlands, corrected for population density.

Figure 2 Maps for Province Population Density (A), the Absolute (B) and Relative (D) Distribution of Dutch Sovereign Citizen in the Netherlands, Including a Legend (C)



On a scale which corrects for population density, the data shows certain provinces, like North-Brabant and Gelderland, to be hotbeds of Sovereign Citizen litigation. Other provinces, like North-Holland and South-Holland, score high in terms of absolute number of cases but also have a high population density, resulting in a lower relative frequency score. Friesland, on the other hand, whose absolute number of cases is relatively modest, has a higher relative frequency score on account of its few inhabitants.

Some caution should be observed in using this data. Since cases are anonymised, the personalised data of Sovereign Citizens (zip codes) involved in cases cannot be collected. Instead, the data represented are the court venues in which the respective cases were handled. It may well be, however, that certain cases are decided in places very different from where Sovereign Citizens live. This could happen for a number of reasons, for example because rules of jurisdiction result in many Zeeland cases ending up being judged in North-Brabant or because cases involving traffic fines will be brought before the court closest to where the defendant was fined, even if they live elsewhere. Other cases had to be excluded altogether because the designated court (such as the Administrative Court for Trade and Industry in Utrecht) has its seat in one place. Another caveat is potential differences in publication practices between courts: North-Brabant,

for example, might publish a relatively higher percentage of its cases than, say, Groningen. Here, too, caution is required, because we have no information about such publication practices. A more complete picture would require access to the non-anonymised data of the Dutch judiciary.

5.3 *Gender and Age*

The case law data set, when checked for gender, breaks down into the following eight categories: male, female, couple, two men, mixed group, male group, group (composition unknown) and unknown. See Table 1 for an overview of this breakdown.

Table 1 **Gender Distribution in Dutch Sovereign Citizen Cases (N = 166)**

Gender	Frequency (Percentage of Total)
Male	95 (57.23)
Female	42 (25.30)
Couple	1 (0.60)
Two men	3 (1.81)
Mixed group	4 (2.41)
Male group	1 (0.60)
Group, composition unknown	10 (6.02)
Unknown	10 (6.02)
Total	166 (100)

This data shows that for every 100 male Sovereign Citizens who appear in court, the number of female Sovereign Citizens who appear is about 42. In the 137 cases in which there is one Sovereign Citizen and the gender is known, 30.7% of the cases involves a woman (42 cases divided by a total of 137).

The data set, when checked for age, yields limited results: only 11 of 166 cases included a birthdate. In this small sample, pieced together by data which the courts disclosed by accident, the median year of birth was 1967 ($SD = 10.18$; $n = 11$). This amounts to an average age of 56 years. Dates of birth are not usually published by the Dutch judiciary, and a more accurate picture will require access to the judiciary's internal database.

5.4 *Socio-Economic Status*

The case law data set, when checked for hints of socio-economic status, yield multiple factors, which have here been grouped into three categories:

modal income; employment (self-employed/small business owner; salaried employment); housing situation (homeowner; rent) (Tables 2-4).²

The reported income has been set against that year’s modal income, as reported by the Dutch Central Planning Bureau (Macro Economic Exploration Report, 2023). Three cases reported either debts or payment difficulties; other cases did not yield information on this front.

Table 2 presents the available data disclosing Sovereign Citizen incomes, which amounts to 18% of the cases. The mean income in these cases falls below the mean Dutch income and comes in at 0.86 of the modal income, with – as the standard deviation shows – few exceptions. They go as far back as to 2009 (and have always been set against that year’s mean income), and incomes range from €10,000.- to €45,000.-, with the vast majority falling between €25,000.- and €35,000.-.

Table 2 **Income Distribution in Dutch Sovereign Citizen Cases (N = 122)**

Income	
Reported (in tax cases)	22 (18%)
Unknown	100 (82%)
Total	122 (100%)
Mean reported income, ranging from ca. €10,000.- to €45,000.- (2009-2023)	0.86 modal income; Standard Deviation 0.36

Table 3 presents the available data on employment of Sovereign Citizens, grouped into four categories: self-employed or small business owner; salaried employment; on government benefits; or unknown. In about 25% of the cases such information is forthcoming, and 17.21% of these cases involve self-employed individuals. Salaried individuals or individuals on benefits are much rarer (at 2.46% and 5.74%).

Table 3 **Employment Data in Dutch Sovereign Citizen Cases (N = 122)**

Employment	
Self-employed/small business owner	21 (17.21%)
Salaried employment	3 (2.46%)
(Partial) benefits	7 (5.74%)
Unknown	91 (74.60%)
Total	122 (100%)

2. The data set has been corrected for recurrent cases (first, second and third instance), and N = 122.

Table 4 shows the scant available data on housing, grouped into three categories: homeowner; rent; or unknown. Such information was available only in 10 of 122 cases. Of these ten, six were homeowners and four were renting property.

Table 4 Housing Data in Dutch Sovereign Citizen Cases (N = 122)

Housing Situation	
Homeowner	6 (4.92%)
Rent	4 (2.46%)
Unknown	112 (91.80%)
Total	122 (100%)

5.5 *Reflection on the Data*

In the previous section, I have presented the available data for Sovereign Citizen cases in the Netherlands, homing in on four variables: case activity; geographical distribution; gender (and age?) of the Sovereign Citizen(s) involved; socio-economic status of the Sovereign Citizen(s) involved. In this section, I will compare these results with data available from other countries and suggest potential explanations that follow from the patterns identified. These might explain *why* people are attracted to Sovereign Citizenship and should be verified in future large-scale quantitative case law analysis.

5.5.1 *Case Activity*

In previous research, the steady growth of this phenomenon is often stipulated but never backed up with publicly available data. For example, Dutch security agencies, presumably by tracking online activity, provide size estimates, claim a strong growth in the recent past and predict growth for the foreseeable future (AIVD, NCTV, 2023). The current data set illustrates when the phenomenon first found its way to the courts (in 2013). This occurred a few years after the phenomenon is said to have developed in the Netherlands (2010; AIVD, NCTV, 2023) and when its popularity sharply increased (in 2020; AIVD, NCTV, 2023). This would mean that court activity broadly corresponds to Sovereign Citizen activity in society at large. If this is true, the extant cases perhaps yield another result. While it is too early to draw firm conclusions on this front, the data does not seem to bear out the predicted future growth for 2024 and beyond. The data perhaps even hints at a decline of Sovereign Citizen activity in 2024 compared to previous years, something which has also been tentatively suggested in a recent report (Geurtjens et al., 2024).

Data on Sovereign Citizen case activity in other countries is limited. A number of studies list substantial numbers of cases but do not plot these on a temporal axis (see the overview for all contributions in Table 5). Two exceptions to this

trend, however, make for interesting comparative material to our results. In a US study (Slater, 2016), 530 cases were analysed and in a Canadian study (Netolitzky, 2023), 1,298 cases. The US study has assembled cases for the years 2006-2015 and demonstrated a sharp increase in numbers starting in 2011 all the way through a part of 2016, when the trend flattened (Slater, 2016, p. 6). The data on Canada, which covers the period 1995 to 2021, similarly demonstrates a marked uptick in the year 2011, peaking in 2013, and slowly coming down until 2021 (but never down to the pre-2011 level).

Table 5 Sovereign Citizen Case Law Data Sets Abroad

Country	Number of Cases	Years	Authors
USA	150	N/A	Smith (2016)
USA	156	1973-2017	Kalinowski (2018)
USA	530	2006-2015	Slater (2016)
Canada	725	N/A	Netolitzky (2017)
Canada	1,298	1995-2021	Netolitzky (2023)
Australia and New Zealand	>200	1980-2023	Hobbs et al. (2023)
Germany	>700	2006-2025	Unstudied

Scholarship has often understood the Sovereign Citizen phenomenon as a (sometimes protracted) response to severe socio-economic crises (de Boer, 2024a, p. 314; de Boer, forthcoming; Hodge, 2019; Kent, 2015; Netolitzky, 2023; Siegel, 2024, p. 207). One example is the American farm crisis of the 1980s, whose devastating impact is often held responsible for the contemporaneous growth of the phenomenon in the USA (e.g., Levitas, 2002, pp. 168-176; Schlatter, 2006, pp. 84-123). It is the 2008 financial crisis, in particular, however, that has often been identified to explain sharp rises in Sovereign Citizen activity in many countries in the late 2000s and early 2010s, and the data of Slater 2016 and Netolitzky 2023, both of which show a marked increase from 2011 onwards, can likewise be explained against the backdrop of this crisis. Our data, too, becomes legible when understood as a response to a prolonged, societal crisis: the Covid-19 crisis. Following its outbreak in March 2020, the case numbers shoot up drastically, just as the first Sovereign Citizen activity in the Netherlands temporally coincides with the aftermath of the 2008 financial crisis; analogous explanations have also been advanced in Germany, but these were not backed up by data (Hüllen & Homburg, 2017, p. 31).

5.5.2 *Regional Distribution*

International scholarship has thus far scarcely collected regionally distributed data of Sovereign Citizen activity and, with the exception of Netolitzky (2023), has never corrected data for population density numbers. Slater (2016), for

example, presents the ten US states with the most Sovereign Citizen activity between 2006 and 2015; eight of these states belong to the eleven most populated US states. On the basis of these absolute numbers, he rejects the possibility of a 'rural' or 'American Frontier' reading of Sovereign Citizenship, for which one would expect the Pacific Northwest and the Western Great Plains regions (e.g. Idaho, the Dakotas, Montana, Wyoming) to be overrepresented (Slater, 2016, pp. 31-33). But it is surely relevant that these are some of the least populated states in the USA, so that one would have to correct for population density. Netolitzky (2023), in his discussion of the volume and frequency of Sovereign Citizen decisions, does correct for population and identifies British Columbia as Canada's pseudolaw centre but offers no substantive explanation that accounts for regional differences. Hüllen and Homburg (2017) have collected data for Brandenburg, one of Germany's eastern *Bundesländer*, distributed across the different municipalities (without correcting for population density). They conclude that Sovereign Citizenship is a rural phenomenon, particularly because city municipalities have lower numbers (Hüllen & Homburg, 2017, pp. 31-33). But their conclusions are hampered by their having failed to take population density numbers into account: the four municipalities with the highest numbers (Potsdam-Mittelmark, Oberhavel, Dahme-Spreewald, Elbe-Elster) include the two largest municipalities (Potsdam-Mittelmark, Oberhavel), population-wise.

The data of this Dutch study can provisionally be slotted into a center-periphery dynamic, inasmuch as the three provinces with the highest relative frequency (North-Brabant, Gelderland and Friesland) are habitually considered peripheral, especially in opposition to the so-called 'Randstad' (the conurbation area in the western part of the Netherlands which comprises ~41% of the country's inhabitants; Zonneveld & Nadin, 2021). For other rural provinces, however, such as Zeeland, Groningen, Overijssel, Drenthe and Limburg, the relative frequency is lower than for a 'central' province like South-Holland.

Some of the indeterminacy must be attributed to imperfect data, which are not always able to capture where Sovereign Citizens operate from. A non-public data set, for example, which contains information on paying customers with a Sovereign Citizen guru (Kouwenhoven & Smouter, 2023; $n = 1,118$), reported 233 members from the province of Limburg (where the said guru is also from), a province not well represented in our data. Moreover, the distribution across provinces papers over city-periphery dynamics within provinces, a challenge also visible in Netolitzky 2023: North-Holland, for example, includes both Amsterdam and peripheral regions and communities like West-Friesland and, for example, Volendam. Our data is unable to account for these differences, even though we know from other countries that citizens come to Sovereign Citizenship from both urban and rural areas, though perhaps for different reasons (Perry et al., 2017, pp. 23-24).

5.5.3 *Gender and Age*

In terms of gender, the cases show a percentage of approximately 30% of women. This is lower than the ‘small majority’ reported by Dutch journalists based on a non-public data set, containing information on paying customers with a Sovereign Citizen guru (Kouwenhoven & Smouter, 2023; $n = 1,118$).³

The female presence of 30% in Dutch cases is on the higher end when compared to data from other countries. The number of female German *Reichsbürger*, for example, hovers between 13% and 29% (Keil, 2021, pp. 258-259). See Table 6 for an overview of available German data. In the USA, data is much less readily available. Smith (2016) found a female presence of 14.7% in US Sovereign Citizen cases ($n = 150$).

Table 6 **Scholarship on the Gender Distribution among German Reichsbürger**

Studies on Gender among German Reichsbürger	Number of Cases	Percentage of Women (%)	Source
Hüllen and Homburg (2017, pp. 31-33)	440	29	Data of the Constitution Protection Agency Brandenburg
Keil (2015, pp. 44-45)	121	20	Police data Brandenburg
Keil (2017, pp. 60-61)	224	20.98	Police data Brandenburg
Keil (2018, pp. 128-129)	580	22.6	Police data Brandenburg
Haase (2018, pp. 31-33)	718	23	Data of the Constitution Protection Agency Sachsen
Fiebig and Köhler (2019)	487	13.76	Newspaper data
Krüger (2017)	217	14.98	Written communications

As Keil (2021) remarks, such elevated numbers for female participation indicate that Sovereign Citizens cannot easily be reduced to other, more straightforwardly criminal phenomena or, we might add, to far-right extremism (Smith, 2016 has a 7.3% female presence among far-right cases, with $n = 382$; cf. Perry et al., 2017, pp. 22-25).

This observation is further corroborated by the comparatively high age of many Sovereign Citizens, and, where such data is collected, by the movement’s racial diversity (Smith, 2016 has 32.6% non-white presence, $n = 135$). In Germany, where only data on age is collected, every second *Reichsbürger* is older than 50 (median: 50; $SD = 13$; Keil, 2021, p. 258). Smith 2016 found the mean age to be 52.3 in the USA ($n = 150$; $SD = 12.32$), whereas far-right defendants had a mean age of 38.71 ($n = 340$; $SD = 12.67$). This closely corresponds to the non-public Dutch data set

3. Unfortunately, no specific percentages were given by these journalists; between 51% and 60% seems likely.

from 2023, referred to previously, which had an average age of 56, i.e. an average birth year of 1967 (Kouwenhoven & Smouter, 2023; $n = 1,118$). A more complete picture would require access to the non-anonymised data of the Dutch judiciary.

Sovereign Citizens, then, are in a sense a *sui generis* phenomenon, comprising relatively old citizens who are and relatively well represented among females. This is an important observation because the movement is so often simply equated with right-wing extremism, especially in Germany and the USA (e.g. Hartleb & Schiebel, 2024; Huhn, 1998-1999; Koniak, 1996; Levin & Mitchell, 1999; Levitas, 2002, pp. 257-342; Schlatter, 2006; Sullivan, 1999; Rathje, 2022; cf. Schönberger & Schönberger, 2023, pp. 70-72). At the same time, there are important exceptions, which, however, rather than reinstating the idea of right-wing extremism, complicate our picture (Slater, 2016, p. 7). Particularly in the USA, for example, young male African-Americans are often attracted to the Sovereign Citizen ideas while in prison (Parker, 2014 ($n = 9$, average age of 39, with only one female; all African American); Paradis et al., 2018 ($n = 36$, mean age = 38.7, $SD = 8.32$; all male, all but one African American). All the same, while such nuances are important, we should not lose sight of the fact that older men are overrepresented in the empirical data on Sovereign Citizens. Although women may participate in substantial numbers, Sovereign Citizenship is still an overwhelmingly male affair.

5.5.4 *Socio-Economic Status*

Generally speaking, the data that could be gathered from the extant cases is limited. On this front, in particular, does the absence of non-anonymised data make itself felt. Still, some cautious remarks may be put forward about socio-economic status. They may be taken as a cautious indication of an average to below average socio-economic position, with a strong presence of self-employed individuals. The data available on housing is too scant for anything by way of substantive remarks.

Looking abroad, the data is similarly patchy, and data on income is nowhere reported. For Canada, Perry et al., 2017, pp. 24-25 report wealth inequality as a driving force of Sovereign Citizenship, yet their information is based on only one interview with a Sovereign Citizen and not backed up by a larger data set; other Canadian data is not forthcoming. The little we have from the USA on the socio-economic status of Sovereign Citizens points to an average to heightened social status. Smith 2016 found 48.9% Sovereign Citizen defendants had a college degree ($n = 94$), against 16.7% among far-right extremists ($n = 239$). The numbers are considerably lower with Parker 2014 (three out of nine) and Paradis et al. 2018 (only one; $n = 28$), but they are working with small and specific sample groups. Among the adjacent (but perhaps slightly more socio-economically elevated) German and Swiss *Querdenker*, Amlinger and Nachtwey 2022 likewise report an average to above average socio-economic status for the majority, with 31% having

finished a high school education and 34% a college education (the German and Swiss average for a college education is 18.5% and 29.6%, respectively).

Of interest within the employment data, incomplete though these, too, are, the comparatively large number of self-employed individuals or small business owners in the sample is of interest; this coincides with more anecdotal reports about Dutch Sovereign Citizens (Van der Tak, 2024, p. 29; Van Rees-Bekkum, 2024, p. 28) and lines up with German data reported on the German and Swiss *Querdenker* (Amlinger & Nachtwey, 2022; $n = 1,150$), a protest group that gained traction in the Covid-19 period. The number of small business owners in this data set was 25%, thus easily exceeding the German and Swiss average of 9.8% and 12.8%, respectively. It might not be too much to venture that they, of all individuals, experience anxiety most intensely around their personal autonomy – since they are, in a sense, a pre-selected population that values the freedom to design their own life, while in practice they are not only very directly confronted with governmental regulations and control but also more dependent on the whims of the market than salaried employees. The Covid-19 pandemic drove both these types of dependencies home, and multiple cases in our database relate to small business owners seeking, and being refused, Covid-19 government support, after which Sovereign Citizen arguments appear in their cases (e.g., ECLI:NL:CBB:2022:802; ECLI:NL:CBB:2022:801; ECLI:NL:CBB:2022:783).

For Germany, Fiebig and Köhler 2019 ($n = 487$) is the only source providing more than self-reported data by *Reichsbürger* in interviews, but the search uniquely focuses on news reports about criminal and other public order offences committed by *Reichsbürger*; the data should be treated with caution. As in our data set, not every news report provided information on socio-economic status ($n = 130$). Within the collected sample that spoke to professional status, 38.46% of the *Reichsbürger* were unemployed ($n = 50$); 30% had a job ($n = 39$); 31.54% were retired ($n = 41$), making it difficult to attribute Sovereign Citizenship exclusively to financial difficulties stemming from unemployment (Fiebig & Köhler, 2019, pp. 22-23). Among the *Reichsbürger* for whom a specific profession could be determined ($n = 111$), blue-collar workers (painters, handymen, etc.) constituted 59.46% ($n = 66$), while 40.54% ($n = 45$) could be qualified as white-collar workers (engineers, doctors, etc.); of the white-collar workers, 11 out of 45 were unemployed (24.44%) when they appeared in news reports. Fiebig and Köhler 2019 also state that 106 people were experiencing financial problems (67.95%), that 70 people were experiencing professional problems (44.87%), whereas fewer experienced health or family problems (19 or 12.18% and 17 or 10.90% respectively). It is unclear, however, whether it was these problems that drove these people to Sovereign Citizenship or whether, instead, the problems were the result of identifying and acting as Sovereign Citizens.

On the whole, this foreign data aligns reasonably well with our, more limited, data and collectively point to an average to below average socio-economic status

among Sovereign Citizens; financial struggles, often associated with the movement in the public eye (Pointer, 2023; Zuidervaat, 2023), are infrequently reflected in the case law record, but should not – as the German data and a recent Dutch bailiff report show (Van Straaten et al., 2024) – therefore be considered absent from the phenomenon. In general, better data is necessary to make claims about Sovereign Citizens' socio-economic status with any degree of certainty, particularly for the Netherlands. Future research would benefit from securing access to the non-anonymised data from the Dutch judiciary and setting up broader empirical data-collection projects.

5.5.5 *Further Research*

My research captures the recent rise in Dutch Sovereign Citizen cases and their geographical distribution across Dutch Provinces. It also shows some of the demographic characteristics of Dutch Sovereign Citizens. In this section, I will suggest potential ways to account for these findings: the connection of the popularity of Sovereign Citizenship to societal crises; the phenomenon's stronger presence in rural provinces; the phenomenon's larger appeal to older men; and, finally, and more tentatively, the phenomenon's association with small business owners and citizens of lower to average socio-economic status.

As I discussed in the introduction, there is no substantial empirical research that includes Sovereign Citizen perspectives and thematises legal alienation, institutional trust and issues of procedural fairness. I will take my cue here from the literature which includes interviews with, and biographical information of, Sovereign Citizens (Keller, 2017; Perry et al., 2017; Rabe et al., 2022; Schmidt-Lux, 2020; Schönberger & Schönberger, 2023; Van der Tak, 2024; Van Rees-Bekkum, 2024), and from a larger, German empirical study on the so-called *Querdenker*, an adjacent protest movement that specifically responded to the Covid-19 pandemic (Amlinger & Nachtwey, 2022). More robust empirical studies, however, are necessary to fully account for the phenomenon.

In the existing legal empirical literature, some patterns can be discerned that explain this data. Often, a specific, negative event, which can be either biographical or socio-political in nature (e.g. the loss of steady employment or, in Germany, the dissolution of the GDR, Rabe et al., 2022, pp. 354-355; Schmidt-Lux, 2020, p. 99; Schönberger & Schönberger, 2023, pp. 31-35, 47-110), reveals the brokenness of the current system to the Sovereign Citizen and leads to feelings of impotence and, sometimes, a precarious and isolated living situation. Equally often, repeated attempts to reconnect to civil society and the workforce have failed, exacerbating existing feelings of marginality and isolation (Fiebig & Köhler, 2019; Keil, 2017, pp. 107-108; Keller, 2017, pp. 42, 55; Perry et al., 2017, pp. 41-42, 2019, p. 8; Rabe et al., 2022, pp. 350-351, 360; Schönberger & Schönberger, 2023, pp. 128-129; Van Rees-Bekkum, 2024, p. 30), a phenomenon also observed in adjacent protest movements (Amlinger & Nachtwey, 2022, p. 288).

While this is not *always* the case (Schönberger & Schönberger, 2023, p. 130), it would explain why the phenomenon is connected to societal crises and is especially pervasive among older men, in peripheral regions, and among lower to average socio-economic strata. People who were once securely woven into the fabric of civil society now find themselves dislodged from it. The immediate impetus might be a crisis like the pandemic, which hits socio-economically vulnerable populations harder (including small business owners) and can accelerate resentment around *longue durée* processes of (perceived) rural and gendered marginalisation; the loss of security and newborn feelings of precarity makes sense especially for older, male generations, who experience a jarring absence of control compared to earlier life stages (Rabe et al., 2022, p. 360). The 2020 pandemic, in either case, was such a moment of ‘collective loss of control’ (Amlinger & Nachtwey, 2022, p. 248), to which many in society responded with varied attempts of sense-making.

Since many of these factors are not gender-specific, this might also explain the robust presence of females among Sovereign Citizens, even though we should not ignore the patriarchal character of many of the phenomenon’s structures and ideas (Bischof, 2017), which is perhaps to be connected to a widespread sentiment among Sovereign Citizens that values and norms are no longer what they used to be (e.g. Keller, 2017, p. 45; Rabe et al., 2022, p. 362). The crisis might also constitute the proverbial ‘snap’ for citizens, and particularly for small business owners, who feel stifled by excessive regulation and government control (Van der Tak, 2024, p. 29; Van Rees-Bekkum, 2024, p. 28) and now decide to explore alternatives outside the system.

6 CONCLUSION

Based on a data set comprising 166 court cases involving Sovereign Citizens, this study has highlighted trends in (1) case activity, and provisionally linked the sharp, recent rise to the Covid-19 pandemic; in (2) geographic distribution of cases across Dutch Provinces, cautiously suggesting a strong presence, especially in peripheral areas; in (3) demographic information and showed a 70/30 M/F gender balance and the relatively advanced age of Sovereign Citizens; in (4) socio-economic data, which revealed a lower to average mean income and the prevalence of small business owners. For all these four findings, the imperfect nature of the present data should be stressed. Larger empirical studies that explore both the internal archive of the Dutch judiciary and expand the analysis to other countries are necessary to further buttress these conclusions.

But however provisional, the relevance of these empirical observations for a general ‘jurisprudence of consequences’ deserves to be pointed out. As mentioned previously, Sovereign Citizens reject the entire legal system – the limit consequence, one might say, of any jurisprudence. *The* question that requires an

answer is why Sovereign Citizens respond to the legal system in this way. This chapter has offered some building blocks for answering that question, and they may well have shown that the problem is more complex: if societal crises, rural marginalisation, gendered shifts in power relations, and middling socio-economic status matter for Sovereign Citizenship, then these extreme responses to the legal system are in part produced elsewhere in society. Limit cases in a 'jurisprudence of consequences', in other words, also show the porosity of the boundaries between law and society.

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MAKING MICROGRIDS WORK: AN EMPIRICAL-LEGAL STUDY OF THEIR TRANSACTION COSTS UNDER EU LAW

Jamie Behrendt

1 INTRODUCTION

A ‘jurisprudence of consequences’, as conceptualised by Miller (1965), emphasises the importance of assessing the real-world impact of legislation. This remains crucial today, particularly when considering the role of legislation in the energy transition. A key example is the impact of current EU electricity market regulations on the development and operation of microgrids, which are decentralised electricity systems with significant potential to contribute to the energy transition (Uddin et al., 2023). Despite their potential, existing EU regulation does not address microgrids (Kojonsaari & Palm, 2021; Soshinskaya et al., 2014), leaving system developers and users in a state of uncertainty.¹ This uncertainty negatively impacts technological progress and ultimately hinders the broader energy transition (Haas et al., 2023). Supporting microgrids as part of the energy transition therefore requires a reassessment of the current legal framework, which starts with understanding the sources and impacts of uncertainty in the regulatory framework.

Microgrids are decentralised electricity systems that can operate independently of the centralised electricity grid but can also interact with it (Mauger, 2022).² In a microgrid, system users can produce and consume their own electricity, often from renewable sources (Uddin et al., 2023). Managing the production, distribution and consumption of renewable electricity in a microgrid has some technical advantages and could be beneficial to society in the energy transition. These include, but are not limited to, producing renewable energy, reducing

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1. This chapter builds on the author’s previous work as part of her PhD dissertation (Behrendt, 2023; Behrendt, 2025). In the development and operation of microgrids, the author focused on analysing the transactional uncertainty due to legal uncertainty and legal complexity.
 2. For a full overview of their technical characteristics, see: Carpintero-Rentería et al., 2019; Satapathy et al., 2024.

transmission losses, reducing the load on the centralised grid through system islanding,³ and encouraging electricity consumers to play a more active role in the energy transition (Mariam et al., 2016; Kurundkar & Vaidya, 2023; Uddin et al., 2023). However, a disadvantage of the use of microgrids is that as more users leave the centralised electricity grid, the costs of maintaining it will be shared among fewer customers. Therefore, to keep microgrids beneficial, tariff regulations must address this issue.

Despite the benefits of microgrids for advancing the energy transition, their implementation in the EU remains limited. This can be linked to the EU's regulatory framework for the electricity market. The existing regulation accommodates a centralised, top-down approach to electricity generation, distribution and consumption (Roggenkamp et al., 2016). Fully decentralised and islanded electricity systems, such as microgrids, fall outside the scope of this formal institutional framework of laws and regulations (Mauger, 2022). As a result, the limited number of individuals and organisations involved in microgrid development and operation face significant transactional uncertainty rooted in the uncertainty and complexity of the legal framework (Soshinskaya et al., 2014). In developing and operating a microgrid, this uncertainty increases transactional uncertainty and associated transaction cost, thereby discouraging their broader adoption.⁴

As noted, a 'jurisprudence of consequences' emphasises the need to consider and minimise the negative (real-world impact of legislation); in the case of microgrids, this refers to the transactional uncertainty and high transaction costs associated with microgrid development and operation due to legal uncertainty. To address this, the regulatory framework applicable to microgrids must be reconsidered. This necessitates, first, identifying the specific sources of transactional uncertainty within the law. Therefore, the central research question addressed in this chapter is, which transaction costs exist in the development and operation of microgrids resulting from uncertainty and complexity in the formal institutional framework governing the EU's electricity sector?

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3. Islanded means that the system can function disconnected from the centralised electricity grid. This is the technical characteristic that distinguishes microgrids from other decentralised electricity grids (Mauger, 2022). For a full overview of what microgrid islanding entails, see: Li et al., 2014.
 4. From an economic perspective, the reason for this is that in the absence of a regulatory framework for microgrids, transactional uncertainty arises (North, 1990). This uncertainty can stem from factors such as incomplete information, ambiguous contractual terms and, crucially, the legal framework itself. Due to transactional uncertainty, more time and resources need to be invested in organising the transactions for running a microgrid, which increases transaction costs. This may discourage system development, which is undesirable considering the positive impact that microgrids could have on the energy transition (Uddin et al., 2023).

This chapter provides novel insights into the impact of legislation on microgrid development and operation. Given the limited number of existing microgrids and the distinct characteristics of each system, this study only provides insights into uncertainties and costs in relation to specific grids rather than a general assessment of transactional uncertainty.⁵ Nevertheless, such an exploratory study has not been conducted to date, making this study original. Furthermore, to carry out this empirical research, it was required to map the existing microgrid projects throughout the EU, which has also not been done before. The added value of the chapter lies in its empirical analysis of regulatory uncertainty and complexity for microgrid stakeholders, its related suggestions for legal reform, and its methodological contribution that can be used as a basis for future empirical legal studies.

To address the research question, this chapter is structured as follows: after this introduction, a brief literature review examines (empirical) research on transaction costs. Section 3 outlines the methodology, while Section 4 presents the main empirical findings, which suggest that the regulatory framework is misaligned with the deployment of microgrids. As a result, developers and operators face significant search and information costs in navigating the regulatory requirements. These findings form the basis for a reassessment of the legislation to support microgrids. Although a full legal analysis is beyond the scope of this chapter, the discussion in Section 5 provides a first indication of such an analysis. The final section concludes the chapter.

2 ANALYTICAL FRAMEWORK: TRANSACTION COSTS AND UNCERTAINTY

The theoretical foundation of this research is law and economics, and in particular transaction cost theory, specifically the work of Williamson (1981). He identified uncertainty as one of the three key factors influencing transaction costs, such as search and information costs, decision-making costs, negotiation costs and enforcement costs (Mundaca et al., 2013). The formal institutional framework, i.e. laws and regulations, plays an important role in minimising these costs by providing structure to the transaction and reducing uncertainty (North, 1990). However, the current institutional framework in the EU is inadequate for the development of microgrids, as it does not consider independent, islanded, energy systems at the local level (Mauger & Roggenkamp, 2021). Existing regulations are not tailored to the specific needs of these systems (Kojonsaari & Palm, 2021; Saeed et al., 2021; Soshinskaya et al., 2014; Warneryd et al., 2020).

5. As previously argued, the distinct characteristics of microgrids necessitate regulations that account for these differences (Behrendt, 2023). However, such regulations do not yet exist, likely due to evolving technology, shifting policy priorities, and the need for further research on market mechanisms and grid integration. This study, therefore, concentrates on specific uncertainties and costs rather than the broader regulatory framework.

While these authors acknowledge the problem of uncertainty, there has been little empirical investigation of its underlying sources. Furthermore, despite the extensive literature empirically researching transaction costs (see, for instance, Friese et al., 2020; Ménard & Saussier, 2000; Sirnes, 2021), only limited research has empirically identified transaction costs arising from (legal) uncertainty and (legal) complexity (Marneffe & Vereeck, 2011; Yang et al., 2022). The few studies that have done so generally rely on surveys and interviews (Shahab & Lades, 2024). To measure or indicate transaction costs, researchers have focused on differentiating between direct and indirect transaction costs. Direct costs include expenses like legal fees (Petersen et al., 2019), while indirect costs are less tangible and include the time and effort required to research and make decisions about a particular asset in the microgrid (Den Butter et al., 2009). Time is commonly used as a proxy for measuring indirect costs, reflecting the effort and resources needed to complete transactions (Mettepenningen et al., 2009; Shahab & Lades, 2024; Zhuang et al., 2020).

3 METHODOLOGY

The central research question in this chapter focuses on identifying the transaction costs that arise during the development and operation of microgrids due to uncertainty and complexity within the formal institutional framework governing the EU electricity sector. In answering this question, this research is divided into two parts. The first part seeks to identify and understand the specific uncertainties and complexities inherent in the institutional framework. The second part of the question explores the consequences of these uncertainties, in particular whether they translate into transaction costs. This links uncertainties to practical constraints (i.e. transaction costs) and their impact on microgrids.

3.1 *Exploratory Qualitative Research*

Microgrids have previously not been empirically studied from a perspective that combines a legal assessment with transaction cost theory. This chapter provides a first step in filling this gap in the literature, presenting an exploratory qualitative study analysing existing, planned and failed microgrids through surveys and interviews. This approach was chosen as the research involves a small, relatively new, research population and as exploratory research is particularly suitable to analyse an emerging phenomenon where limited data is available (Webley, 2010). The research was carried out in the following four stages.

Stage 1: Microgrid Selection

First, an overview of existing microgrids in the EU was made. Here, a major obstacle was that the term microgrid is not clearly defined, either from a technical or from a legal perspective. It was therefore necessary to define the research group. Electricity systems were selected based on the key characteristics of microgrids identified by Carpintero-Rentería et al. (2019). These are (i) islanded and grid-connected functionalities (ii) clearly defined electrical boundaries, and (iii) a control entity capable of managing energy resources along the loads. A literature review and internet search were conducted to identify electricity systems that meet these criteria. This led to the creation of a unique map, which is now publicly available, that indicates where microgrids exist across the EU.⁶ Subsequently, the developers and operators of these systems were contacted to participate in this research. These range from industrial sites where companies are connected to their own energy system, to residential areas where a group of households have developed their own grid, to researchers or electricity providers who have implemented microgrids to test technologies, to a village that has considered it but has deliberately not developed into a microgrid.

Stage 2: Surveys

A survey was designed that was structured into four distinct blocks. The first block focused on background information about the system. For example, respondents were asked about the parties involved (e.g. electricity customers, distribution system operators) and the ownership and operational responsibilities.

The second block assessed the development of microgrids and included questions on monetary costs as well as time and effort. In addition to specific questions on challenges to microgrid development (identified in the previous theoretical analysis), respondents also had room to share their own experience in open questions; for instance ‘what were the main barriers you encountered during the development of the microgrid?’ The third block mirrored the structure of the second, but with a focus on the operation of microgrids.

The final block discussed the legal dimensions. Questions explored the legal uncertainties and complexities experienced during the development and operational phases. For example, respondents had to rate the level of complexity associated with the development of microgrids on a scale of 0 to 10 and then respond to specific statements, with which they could strongly disagree or strongly agree. To make the questions more detailed, the survey also asked about specific

6. The map can be accessed via: Microgrids-Research.eu.

steps, such as the authorisation process and grid access procedures as established in existing legislation, specifically Directive 2019/944 on common rules for the internal market for electricity. To facilitate a full understanding, participants could also share their experiences in an open-ended question.

The survey was sent to 23 operational microgrids, 4 developing and 6 potential microgrids, 1 failed microgrid, and one system deliberately not developed into a microgrid. However, the response rate was lower than expected, with only six respondents providing information, and of those six, not all completed the survey fully. In hindsight, the low completion rate can probably be traced to the length of the survey (25 minutes), which is attributed to the complexity of the subject. Furthermore, it required specialised knowledge, which not all respondents appeared to have, especially where development tasks were outsourced. Microgrids that lack this expertise are less inclined to respond, and this implies that the results are likely to be an underestimation of transaction costs.

Stage 3: Interviews

To increase the robustness of the study, the third stage in this research included conducting 8 interviews. In addition to the respondents identified previously, which are microgrid developers, operators or microgrid users, energy consultancies involved in research on microgrid development were contacted, thus broadening the response base. The survey served as an interview guide but was adapted for each interview based on the respondent's expertise and specific details of the microgrid under discussion. This interview approach, also used by other researchers who studied transaction costs (Victor & Paulo, 2023), proved to be more suitable for evaluating transaction costs compared to the survey. It allowed for in-depth discussion of network specifics not captured in the survey. In addition, the interviews discussed some of the legal solutions proposed to reduce the uncertainty related to transaction costs, which had not yet been included in the surveys. Overall, respondents seemed more willing to discuss the topic orally. The mixed method of using both surveys and interviews led to 14 responses. While this number seems modest, it must be seen in the context of the relatively few microgrids identified in the EU.

Stage 4: Empirical Analysis

The fourth step was to analyse these responses, an exercise performed by manually coding the results. Responses were systematically categorised using keywords that addressed specific themes: uncertainties in development and operation, legal issues and activities that incur transaction costs. This approach was chosen primarily because of the relatively long interval between the surveys

and interviews, giving the researcher sufficient time to assess each response thoroughly. Manual coding allowed for a tailored evaluation of each respondent's input within the specific context of each microgrid.

The results gathered in the empirical analysis lay the foundation for a forthcoming fifth step, which involves conducting a legal analysis to evaluate how existing laws can be amended to facilitate the development and operation of microgrids. This chapter provides a brief overview of this analysis in the discussion section. However, a more in-depth exploration will be presented in a separate contribution, as a detailed discussion exceeds the scope of this chapter.

3.2 *Limitations of the Study*

While this study provides valuable insights, it is also important to acknowledge its limitations. First, the survey component of the research encountered a low response rate, which limits the degree to which the findings can be generalised. The research methodology itself may also contribute to this, as it may not have fully captured the different perspectives on microgrid development and operation. Although efforts were made to ensure a representative sample, the small and specialised population studied contributed to this challenge. Second, the qualitative interviews are inherently subjective and may introduce biases. They rely on the participants' recollections and on the institutional memory of microgrid developers and operators, which proved to be difficult to unlock. Despite the use of the interview guide to mitigate these biases, the interpretation of themes could be influenced by the perspectives of both researchers and participants. As a result, the complexity of the legal and regulatory intricacies at play may not have been fully captured. Future research could thus benefit from more diverse samples to validate and extend these findings, once more microgrids are set up.

3.3 *Indication of Transactional Uncertainty and Transaction Costs*

Considering the above, this exploratory analysis serves as a starting point for empirical research into transactional uncertainty and the resulting transaction costs in microgrid development and operation. This chapter identifies sources of transactional uncertainty within the legal framework and provides an indication of the transaction costs incurred by specific microgrids without directly measuring them. Consequently, the results indicate sources of uncertainty and capture relative transaction costs in the microgrids analysed, rather than providing a general estimation for all microgrids (Webley, 2010). This still helps to understand the legal hurdles in the development and operation of microgrids, which is the first step necessary to facilitate their development.

4

RESULTS

The following section presents the key empirical findings. It suggests that the EU's formal institutional framework is incompatible with microgrid development and operation. As a result, developers and operators spend significant time on research and on understanding the applicable rules, leading to transaction costs, especially search and information costs. In the following sections, the findings of transactional uncertainty are described first, followed by the formal institutional framework and transaction costs.

4.1 *Transactional Uncertainty*

The key finding is that uncertainty is linked to the lack of clarity about what a microgrid is from a legal perspective. This even affects the (legal) future of the microgrid, as respondents are unsure whether their microgrid will remain operational. Reasons for this are the incompatibility of the law as, for instance, evolving legislation does not support microgrids or because the microgrid is based on a legal vacuum that may not be legally accepted if challenged in court. Respondents link the uncertainty to the fact that microgrids are relatively new and that the law is incomplete to guide their development. There is little help from regulatory authorities, municipalities or the system operator of the centralised grid; one respondent stated that developing a microgrid currently means 'creating your own story' rather than following predefined guidelines. Furthermore, as regulations are continuously changing, this leads to navigating a perceivably complex regulatory landscape and documentation process.

4.2 *Formal Institutional Framework*

Uncertainty arises from the formal institutional framework, which is incompatible with how microgrids are developed and operated, and some respondents face legal prohibitions, such as a ban on operating as an islanded system or on owning a private network.

A key issue within the regulatory framework refers to identifying and meeting permitting and licensing requirements. This includes finding a legally acceptable structure for the system and determining the legal allocation of network management responsibilities. In this respect, one respondent emphasised the need for market actors to take on some of the responsibilities currently held by publicly regulated entities. Another respondent highlighted the ineffectiveness of current legislation. At the development stage, for example, there is a lack of clear legislation on the authorisation and construction of, and access to, a microgrid. In the operational phase, there is no legislation to determine the ownership,

operation and maintenance of a microgrid, with existing laws focusing only on flexibility services. Other legal challenges relate to ensuring access to both the central grid and the microgrid. Furthermore, existing tariff regulations are affecting the financial viability of microgrids. This is closely linked to difficulties in securing financing and establishing a sustainable business model. This lack of legal precedent and clear guidance further contributes to the respondents' perception that the development and operation of microgrids is legally uncertain and complex.

Interestingly, not all respondents see regulatory uncertainty and complexity as a problem. Because there are not many laws in place to guide microgrid development, one respondent perceives this as more freedom to get things done. This opinion is echoed by another, who emphasises the need to be creative in applying the law to achieve something new.

One respondent provides detailed insight into the complications that may arise for developing a microgrid under the current legal framework: The microgrid under discussion is located in an industrial park. Originally constructed as a direct line, the infrastructure developed into a microgrid.⁷ Due to the expansion of the system, the microgrid operator applied to the National Regulatory Authority (NRA) for the status of a Closed Distribution System (CDS).⁸ However, this was rejected by the NRA, who claimed that the system did not meet the benchmark for determining that it primarily consumes and distributes its own electricity, which is a legal requirement for a CDS. As a result of the denial, the microgrid will disintegrate because all connected lines will need to receive their own European Article Number (EAN codes) for electricity supply.⁹ Currently, the microgrid is still in place until a decision is made on who takes over the operation of the system, leaving the grid operator with regulatory uncertainty about the future of the system. In the meantime, the parties involved in the management of the microgrid are extensively researching options to find legal solutions to keep the microgrid, as they perceive this to be an interpretation issue of the NRA. In addition, there is now confusion related to the operation of the system, as the rules previously established for the direct line are no longer applicable, but the rules applicable

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7. A direct line, defined in Art. 2, para. 41 and regulated in Art. 7 of the 2019 Electricity Directive, is an electricity line that links one isolated generation site with one isolated customer.
 8. A closed distribution system, under Art. 38 of Directive 2019/944, refers to an energy network that distributes electricity exclusively to non-household customers within a defined geographical area, such as an industrial park or business district, and is not accessible to the public or residential consumers. It can be seen as the closest, legally recognised system that resembles a microgrid, which is why the developers applied for this status.
 9. An EAN code is an identification number for a connection to the electricity grid. If each house in the system must get its own EAN code, then they will get their own connection to the grid, which means that the system is no longer a microgrid.

to a CDS have been denied, leaving its management in a state of uncertainty. Furthermore, another respondent highlights that direct application of CDS rules to smaller microgrid systems is impractical due to the inherent complexity of those rules. Setting up a CDS involves understanding complex regulatory issues to ensure energy efficiency, technical feasibility and legal compliance, in particular for industrial service sites. While these regulations are essential to ensure a reliable energy supply and to protect grid users, they pose significant challenges for smaller projects, such as microgrids.

4.3 *Transaction Costs*

The aforementioned uncertainties and issues in the formal institutional framework have resulted in various transaction costs. Direct costs include fees for outsourcing tasks to (legal) experts or system managers. However, the most cited source of transaction costs are indirect costs, specifically search and information costs, arising from the substantial time and effort required to understand applicable laws and procedures. For instance, a hotelier explained that legal research delayed the development of the hotel by 1.5 years and increased construction costs. Furthermore, a microgrid software provider noted that significant development time is spent filling knowledge gaps to secure support from authorities, which is critical to building trust and fostering system growth for microgrids, especially within grid companies, to increase their willingness to cooperate. Similarly, another dedicated most time to training the distribution system operator responsible for the centralised grid and noted that system operators often lack the necessary training to manage complexities with microgrids, which explains the aforementioned lack of guidance.

Other transaction costs in microgrid projects are decision-making costs that arise from the necessity to select appropriate technologies for the microgrid, often requiring extensive research and consultation. Negotiation costs are incurred during discussions to secure access to both the centralised grid and the microgrid, involving significant time and resources. Monitoring and verification costs are necessary to oversee the microgrids development and operation, ensuring adherence to legal and regulatory standards. Furthermore, enforcement and compliance costs emerge when the legal status of the microgrid is challenged, necessitating legal interventions and potentially leading to additional legal disputes, as will be further discussed in the next section. Finally, trading costs are involved in the authorisation procedures and in securing the necessary permissions for accessing both the centralised grid and the microgrid. These costs collectively illustrate the extensive financial and administrative burdens resulting from the current regulatory landscape.

The foregoing issues lead to the following overview. Transactional uncertainty in microgrids stems from their novelty and the unclear legal status within current regulatory frameworks. Furthermore, microgrid operators often lack guidance from authorities on how to develop or operate microgrids. From a legal perspective, key issues include prohibitions on certain grid constellations, navigating permitting and approval requirements, establishing suitable legal structures for the development and operation of the microgrid, and identifying tariff regulations and financing for microgrids. From these challenges arise significant transaction costs, including expenses for legal expertise and extensive research efforts (Figure 1).

Figure 1 Research Results

Key Factors of Transactional Uncertainty	Key Issues in the Legal Framework	Main Resulting Transaction Costs
Microgrids are new, and their legal status within the regulatory framework is unclear: Respondents 4, 6, 8, 9, 11	Legal prohibitions on certain grid constellations: Respondents 5, 6, 7, 9	Respondents incur direct costs for outsourcing legal expertise: Respondents 4, 6, 8, 9, 11
Leaving operators to their own devices, there is a lack of guidance from the authorities on how to develop and operate a microgrid: Respondents 9, 11	Identifying and meeting permitting and approval requirements: Respondents 3, 5, 6, 9, 12, 14, 15	Respondents incur indirect costs for time spent on research, resulting in search and information costs: Respondents 3, 4, 5, 6, 9, 11, 12, 13, 14
	Finding a possible legal structure: Respondents 6, 9, 12, 13, 14	
	Tariff regulation and financing: Respondents 6, 9, 12, 14, 15	

5 DISCUSSION

Although exploratory, the results presented in the previous section indicate that the regulatory framework in the EU is overly uncertain and complex, creating barriers to the deployment and operation of microgrids. This mismatch between regulatory structures and the practical needs of microgrid stakeholders results in high transaction costs, specifically search and information costs.

As highlighted in Section 4.1, the lack of a clear legal definition for microgrids increases uncertainty and complicates efforts to establish or enforce their legal status. For example, one respondent expressed concern that the legal basis of their microgrid project might not stand up in court if challenged. Similarly, as discussed in Sections 4.2 and 4.3, developers and operators struggle to navigate complex regulatory requirements, identify appropriate legal structures, and meet permitting obligations. These challenges are compounded by the lack of specific

rules governing access to microgrids and restrictive tariff frameworks, which make it difficult for operators to expand and secure financing for infrastructure development. As it stands, the current institutional framework is not well suited to supporting the practicalities of microgrid development and operation.

For the deployment of microgrids in energy transitions, targeted legal reforms should be considered that align the regulatory framework with the operational realities of microgrids. According to the findings presented earlier, a key priority should be to reduce transaction costs, an inherent goal of regulation (Marneffe & Vereeck, 2011; North, 1990). For instance, one critical area involves addressing the legal ambiguity surrounding the legal status of microgrids. However, this approach involves trade-offs. Rigid definitions may limit future innovation, while a more flexible framework might fail to resolve current uncertainties (Ranchordás, 2015). Achieving the right balance will require what Majumdar and Marcus (2001) describe as “an appropriate balance between rules and discretion” to enable stakeholders to exercise choice effectively within a system of constraints. A potential solution could be to integrate microgrids into existing regulatory categories, such as energy communities or CDS, to provide a more predictable legal framework.¹⁰

Other critical regulatory incompatibilities also need to be addressed. For example, the EU’s unbundling regime, which separates network operations from commercial activities, restricts microgrid operators from managing both grid infrastructure and commercial activities. A review of this regime could provide operators with greater flexibility in developing and operating microgrids. In addition, stakeholders often report difficulties in accessing relevant legal and regulatory information, and thus significantly higher compliance costs. Establishing centralised information points or guidance platforms could help reduce these information asymmetries by providing transparent, accessible and up-to-date regulatory guidance.

While a detailed discussion of these reforms is beyond the scope of this chapter, future research will explore these issues in more depth. The results gathered in this contribution lay the basis for the legal analysis that will aim to explore how tailored regulatory solutions can address these challenges while ensuring that

10. In EU law, an energy community is defined in Art. 2, para. 11 and regulated in Art. 16 of the 2019 electricity directive. It is a legal entity whose members jointly engage in the production, distribution and consumption of energy, prioritising environmental, economic and social benefits over profit. A CDS, defined and regulated in Art. 38 of the same directive, is a closed network for industrial, commercial or shared sites, in which electricity is distributed primarily to a limited group of users within that site. Both systems resemble microgrids and could serve as a legal foundation for their regulation, but for this approach, certain legal amendments are necessary, which are further explored here: Mauger, 2022, Behrendt, 2023.

microgrids are viable in the long term. This next phase of research will focus on developing a legal environment in which microgrids can evolve as integral components of the electricity system.

6 CONCLUSION

Focusing on a ‘jurisprudence of consequences’ offers a perspective for researchers to evaluate the real-world impact of legislation. This is particularly important in the field of energy law, given the role of legislation in supporting innovative technologies that can advance the energy transition. In this context, this chapter empirically indicates how current EU electricity legislation negatively impacts the development and operation of microgrids.

Through exploratory surveys and interviews, the findings presented in this chapter suggest that the current regulatory framework for microgrid development and operation imposes transactional uncertainty on microgrid developers and operators, rooted in the regulatory framework, which increases transaction costs. Specifically, the perceived legal complexity and uncertainty of EU electricity market regulation increases search and information costs that can undermine the feasibility of microgrid implementation. However, an issue deserving further investigation is that not all respondents perceive this uncertainty and complexity as problematic, as this suggests a divergence in perception.

By highlighting the issue of transactional uncertainty, this study reveals a mismatch between the regulatory framework and the practical realities of microgrid implementation. To ensure that microgrids can contribute effectively to the energy transition, EU regulation needs to be altered to minimise legal uncertainty and complexity.

In essence, the case of microgrids illustrates how regulatory uncertainty and complexity impact the financial and operational burdens that limit technological progress. Identifying these issues is a prerequisite to addressing them and creating a reformed regulatory framework that facilitates the deployment of microgrids to accelerate the energy transition. This shows that focusing on a ‘jurisprudence of consequences’ can support emerging technologies by removing regulatory barriers and encouraging innovation.

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DISEASE OR DECISION? HOW DIFFERENT VIEWS TOWARDS ADDICTION CAN AFFECT LEGAL RESPONSIBILITY

Anna Elisabeth Goldberg

The debate over how addiction should be conceptualised is long-standing and contentious, particularly between the brain disease model and the choice model of addiction (Goldberg, 2020). As the names suggest, the brain disease model highlights how chronic brain changes from prolonged drug use lead to behavioural issues like impaired self-control (Leshner, 1997; Volkow et al., 2016), while the choice model emphasises voluntary control over drug use and recovery through motivation (Heyman, 2009). Although many models exist beyond these two (West, 2013), the brain disease versus choice model debate remains a focal point in addiction discussions, especially in legal contexts. I do not intend to quarrel further over these two models but rather wish to address the consequences of this debate on the field of legal decision-making. If addiction is best classified as a brain disease leading to uncontrollable craving and other mental impairments, should an addicted defendant be held accountable for their addiction-driven crimes? Conversely, if we contend that (at least some) addicted individuals can control their substance use and recover with or even without treatment, should they not be considered to be in control of their criminal behaviour, too? Clearly, these statements are overdrawn in the sense that reality is likely somewhere in the middle, but it is to be expected that different models can fuel different perceptions of criminal responsibility: societally, and thereby also affecting legal professionals.

Hence, regardless of which model ought to prevail, different conceptualisations will influence courtroom decisions. Bearing this in mind, this chapter has two main objectives. First, it presents the results of an experimental vignette study exploring how two models of addiction (brain disease model and choice model) affect public prosecutors' views on criminal responsibility and recidivism risk in cases involving violent and property offences. The study uses hypothetical cases where the defendant's addiction is framed differently, along with varying offence types. Importantly, criminal responsibility is used here as an umbrella

term containing the lack of any excuses (such as an insanity defence) as well as matters of sentencing. As the context is that of Dutch criminal law, the Dutch equivalent of the insanity defence is used throughout, which is referred to as the non-accountability excuse. Moreover, the Netherlands also accommodates a generalised diminished accountability possibility, which is a widely accepted reason for sentencing mitigation. I refer to other authors who have provided more details on this excuse as well as a comparative overview relating the requirements to other jurisdictions (Meynen, 2016).

A second aim is to examine the outcomes of this study in a broader societal context. In the discussion, I address how societal perspectives, such as the stigma surrounding substance disorders (Room et al., 2001), may shape legal decisions. This research indeed suggests that perceptions of prior fault under the choice model could lead to harsher judgments, while vice versa, framing addiction as a voluntary decision in the legal context may reinforce societal stigma. By exploring the interaction between societal views and legal outcomes, this study contributes to understanding the responsibility of addicted offenders and the broader implications for legal and societal perceptions. As I will argue, my empirical research on addicted defendants exposes the implicit effects of preconceived notions on legal decision-making, thereby advancing the notion of a 'jurisprudence of consequences' (Miller, 1965).

All in all, the central research question addressed in this chapter is the following: How do different conceptualisations of addiction influence the perception of public prosecutors regarding the criminal responsibility and recidivism risk of an addicted offender, and how are such legal decisions shaped by societal perspectives? To answer this question, I first provide the analytical framework to understand and operationalise the concepts central to this study. I then outline the experimental research design used – a vignette study – and continue by addressing the key results thereof. In the discussion that follows, I reflect on the implications of these findings as well as on the implications for the interaction between law and society.

2 ANALYTICAL FRAMEWORK

Although comparing the effects of a brain disease with a choice model perspective of addiction on responsibility assessments is novel, previous studies have explored the impact of neuroscientific information on criminal responsibility. Initially, it was widely hypothesised that neuroscientific evidence would lead to more lenient responsibility judgments (Bennett, 2016), and with the increase of neuroscience in courtrooms (Catley & Claydon, 2015; De Kogel & Westgeest, 2015; Farahany, 2015), many researchers have tested this hypothesis. It was shown that the effects of neuroscientific evidence are not only exculpatory but that they also lead to a higher level of perceived dangerousness of the defendant (Barth,

2007), likely because biological factors are considered ‘fixed’ or unchangeable. This phenomenon, known as the ‘double-edged sword’ (Aspinwall et al., 2012), suggests that highlighting physiological or neurological causes may lead to a perception of behaviour as being beyond individual control, thus reducing perceived personal responsibility (Allen et al., 2019).

Other studies have also explored the ‘double-edged sword’ concept (Aspinwall et al., 2012; Denno, 2015) and suggest that the impact of neuroscience on responsibility assessments is more complex than simply reducing blame. The following well-known studies illustrate these differences in findings. Greene and Cahill (2012) investigated the role of brain scans in capital punishment decisions. In this experiment, 259 psychology students read vignettes that varied in terms of the defendant’s perceived dangerousness (low versus high) and the type of diagnostic evidence presented (diagnosis only, diagnosis plus neuropsychological results, or diagnosis with both neuropsychological and neuroimaging evidence). Participants were asked to recommend a sentence – either a death sentence or life imprisonment without parole – after the defendant was found guilty. The results showed that neuropsychological tests and imaging reduced the likelihood of a death sentence, but this effect occurred only for defendants considered high risk for future dangerousness (Greene & Cahill, 2012). In addition, Gurley and Marcus (2008) examined the likelihood of acquittal under a ‘not guilty by reason of insanity’ (NGRI) defence. Using vignettes featuring psychosis or psychopathy diagnoses and varying the inclusion of MRI evidence, they studied 396 psychology undergraduates. Participants received jury instructions on the insanity standard and a court-ordered expert’s statement. The presence of neuroimages significantly increased NGRI verdicts, with jurors more likely to acquit if an MRI (magnetic resonance imaging) showing a brain lesion was presented. Psychotic defendants also received more NGRI verdicts than psychopathic ones, suggesting public perception of disorders influences judgments. This is relevant to addiction cases, as the addiction debate elicits diverse views on the nature of addiction.

In this vein, Sinclair-House et al. (2019) examined how neuroscientific insights regarding addiction influence sentencing. Using vignettes, they compared defendants addicted to heroin with those suffering from a fictional neuropsychiatric illness. Despite equal impairments in capacities and equal focus on the neuroscientific consequences of the disorder, prison sentences were not reduced for the addicted defendant compared to the defendant with the fictional disorder. This was attributed to the role of prior fault (i.e. anterior culpable behaviour) in the acquisition of the addiction. Subsequent research supports this view, suggesting substance abuse is often seen as a prior fault, assigning blame regardless of specific culpable actions (Goldberg, 2022; Goldberg et al., 2021).

These studies represent only a small proportion of research using vignettes to examine the effects of neuroscience. Other studies that used such designs found outcomes ranging from lower sentences (Allen et al., 2019; Aspinwall et al., 2012)

to longer involuntary hospitalisation (Allen et al., 2019) and effects on perceptions of legal responsibility (Fuss et al., 2015). An excellent overview of different studies and effects has been provided by Aono et al. (2019). While results are mixed, the general trend of mitigating effects from neuroscientific information also informs the hypothesis of this study: vignettes framing addiction as a brain disease will lower perceived accountability and suggested sentences but increase perceived recidivism risk, reflecting the ‘double-edged sword’ phenomenon.

Besides the design varying on addiction explanation, I also manipulated offence type, resulting in a violent and a property crime version of the vignette. Two different offences were included to assess whether the hypothesised neuroscientific effects on responsibility are only relevant in certain types of offences. Both property crimes and violent offences have links with addiction and substance use. In simplified terms, property crimes may have an *instrumental* connection to substance abuse, as it can provide the necessary funds to sustain a drug habit (Hoaken & Stewart, 2003). Conversely, the link between violent offences and addiction is often more *reactive*. This relationship can, for instance, be explained by some negative effects of craving (irritability) which could create an aggressive response from the offender after a non-violent encounter with the victim. But not only as a result of craving: potential damage to the prefrontal cortex as a consequence of prolonged substance use may cause problems with inhibition and thus aggressive outbursts (Volkow et al., 2016). Perhaps the violent nature of the offence may amplify neuroscience’s mitigating effects, as such crimes are often linked to a loss of control. If and when impaired volitional capacities are central to the offence (e.g. in violent crimes), neuroscientific evidence reducing responsibility for this impairment may have a greater impact than for offences where such impairment is less apparent (e.g. in property crimes).

Because both types of crime can be related to addiction (Bronson et al., 2017; Goldstein, 1985), albeit in different ways, and the vignette clearly explicates this relationship in both instances, I tested whether the type of crime influences perceived criminal responsibility. It is hypothesised that property offences will be judged more leniently – resulting in lower accountability and punishment – because their utility and purpose are more understandable and evoke greater sympathy in the context of addiction.¹

1. None of the previously mentioned vignette studies explored the effects of different types of offences. Hence, it is merely a careful hypothesis. Although this is an intuitive hypothesis, its logic does appear in German criminal legal practice. The German Supreme Court has clarified that only property offences, directly related to the irresistible impulse caused by the withdrawal symptoms, are an acceptable reason to judge the defendant as partially or completely non-culpable (provisions 20 and 21 of the German Criminal Code, the German insanity defence equivalence; Goldberg & Roef, 2019). Hence, what is already explicit in German law may reflect an implicit tendency that this study aims to test.

3 DATA & METHODOLOGY

3.1 *Participants*

The study involved 109 practising public prosecutors from seven of the ten districts in the Netherlands, representing just over 10% of the approximately 900 prosecutors employed nationwide (Openbaar Ministerie, 2020). While response bias is a potential concern, it is not problematic for examining between-subject effects, although it is considered when generalising results. Women made up a slight majority of the sample (58.7%). No additional demographics were collected to ensure anonymity. Participants reported their prior (neuro)psychological knowledge, which analyses showed did not confound the results. Prosecutors were randomly assigned to one of four vignette conditions by the used software.

3.2 *Design*

The basis of the experiment is a vignette, i.e. a fictional criminal case, of an addicted offender (André). The vignette first contains details about the offence and the offender and subsequently contains an excerpt from a behavioural expert witness report written by a psychologist. The vignette is constructed in a 2 × 2 between-participants design in which there are two independent variables, being the type of offence (hereafter referred to as *offence type*) with the levels ‘violent offence’ and ‘property offence’. The second independent variable is the way that addiction is explained in the behavioural report (hereafter referred to as *addiction explanation*), containing the levels ‘neuroscientific explanation’ and ‘choice-based explanation’. As such, there were four versions of the vignette distributed among the respondents, as shown in Table 1.

Table 1 Overview of the 2 × 2 Factorial Vignette Design

Addiction Explanation	
Offence type	Neuroscientific Choice
	+ +
	Violent Violent
	Neuroscientific Choice
	+ +
	Property Property

3.3 *Measures*

3.3.1 *Independent Variable: Offence Type*

The independent variable *offence type* has two variations: half of the vignettes contained the story of André committing a violent crime (aggravated assault under Art. 302 DCC, stabbing a victim after being bumped into), whereas the other half concerned a property crime (armed robbery under Art. 317 DCC, using a knife to threaten and rob a food delivery employee). In both scenarios, André's addiction was causally linked to the crime – irritability from drug cravings in the violent offence and a need for money to satisfy the craving in the property offence. Both vignettes explicated this (causal) connection.

To ensure any differences arose from the offence type, not severity, both crimes were matched for severity based on sentencing guidelines. Both offences carried a recommended 30-month imprisonment, explicitly stated in the vignette to equalise perceived severity. Aside from offence-specific details, the events in the vignette case contained as much as possible the same information, including the use of a knife and the presence of a victim.

3.3.2 *Independent Variable: Addiction Explanation*

The independent variable *addiction explanation* was presented as two versions in the behavioural report excerpt. One version framed addiction as a brain disease, incorporating textual neuroscientific evidence. This included details about the chronic nature of addiction, the role of the brain and affected capacities. Example statements from the neuroscientific version of the vignette include the following:

Recent neuroscientific research shows that substance dependency is largely caused by disruptions in the dopamine circuit, which influences the experience of motivation, reward and pleasure to a great extent. Changes in the dopamine circuit, particularly in the frontal side of the brains (the prefrontal cortex) result, amongst others, in compulsive drug use and loss of control over drug-related behaviour. This impedes the individual's ability for reaching out for and sustaining professional help. Consequently, the disorder of the defendant can be classified as a brain disease of a chronic nature.

In contrast to the neuroscientific version, the choice version elaborates further on addiction as a free choice, along the lines of the choice model of addiction. Particularly the continuously conscious decisions to continue the drug use instead of quitting or seeking help, while the negative consequences were known and foreseeable for the suspect, are important in this explanation. Example statements from the neuroscientific version of the vignette include the following:

The defendant's addiction is a disorder which continuously influences his behavioural choices. However, the defendant has regularly had the opportunity to cease his substance use.

Additionally, he has had enough treatment in the past to be aware of his impulsive actions caused by these well-known cravings. These cravings, and the associated feelings of unrest and agitation, which were present at the time of the offence, were therefore foreseeable for the defendant.

Importantly, both versions explicitly link the addiction to the offence, because the non-accountability excuse requires a causal connection between disorder and offence (Nauta et al., 2024). Because both vignettes contain the same underlying disorder, and only the explanation of that disorder is being tested, a causal connection to the offence must be present in all cases. All data and materials used for this publication are openly available (Goldberg, 2021).

3.3.3 *Dependent Variables*

There are three dependent variables, namely the answers to the questions “what is your perception of the degree of accountability?”, “what would be your proposed sentence?” and “what is your estimation of the recidivism risk?” (referred to as *perceived (degree of) accountability*, *suggested sentence* and *recidivism estimate*, respectively). Perceived accountability was measured on a 5-point Likert scale: fully accountable; slightly diminished accountable; diminished accountable; strongly diminished accountable; and non-accountable. These categories are numbered, whereby 1 = fully accountable and 5 = non-accountable, allowing for ANOVA analyses later. The suggested sentence variable was measured by asking the prosecutors which sentence they would impose. There were three multiple-choice answer options: 30 months, conform to the sentencing guidelines; less than 30 months, namely [open space]; and more than 30 months, namely [open space]. Lastly, the answer option regarding the assessment of recidivism risk was again a 5-point Likert scale: little to no chance of recidivism; small chance of recidivism; probable chance of recidivism; large chance of recidivism; very large chance of recidivism, also categorised using the numbers 1-5.

3.3.4 *Analyses*

All data were entered in IBM SPSS Statistics 24. I used a two-way 2 (*offence type*: violent vs. property) $\times$ 2 (*addiction explanation*: neuroscientific vs. choice) factorial ANOVAs for both Likert-scale variables *degree of accountability* and *recidivism estimate*. The prosecutor’s answers regarding *suggested sentence* were analysed using Fisher’s exact test.

3.4 *Additional Vignette Elements*

All vignettes presented identical circumstances and background scenarios, including the offence’s time and place, the offender’s name (André), his cocaine dependency, the presence of a victim and the use of a knife. Each vignette

explicitly stated that André was the offender, eliminating evidentiary concerns. They also explained that André had been addicted to drugs for years and that prior treatment attempts were unsuccessful before introducing the behavioural report excerpt. The report excerpt included the *addiction explanation* variations while also providing standard details about André’s cocaine dependence, based on DSM-5 characteristics and symptoms. These general remarks were consistent across all vignettes, the only divergence occurring in the addiction explanation section described under the ‘independent variables’ section.

3.5 Procedure

Seven of the ten districts in the Dutch Public Prosecution Service agreed to participate. Team managers invited employees to participate via a link to the online testing environment created in Qualtrics, which hosted the four vignette versions and questions. Informed consent was obtained at the experiment’s start, with no IP addresses or personal data collected. Participants were instructed to make an informed judgment based on the vignette, despite its brevity (about one page) and were assured that the limited details would be considered when interpreting the results. After submission, participants received a written debriefing explaining the study’s purpose and the researcher’s contact details.

4 RESULTS

4.1 Perceived (Degree of) Accountability

Tables 2 and 3 show the responses to the question “what is your perception of the degree of accountability?”, while differentiating between *offence type* and *addiction explanation*, respectively.

Table 2 Overview of Responses to the Accountability Variable, Differentiated by Offence Type

	Violent Offence		Property Offence		Total	
	N	%	N	%	N	%
Fully accountable	20	38.5	21	38.9	41	38.7
Slightly diminished accountable	26	50.0	27	50.0	53	50.0
Diminished accountable	6	11.5	5	9.3	11	10.4
Strongly diminished accountable	0	0.0	1	1.9	1	0.9
Non-accountable	0	0.0	0	0.0	0	0.0
Total	52	100	54	100	106	100

Table 3 Overview of Responses to the Accountability Variable, Differentiated by Addiction Explanation

	Neuroscientific Explanation		Choice-based Explanation		Totals	
	N	%	N	%	N	%
Fully accountable	13	25.0	28	51.9	41	38.7
Slightly diminished accountable	29	55.8	24	44.4	53	50.0
Diminished accountable	10	19.2	1	1.9	11	10.4
Strongly diminished accountable	0	0.0	1	1.9	1	0.9
Non-accountable	0	0.0	0	0.0	0	0.0
Total	52	100	54	100	106	100

The tables show that, in general, most participants considered the defendant fully accountable (38.7%, $n = 41$) or slightly diminished accountable (50%, $n = 53$). A small group thought that the defendant was diminished accountable (10.4%, $n = 11$), and only one prosecutor considered the defendant strongly diminished accountable. None of the prosecutors considered the defendant non-accountable. This suggests that there is some willingness to integrate addiction into the accountability judgment, as addiction was the only factor in the vignette that could possibly affect (degrees of) accountability, although this effect is limited.

To assess whether *offence type* affected responsibility decisions, the mean response of the violent offence vignette can be compared to the mean of the property offence vignette.² The means seem highly similar between the two versions, with a mean of 1.73 ($SD = 0.660$) for the violent offence compared to a mean of 1.74 ($SD = 0.705$) in the property offence condition. Indeed, there is a non-significant main effect for *offence type*, showing that the type of offence in itself does not affect the judgment regarding accountability ($F(1, 102) = 0.012$, $p = 0.914$). This is contrary to the hypothesis that the property offence would have blame-reducing effects.

On the other hand, significant main effects were found for *addiction explanation* as well as *sample*. This means that, as predicted, participants reading the neuroscientific conceptualisation of the vignette considered the defendant to be less accountable for the offence ($M = 1.94$, $SD = 0.669$) compared to the choice-centred perspective of addiction ($M = 1.54$, $SD = 0.636$), $F(1, 102) = 10.493$, $p = 0.002$. This confirms the hypothesis that the neuroscientific version would lead to perceptions of reduced accountability.

2. To be clear, the numerical values for the variable *degree of accountability* represent: 1 = fully accountable; 2 = slightly diminished accountable; 3 = diminished accountable; 4 = strongly diminished accountable and 5 = non-accountable.

Although these are interesting main effects, the ANOVA reveals no interaction effects: that is, whether the independent variables interact and affect the outcome variable. Hence, there is no evidence that the mitigating effects of neuroscientific evidence are more pronounced in either the violent or the property offence ($F(1, 102) = 2.658, p = 0.106$). This contradicts the hypothesis that the blame-reducing effects of neuroscientific information would be more pronounced in the case of the violent offence.

4.2 *Suggested Sentence Length*

This variable contains the answers to the question “which sentence would you impose?” Table 4 shows the responses as a function of both the *offence type* and the *addiction explanation*. In addition to the multiple-choice answers, the prosecutors could also indicate their preferred alternative in writing.

Table 4 Overview of Responses to the Sentence Length Variable, Differentiated between Both Offence Type and Addiction Explanation

	Offence Type				Addiction Explanation				Totals	
	Violence	%	Property	%	Neuro	%	Choice	%		%
<30 months	22	42.3	33	63.5	29	55.8	26	50.0	55	52.9
30 months	26	50.0	17	32.7	18	34.6	25	48.1	43	41.3
>30 months	4	7.7	2	3.8	5	9.6	1	1.9	6	5.8
Total	52	100	52	100	52	100	52	100	104	100

Half of the prosecutors considered the suggested sentence (30 months) too strict: 52.9% ($n = 55$) would rather impose a shorter sentence. There does not seem to be a difference between the distribution of answers as a consequence of *addiction explanation* (Fisher’s Exact test, $p = 0.201$). Neither is there a difference between the two offence types ($p = 0.058$), meaning that there is no difference in the participant’s sentencing decision for the violent offence or property offence. Both of these findings are contrary to the hypotheses that the property offence would result in lower sentences and that the neuroscientific version of the vignette would lead to lower sentences.

4.3 *Recidivism Estimate*

This variable reflects answers to the question “what is your estimation of the recidivism risk?” Tables 5 and 6 show the responses, as differentiated, first, by *offence type* and, second, by *addiction explanation*.

Table 5 Overview of Responses to the Recidivism Estimate Variable, Differentiated by Offence Type

	Violent Offence		Property Offence		Total	
	N	%	N	%	N	%
Little to no chance of recidivism	0	0.0	0	0.0	0	0.0
Small chance of recidivism	0	0.0	2	3.7	2	1.9
Probable chance of recidivism	12	23.1	7	13.0	19	17.9
Large chance of recidivism	32	61.5	35	64.8	67	63.2
Very large chance of recidivism	8	15.4	10	18.5	18	17.0
Total	52	100	54	100	106	100

Table 6 Overview of Responses to the Recidivism Estimate Variable, Differentiated by Addiction Explanation

	Neuroscientific Explanation		Choice-based Explanation		Totals	
	N	%	N	%	N	%
Little to no chance of recidivism	0	0.0	0	0.0	0	0.0
Small chance of recidivism	1	1.9	1	1.9	2	1.9
Probable chance of recidivism	8	15.4	11	20.4	19	17.9
Large chance of recidivism	35	67.3	32	59.3	67	63.2
Very large chance of recidivism	8	15.4	10	18.5	18	17.0
Total	52	100	54	100	106	100

Most of the respondents considered the defendant to be at a high risk of recidivism, as 80.2% of the prosecutors ($n = 85$) indicated a large chance or a very large chance of recidivism. The descriptive data shows little meaningful variation across the experimental conditions, suggesting that the *offence type* or *addiction explanation* does not affect their perception towards the recidivism risk of the defendant. Indeed, the difference between the violent offence ($M = 3.92$, $SD = 0.621$) and the property offence ($M = 3.98$, $SD = 0.687$) is not significant ($F(1, 102) = 0.222$, $p = 0.639$).³ There is also no significant difference between the neuroscientific version of the vignette ($M = 3.96$, $SD = 0.625$) and the choice-centred perspective ($M = 3.94$, $SD = 0.685$), $F(1,102) = 0.017$, $p = 0.898$. This

3. Note that the value 1 represents 'little to no recidivism' and that the value 5 represents 'very large chance of recidivism'.

contradicts the hypothesis that the neuroscientific version would result in a higher perception of recidivism risk due to the theory of the 'double-edged sword'. Lastly, there is no interaction effect between *offence type* and *addiction explanation* ($F(1, 102) = 0.530$ $p = 0.468$).

5 DISCUSSION

In this section, I first reflect on the findings of the vignette study, exploring their explanations, implications, and the interaction between law and societal perspectives. The results – showing that addiction is judged more leniently when framed with a neuroscientific perspective – highlight the influence of societal views on legal decision-making. I argue, however, that the law keeps these views firmly in place through their decision-making, resulting in a reciprocal process.

5.1 *Reflecting on the Findings*

This study examined public prosecutors' legal decision-making on criminal responsibility by varying addiction explanations (brain disease model vs. choice model) and offence types (violent vs. property) in a vignette. The hypotheses were, first, that neuroscientific information would lower perceptions of accountability and lead to more lenient sentencing; second, that property offences would be judged more leniently than violent offences; third, that the neuroscientific vignette would increase perceived recidivism risk; and, fourth, the presence of an interaction effect where violent offences would show stronger mitigating effects of neuroscientific evidence. The experiment found evidence only for the hypothesised impact of neuroscientific evidence on accountability perceptions.

The results indeed show that the offender is considered less accountable for the offence when his addiction was explained from a neuroscientific perspective, compared to an explanation related to choice. The confirmation of this hypothesis is in line with previous studies that generally indicate the exculpating effects of neuroscientific evidence (Aono et al., 2019).

These results cannot be directly compared to studies on neuroscientific evidence and the insanity defence (e.g. Gurley & Marcus, 2008; Schweitzer & Saks, 2011). While this study supports the idea that neuroscientific perspectives lower perceived accountability, this differs conceptually from previous findings of more successful insanity defences. Unlike the all-or-nothing insanity defence, Dutch law allows degrees of accountability, giving jurors more flexibility in assessing responsibility. This is reflected in the fact that none of the prosecutors in this study ruled for complete non-accountability, which is rare and requires full loss of control or rationality – especially difficult to prove in addiction cases (Goldberg & Roef, 2019). Since addiction can be factored into sentencing and accountability

degrees, it does not need to serve as a fully exculpatory defence. Consequently, differences in perceived accountability remain within a spectrum (full, slightly diminished or diminished), making the practical impact of neuroscientific evidence in Dutch law more nuanced than in jurisdictions where it leads to full exculpation.

However, specifically in addiction cases, neuroscientific information may have a distinct exculpatory effect. Addiction is often perceived as a form of prior fault, where defendants are considered at least partly responsible for their addiction and related behaviour (Goldberg et al., 2024). Prior fault, as mentioned, effectively blocks defences when these exculpatory conditions are culpably caused (Jansen, 2020), meaning voluntary intoxication cannot negate responsibility (Van Kalmthout, 1998). While the vignette avoided explicitly mentioning *culpa in causa* to prevent bias, the choice-based version did imply voluntary drug use, potentially leading participants to engage with prior fault reasoning and assign higher accountability. As prior fault primarily applies to excuses, and much less to sentencing, this could also explain why no effect was found on sentencing perceptions. Prior fault was also considered the pivotal factor in the study by Sinclair-House and colleagues, whereby addiction was considered less mitigatory than a fictional psychiatric illness because addiction was associated with prior fault (2019).

Perceptions of prior fault in cases of addiction could be indicative of stigma towards individuals with substance use. Room and colleagues (2001) found that addictions and substance usage are among the most stigmatic features for individuals. The brain disease model of addiction might impact such stigma, possibly leading to lower accountability perceptions. While research suggests the brain disease model does not directly reduce stigma (e.g., Meurk et al., 2014), it may mitigate perceptions of choice and prior fault. This, in turn, could increase leniency without fully eliminating stigma – an idea worth exploring in future research.

Regarding sentencing effects – or the lack thereof – it is notable that the type of addiction explanation did not influence sentencing recommendations. This contradicts previous findings of lower prison sentences with neuroscientific evidence (Sinclair-House et al., 2019) and challenges the expectation, based on common legal practice, that lower accountability judgments typically lead to reduced sentences (Claessen & De Vocht, 2012). One possible explanation is that the data did not distinguish between prosecutors who significantly reduced the 30-month benchmark and those who merely proposed partial suspension, potentially obscuring subtle differences. Additionally, Dutch sentencing allows for individualised decisions, considering personal circumstances. Many participants indicated they would tailor sentences and conditions to the defendant's addiction. This suggests that, regardless of the addiction explanation, prosecutors already factored addiction into their sentencing decisions. Hence, the additional difference

between a neuroscientific perspective and a choice perspective may not have altered this further.

Participants may also apply different reasoning to accountability and sentencing. While accountability judgments focus on personal responsibility, sentencing serves multiple goals, both retributive and utilitarian (e.g. proposing additional measures or conditions). These considerations do not always align: one can view an offender as fully responsible yet still support a reduced sentence for practical reasons. This could explain why neuroscience's exculpatory effects appear in accountability assessments but not in sentencing. Future research could explore the punishment goals guiding these decisions to better understand this unexpected discrepancy.

No differences were found in recidivism risk estimates, contradicting the *double-edged sword* theory (Aspinwall et al., 2012; Barth, 2007). This suggests that neuroscientific information alone does not shape risk assessments – a positive finding, as risk evaluation involves multiple dynamic factors (Campbell, 2016). Mere predisposition is not a valid predictor for reoffending; perhaps the participants of this study noted that. Another explanation is that prior research on the *double-edged sword* did not focus on addiction, which is a well-established risk factor for recidivism (Dowden & Brown, 2002). Given that addiction itself signals a high risk, participants may have already considered recidivism likely, making additional neuroscientific details less impactful.

Lastly, the lack of significant differences between property and violent offences – whether in accountability, sentencing or recidivism estimates – is unexpected. For accountability, this can be considered a positive outcome, as judgments should be based on the offender rather than the offence. Regarding the lack of effects on sentencing, two possibilities can be explored. First, both offences may be seen as equally severe, aligning with sentencing guidelines. However, this contradicts the intuitive expectation that violent crimes are judged more harshly. Second, the vignette's property offence did involve a violent element, as a knife was used for extortion, which may have led to similar judgments as the violent offence. A less confrontational property crime, such as a theft from a supermarket, might have revealed clearer differences, but it would have disrupted the sentencing severity balance. Prior research shows that more heinous crimes lead to stronger responsibility perceptions and harsher punishments (Appelbaum & Scurich, 2014). To isolate offence type effects, future studies should use a design where severity is controlled and at the same time, ensure that the property crime lacks violent elements.

5.2 *Strengths, Limitations and Implications*

A key limitation of this study is the artificial nature of the vignettes in replicating real-life cases. While efforts were made to enhance realism, a one-page summary

cannot capture the depth of information necessary for evaluating complex legal matters like accountability, sentencing and recidivism risk. Full case dossiers would have provided a more realistic context but were avoided to ensure broader participation. Consequently, the study's findings remain largely theoretical, with limited generalisability to real-life cases.

Another limitation is potential response bias. With just over 10% of Dutch prosecutors participating, the results should be interpreted cautiously. Additionally, while the study focused on accountability judgments, prosecutors do not make final accountability decisions – judges do. Including judges in the sample would have strengthened the findings, although permission to conduct the experiment among them was not granted. Nevertheless, using a sample of experienced prosecutors is a strength, as many experimental studies rely on students or laypersons. Still, future research should aim to include judges to enhance the study's applicability.

Overall, using vignette research as a method has shown to be a strength in the field of empirical-legal research, especially in light of the concept of 'jurisprudence of consequences'. Legal research into court decisions is, by definition, limited to the information provided in case law: here, the exact motivations are necessarily obscured, not only because judges are bound by confidentiality agreements but also because factors are considered integrally in determining the final judgment. As such, for an empirical scholar, it will always remain unclear which factors may have contributed to a certain judgment – let alone the exact extent to which they did. Vignette studies, despite their limitations in external validity, offer a window into the legal decision-making process and allow us to pinpoint the exact effects of certain case facts. Uniquely, vignette studies make visible the influence of certain factors, which even through introspection by the subject may not have surfaced. Therefore, empirical methods such as these expose implicit processes, thereby contributing to a 'jurisprudence of consequences' (Miller, 1965). After all, the findings of these studies can be used to further educate lawyers on the pitfalls of stigma and bias, and specifically, the preconceived notions surrounding addiction and the effects of the addiction debate. Accordingly, this research and other studies may positively impact legal decision-making in cases of addicted defendants and, by extension, defendants with mental disorders, in general.

5.3 *Reflecting on the Interaction of Law and Society*

Finally, I wish to draw some conclusions beyond the findings of this study. The results of this experiment, but also those of previous studies, indicate that the way we present information about a disorder can have concrete consequences for legal outcomes. Apparently, societal perspectives on addiction (such as perceptions of choice or disease) affect legal decision-making. In my study, the consequences are relatively minor: although accountability was judged more leniently in the brain

disease vignette, in practice this would not have fundamentally changed the legal outcome of the case. Other studies, however, including experiments conducted in the Netherlands, have found more far-reaching consequences. For example, Van Es et al. (2022) found that the presence of a behavioural expert's mental health report increased guilty verdicts by nearly 20% compared to cases without such a report. In other words, the mere presence of a disorder contributed to the belief that the defendant was guilty. A possible explanation is the stereotype linking mental disorders with (violent) crime, leading respondents to view the disorder itself as evidence of having committed the offence (Van Es et al., 2022).

As such, it is important to underscore the interaction between bias, stigma or stereotypes in the field of forensic mental health and the law. I argue, however, that this process may be reciprocal, creating a vicious cycle where preconceived notions affect the law, but the law consequently reinforces these perceptions. An examination of jurisprudence of cases with addicted defendants reveals how judges justify sanctions or accountability assessments. Courts frequently emphasise the defendant's personal responsibility in developing or maintaining a substance use disorder, further entrenching the notion of addiction as a matter of choice rather than illness.⁴ In a similar vein, it stands out that courts will find responsibility for the addicted defendant even when circumstances present themselves in polar opposite ways. For instance, in three cases in which the defendant had sought either treatment or therapy for the addiction once, multiple times or never, the courts used remarkably similar argumentations and considered the defendant responsible for all three situations. In the first, they argued that repeated (unsuccessful) treatment was indicative of the defendant's knowledge of the dangers and pitfalls of substance use and dependencies; in the second, the court stated that a previous period of abstinence (during treatment) meant that the defendant was clearly able to abstain if he wanted to; and in the last scenario, the judge blamed the defendant for not reaching out to professional mental health care. What these examples show is that courts continue to find responsibility for being addicted, seemingly without much differentiation as to the exact context. This strengthens the view of addiction as a disorder of choice, which may uphold societal views whereby addiction may often remain perceived as a moral weakness.

4. For instance, a court which stated: "He is ultimately responsible himself for the acquisition and continuation of his addiction behaviour. He can be considered blameworthy, although the offence can be accounted to him to a diminished extent. Court of Appeal's-Hertogenbosch, February 29 2016, ECLI:NL:GHSHE:2016:704. (Own translation of the original: "Hij is in laatste instantie zelf verantwoordelijk voor het ontstaan en continueren van zijn verslavingsgedrag. Er kan hem dus een schuldverwijf worden gemaakt, ook al is het delict hem in verminderde mate toerekenbaar.")

6 CONCLUSION

In conclusion, this study aimed to investigate the role of the addiction debate on assessments of criminal responsibility in two types of crimes. The results are mixed, suggesting an accountability-reducing effect of neuroscientific explanations of addiction but no further mitigating effects on sentencing. Because the effects of neuroscientific information were present only in accountability judgments, it remains unclear what the exact mechanism that caused these effects was. A major explanation for the mixed results can be found in the nature of the Dutch legal system, in which the questions regarding accountability and sentencing have a distinctly different function. Thus, some legal questions or elements may be more susceptible to the effects of neuroscience than others. More research into the exact reason why neuroscience can have mitigating effects or not and the role of different underlying disorders or offences is necessary to pinpoint this mechanism. Aside from noting the limitations and strengths, the present study provided further insight into how presenting information in a certain way can influence decision-making. Especially in the legal arena, where decisions can have far-reaching consequences, it is important to be aware of the effects that the presentation of case facts has on professionals. This means that the underlying conceptualisation of addiction, as presented by an expert witness, has further implications for the defendant. Awareness of these effects is necessary for both the experts and the judges. Additionally, it is important to understand that societal perspectives towards mental disorders, including addictions, impact legal decision-making, but that such decision-making also reaffirms such preconceived notions.

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INSTRUMENTALISING EFFECTIVENESS AND EMPIRICAL LEGAL SCHOLARSHIP IN HUMAN RIGHTS LEGAL INTERPRETATION¹

Jordan Dez

1 INTRODUCTION

The effectiveness of the legal norms of human rights raises many empirical legal questions. Has a treaty been effectively implemented by state parties (Sikkink, 2017)? Has the general level of human welfare corresponding with the content of rights increased (Cope et al., 2019; Simmons, 2009)? Can individuals effectively access the content of a right (Gionco & Celoria, 2018)? The concept of a ‘jurisprudence of consequences’ within the context of human rights legal adjudication invites further inquiry into the principle of effectiveness – not merely of effectiveness of a treaty implementation – but rather, the larger inquiry of effectiveness human rights legal jurisprudence (Obodo, 2020; Protopapa, 2020; Rietiker, 2010). How can empirical legal data be methodologically incorporated into a judicial analysis of the effectiveness of human rights? This contribution strives to illustrate how the legal analysis of the principle of effectiveness can be informed by empirical legal data, as part of this edited volume into defining the scope of a ‘jurisprudence of consequences’. Following the interpretive process prescribed by the Vienna Convention on the Law of Treaties (VCLT), this chapter asserts that empirical data can be used (1) to problematise normative assertions or assumptions of effectivity; (2) as guide through obscure interpretation; and (3) to confirm textual analysis. Further, this chapter suggests that empirical interpretive insights are not limited to the legal context of human rights interpretation but can form an initial scaffolding to instrumentalise a ‘jurisprudence of consequences’.

Arthur Selwyn Miller introduced the concept of a ‘jurisprudence of consequences’ in 1965 to address the law-making nature of US Supreme Court constitutional jurisprudence. Selwyn Miller argued that because such decisions have legislative effects, the Court’s jurisprudence should be informed not only by

1. This chapter communicates conclusions from a PhD dissertation research funded by the Dutch Research Council (NWO) Project #406.18.RB.020, Claim-Making as Rights-Making: Irregular Migrants Reshaping International Human Rights Law.

legal precedent but also by the effects of judgments. Miller called for a two-faceted impact analysis of judgments; (1) that judges appreciate the consequences of their decisions, and (2) legal academics evaluate the social effect of judicial decisions and the extent to which they further ‘the attainment of social goals’ (Miller, 1965, p. 368). This chapter will engage the principle of effectiveness as a doctrinal bridge between the adjudicator and the academic – the normative and the empirical. As a principle of human rights law, ‘effectiveness’ means that rights should be practical, not simply rights on paper or illusory.

This rule simply implies that the drafters of a treaty have adopted a norm in order to be applied and, thus, the judge has to choose, among different possibilities, that interpretation which is most likely to guarantee the effectiveness of the treaty (*ut res magis valeat quam pereat*). (Rietiker, 2010, p. 256)

To a certain extent, the principle of effectiveness in human rights law can disrupt the causative arc of a ‘jurisprudence of consequences’ – considering not only the effects of a current opinion on the future of the affected individual or group but also the activities of the group and jurisprudential precedent that came before the opinion. Indeed, Miller’s ‘jurisprudence of consequences’ looked in two directions – back at precedent and forward at the effects of judgments. This Janus face of jurisprudence is at home in the common law system but is relevant to a broader theory of the ‘jurisprudence of consequences’, also in the civil law tradition (Postema, 2002). To appreciate the consequences of judicial decisions, the judge can look at the current empirical situation related to the right (reliant on the scholarship of legal academics) to forecast the potential effects of further jurisprudence. To this end, this chapter will discuss the instrumentalisation of the principle of effectiveness – on whether and how a human rights adjudicator can examine empirical legal scholarship to evaluate effectiveness.

This chapter will explore three moments in the process of treaty interpretation from the VCLT and show how empirical data can inform application of the principle of effectiveness in those instances. The analysis herein will focus on three classic civil and political rights found in most or all human rights treaties – the freedoms of expression, assembly and association. However, I will examine these freedoms for a rights-holder where there is particular difficulty in effective human rights protection – undocumented migrants (Dembour & Kelly, 2011). Although undocumented migrants are formally included within the personal scope of these rights, relying on them proves more difficult in practice (Bosniak, 1991; Noll, 2010). In the absence of robust litigation from migrants, the scope and content of these rights has been moulded to the concept of the citizen. In such a legal environment, empirical legal research can be used to provide meaning to “populat[e] the categories” that human rights law has “called into being” (Niezen, 2014).

This contribution to a ‘jurisprudence of consequences’ will show how political freedoms (expression, assembly, association) can be interpreted for the undocumented migrant² rights-holder under the principle of effectiveness. The interpretive argument laid out in this chapter is grounded in empirical data collected from 2019 to 2022 on the organising practices of three organisations of undocumented migrants in Amsterdam.³ During this time, I conducted qualitative research with three such organisations, employing triangulated methods of participant observation; semi-structured interviews; and document review.⁴ Section 2 of this chapter will provide an introduction to the three cases, while Section 3 will provide a description of the VCLT legal interpretive framework. The discussion in Section 4 will then show how the empirical data from the cases could be used within an analysis of effectivity guided by the interpretive framework from the VCLT. The conclusions will suggest a broader application of the methodological development for other areas of law based on the principle of effectivity.

2 INTRODUCTION TO THE CASE STUDIES

To select case organisations, I used Gerring’s diverse case selection method, which focuses on a few case studies that together capture the variation in a subject (Gerring, 2007, p. 58). Using the diverse case selection method, I selected three case studies, each focusing on one of the three political freedoms of speech, assembly and association. In doing so, I was able to gain insight into these rights in context. To explore the freedom of expression, I conducted research with a cooperative of Pan-African undocumented migrants in Amsterdam with active or previous asylum claims. This cooperative, ‘PrintRights’, was organised while members were residing in the emergency shelter system in Amsterdam during the pandemic. The group decided to manufacture and distribute face masks to fellow shelter residents and later to sell those masks to the general public. They intentionally organised under the freedom to distribute printed works, which falls within the scope of the freedom of expression, to protect their economic activity. The case study revealed three issues with effective protection of undocumented migrant speech: the definition of government interference; the analysis of what is protected

2. To be undocumented means to have no migration status or citizenship from the country in which one resides. ‘Undocumented’ is a flexible category, referring to non-nationals who have entered irregularly, fallen out of status, or remained in the territory after the denial of an asylum or other migration status application.
3. Ethical approval was granted for this case study by the Vrije Universiteit Amsterdam, Faculty of Law, Ethics Committee for Legal and Criminological Research (CERCO).
4. This chapter will engage with this body of data as a vehicle for the empirical legal methodological argument, and, thus, qualitative data analysis is not the focus of the argumentation. For the full examination of the qualitative data discussed herein, please refer to the dissertation manuscript Jordan Dez (2025) *The Political Rights of Migrants: Undocumented Migrant Politics as Human-rights making Practice*.

expression; and the failure to examine the political nature of speech. PrintRights will be discussed in Section 4.1 to show how empirical data can problematise normative assumptions or assertions of effectivity.

To explore the freedom of assembly, I researched Amsterdam City Rights, a collaboration between documented and undocumented people who fight for the rights of undocumented people in the municipality of Amsterdam. The group first organised in 2018 to communicate with the municipality of Amsterdam undocumented people's feedback on shelter regulations. Initially, they had little response from the municipality, as one undocumented member recounts:

It sucks when you write to someone and they don't give you feedback. 'I will not meet up with you', or 'this is not possible'. If you just send mail, and last month we sent ... no reply this week, no reply, no reply, no reply. It really sucks. If you respond to our mails, that is a plus. If you give us a zoom meeting, now we cannot really have physical contact, to talk about what are the things we want to change, that is a plus. I know it has been a very gradual, tedious process, but we shall be there. We shall be there. And now the municipality acknowledges our work, our principles, some of the things we are trying to do. [ACR 1]

Eventually, the municipality responded by inviting 120 undocumented people to a public forum to provide feedback on the shelter system, which forum resulted in 24-hour shelter and removal of security guards from the shelter. Amsterdam City Rights continues to provide a forum (WhatsApp group and weekly meeting) where undocumented people can voice their complaints and organise solutions. When this research was conducted, the group was composed of undocumented people of all backgrounds, documented migrants and citizens. Amsterdam City Rights targeted their claims for political inclusion and human rights at the municipality in order to be heard. My fieldwork with the group was the longest of the three case studies, beginning in 2019 and still ongoing through 2022. Over this period, Amsterdam City Rights created a political voice for undocumented people within the municipality. Towards the end of this period, the group was being consulted by both social organisations and the municipality on policy initiatives that affected undocumented people. Amsterdam City Rights will be discussed in Section 4.2 to show how empirical data can be used to fill the gaps in obscure interpretation, here particularly, the freedom of assembly and the right to consultative voice.

To explore the freedom of association, I researched with the Migrant Domestic Workers, unionised with the FNV union. The FNV Migrant Domestic Workers are comprised of roughly thirty undocumented migrant domestic workers, who engaged in remunerated domestic work, such as child care, cleaning and elder care services. All of the union members in this group were also members of grass-roots migrant associations (Eleveld & Van Hooren, 2018). Such migrant associations provide particular services for the undocumented migrant worker that

are not yet provided by the formal trade union. For example, migrant associations provided legal representation for people who are in immigrant detention and accompaniment to negotiate rights against private employers. Within migrant associations, undocumented migrant workers were able to engage in rights-making that might be more applicable to their undocumented status than their marginalised workers status. Migrant associations also organised around labour rights, in ways that are outside of the normal collective bargaining methods of the formal trade union, such as quitting an employer to allow for re-negotiations; using social gatherings to educate about labour rights; creating communities of coping to discuss labour exploitation. While the textual interpretation of the freedom of association favours a broad scope, given the different international textual provisions on this right, Section 4.3 will show how a supplementary analysis using the principle of effectiveness can be used to confirm the textual analysis.

3 LEGAL FRAMEWORK

This section will demonstrate how empirical data can be incorporated into doctrinal treaty interpretation guidelines from the VCLT, Articles 31 and 32. As mentioned previously, this research assessed freedoms of expression, assembly and association from multiple human rights treaties and their corresponding case law. The research began with the International Covenant on Civil and Political Rights (ICCPR), as the major international multinational treaty on civil and political rights. For each right discussed herein, I reviewed the relevant text and corresponding international case law of the ICCPR as well as three major regional human rights treaties – the American Convention on Human Rights, the African Charter on Human and People's Rights, and the European Convention on Human Rights. In reading systemically, I also referred to specialised migrant-focused instruments, such as the 1951 Geneva Convention Relating to the Status of Refugees, the UN International Convention on the Rights of Migrant Workers and Their Families (ICMW) and the Council of Europe, Convention on the Participation of Foreigners at the Local Level (Local Participation Convention).

Of note, in general, undocumented migrants are included within the scope of political freedom in international human rights law. For example, the general jurisdictional statement of the ICCPR, Article 2(1), binds the state to the protection of the rights in the Covenant for all individuals within the state party's territory and subject to the state party's jurisdiction. General Comment 15 of the UN Human Rights Committee (HRC), as reiterated by General Comment 31, clarifies that the general personal scope of the ICCPR includes all migrants (*ICCPR General Comment 31*, 2004, p. 31). Nonetheless, as discussed in Section 4, the adjudication of these rights for undocumented migrants, and their experiences engaging in organising activities protected by these freedoms, raises issues regarding effective

protection. Section 4 will discuss the three freedoms individually and dialogue the doctrinal analysis from the VCLT with each of the three empirical case studies from this research project. Each of the three examples illustrates a way that the analysis of effectiveness can be informed by empirical data.

Consistent with the interpretive method from Article 31 of the VCLT, I read human rights norms textually (with their ordinary meaning), teleologically (in the context of the full treaty and in light of its object and purpose) and systemically (in the context of plural normative instruments of international law (Lo, 2017b; McLachlan, 2005; Slingenberg, 2014). Article 31 of the VCLT states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Reading teleologically means to read the relevant substantive provisions of the treaties within the larger context of the respective conventions. For example, in both the European Convention on Human Rights (ECHR) and the ICCPR, the principle of effectiveness is relevant to this teleological reading. The ICCPR states at Article 2(2):

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or the measures *as may be necessary to give effect to the rights* recognised in the present Covenant. (emphasis added)

Similarly, the ECHR at Article 1 states:

The High Contracting Parties *shall secure to everyone within their jurisdiction* the rights and freedoms defined in Section I of this Convention. (emphasis added)

This means that the substantive provisions of the conventions should be read together with the obligation to effectively secure rights people in practice.

It is particularly through the application of the principle of effectiveness, as both a primary and a supplementary principle of interpretation, that this chapter finds possibility for engagement with empirical legal studies. Following the interpretive methodology of the VCLT, the principle can be applied at different stages of the interpretive process; either within a textual analysis under Article 31 VCLT or a supplementary analysis under Article 32 VCLT. Accordingly, I propose here a narrow methodological development, where recourse can be had to empirical legal scholarship to inform an analysis of the effectiveness of a right, within the guidance of the VCLT.

4 DISCUSSION

Connecting human rights legal doctrine to empirical data on the use of human rights is no simple task as it attempts to bridge the ‘ought-is’ divide (Ansems, 2021, pp. 132-135; Davies, 2020; Taekema & Klink, 2023). As argued by Fischman, there is something special about empirical legal scholarship that sets it apart from empirical methods used in the social sciences. Empirical legal scholarship can be, or according to Fischman, should be, normatively driven (Fischman, 2013). The ELS academic is not only counting treaty ratification, or creating metrics for wellness of society, but connecting the subjective normative standard with the activities on the ground. In instrumentalising effectivity, the question is not (exclusively) ‘how much’ but rather ‘how is this working (or not)?’, ‘what are the practical barriers here?’, ‘must this norm work differently for this group?’, ‘how has this worked (or not) for others in a similar position?’. The principle of effectiveness creates an infrastructure for connecting legal and empirical analysis – for translating everyday occurrences into the language of law or rights (Wilson, 2007). The following section will discuss how the VCLT treaty interpretation method can be engaged in this translation process.

4.1 *Article 31 Teleological Reading: ELS Can Problematises Normative Assertions or Assumptions of Effectivity*

This first subsection will focus on the effectivity of the freedom of expression as explored through the case of PrintRights. I make particular reference to cases from the HRC and the European Court of Human Rights, adjudicating the freedom to hold and express opinions (Art. 19 ICCPR; Art. 10 ECHR respectively).⁵ As described previously, under an Article 31 VCLT analysis of the textual provisions of both of these treaties for undocumented migrants, effectiveness can be read teleologically into these provisions: the state must ‘give effect to rights’ (ICCPR) and ‘secure [rights and freedoms] for everyone in the territory’ (ECHR). I will discuss here two relevant cases and then proceed to show how empirical legal data can bring the effectiveness of the courts’ holdings into question (*Case of Alidjah-Anyame v. The United Kingdom (dec.)*, 1999; *Case of Sharif Baban v. Australia*, 2003). This discussion begins with an examination of the 2003 HRC case of *Sharif Baban v. Australia*. In that case, an Iraqi Kurd and his son travelled to Australia to claim asylum and were detained on arrival. They were held continually in

5. ICCPR Art. 19(2) “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” ECHR Art. 10 (1). “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.”

detention during their initial asylum procedures and unsuccessful appeal of denial of status. Baban subsequently participated in a hunger strike within a recreation room of the detention centre to protest his prolonged migrant detention. The state party reacted by transferring Baban and his fellow hunger strikers to a different detention facility and kept them in isolation, stating that the hunger strike and occupation of the recreation room prevented some detainees from receiving medical care and threatening the medical health of certain vulnerable (diabetic, pregnant, minor) detainees. Baban challenged the transfer and isolation as a violation of his freedom of expression under Article 19 ICCPR. The HRC refused to answer the threshold question of whether a hunger strike was protected expression but found that in any case, the government action was legitimate under Article 19(3). This means that without even examining the scope of protected content, the HRC began its analysis with the permissibility of government interference.

Similarly, freedom of expression of an undocumented migrant under Article 10 ECHR was addressed in the 1999 admissibility decision of *Alidja-Anyame v. UK*. This case concerned a Ghanaian national who originally came to the UK as a student. While studying, the applicant joined the Ghanaian Democratic Movement, which was highly critical of the ruling party in Ghana and distributed pamphlets for the Movement. The applicant travelled back to Ghana also to circulate pamphlets, for which he became wanted by Ghanaian authorities, and subsequently returned to the UK to finish his studies. While in the UK, he requested asylum before the end of his study but was denied. He contested his subsequent deportation as violative of, inter alia, Articles 10 and 11 ECHR (expression; assembly and association, respectively). Previous case law of the European Court of Human Rights (ECtHR) established that deportation or denial of an application for migration status would be deemed to interfere with protected expression only if the interference was expressly motivated to suppress expression – a ‘content-based’ restriction (*Case of Cox v. Turkey*, 2010; *Case of Nolan and K. v. Russia*, 2009). The burden is implicitly on the applicant to establish the motivation of the government. The ECtHR ruled in *Alidja-Anyame* that generally, “deportation of an alien pursuant to immigration controls does not therefore constitute an interference with the rights guaranteed under these Articles”. This means that if an undocumented migrant is detained pursuant to speaking out at a demonstration and placed in migrant detention, this can be deemed permissible unless the migrant can prove a content-based intention of the government.

The data from PrintRights problematises the conclusions in this jurisprudence. First, as seen in the ECtHR case law, the enforcement of migration law (through the denial of status/benefits; migrant detention; or deportation of undocumented migrants) will not be deemed to interfere with undocumented migrant expression unless the migrant can establish that the government intended to interfere with expression. The PrintRights case revealed that the fear of deportation (the

enforcement of migration law) has a chilling effect on migrant speech (Dez, 2022). One respondent recounted this chilling effect:

To move around and speak with our voices – even though there are all these laws and other stuff, I am not in a privileged position to do that. That is why, most of the time, when I am invited to speak at a protest, I am like, nah. And many other people they fear that this will have an effect on their procedures ... ‘We are accepting you in our country, and what you can do is come and speak against it’ bloody hell. [PR1]

Whether or not speech will be ‘chilled’ is indeed itself an empirical question, which can be examined by examining both the past and the current legal environment for expression, and the consequences of the judicial decision on speech. In other Article 10 case law the ECtHR has indeed invoked the principle of effectiveness to examine whether speech was chilled. In a recent Grand Chamber decision of the ECtHR, the court emphasised the need for effective protection of speech by removing barriers to revelations in the context of whistle blowing. Criminal sanctions of whistle blowing could have a chilling effect on future expression, rendering the freedom of expression ineffective in that context (*Case of Halet v. Luxembourg*, 2023, paras. 203-204). The standard from *Alidja-Anyame*, namely that undocumented migrant detention and deportation that interferes with expression is not deemed ‘government interference’, contributes to the overall chilling of undocumented migrant speech and thus undermines effective protection.

A second empirical legal conclusion from the PrintRights case, also following the first conclusion, was that the undocumented identity of the claimant must be considered when identifying the protected conduct. PrintRights formed their expression with an awareness of migration enforcement. The group was formed to reduce the risk of interaction with migration police on public transit; they designed their name and logo to invoke an affirmative legality of the freedom of expression; they minimised their public speech-making out of fear of deportation; and they made masks with human rights and political messages to refute the narrative of criminality of the undocumented. PrintRights expressed themselves on highly contested political issues from the perspective of a disenfranchised minority that is directly affected by those issues – this is highly valuable political speech that should narrow the government’s margin to interfere (Reventlow & McCully, 2021). However, the opposite approach was taken by the HRC, which brings me to my third ELS conclusion for this case study. Returning to *Sharif Baban*, conducting a substantive examination that considers the undocumented status of the speaker requires, first and foremost, that the protected expression is first identified. The reluctance of the HRC to identify the protected activity but instead to skip to the analysis of the overshadowing power of the state to interfere is a challenge to the textual assertion that the freedom of expression is for everyone.

In a case like *Sharif Baban*, considering the undocumented status of the claimant is indeed relevant to the expressive act. Mr Sharif Baban had no public stage on which to speak. Hunger striking is frequently engaged in as a political strategy of undocumented migrants and asylum seekers in response to conditions of detention, or lack of viable migration status options (McGregor, 2011; Stierl, 2019). The UN Special Rapporteur on migrant rights has commented that migrant detainees are particularly vulnerable to retaliation for speaking out about detention conditions (Crépeau, 2014). In *Baban*, the HRC accepted Australia's regulation of hunger striking, without discussing the potentially retaliatory motives of the government. Under the justification provided by Australia in *Baban*, a state party can easily legitimate retaliation for hunger striking under the logics of public health and public order. But there is an expressive difference between a citizen simply not eating at home and an out-procured and thus undocumented migrant in a detention centre going on hunger strike. The identity of the speaker in relationship to the state, the location and conditions of the speaker at the time, and the communicative intention are relevant to this inquiry yet not examined by the HRC in *Sharif Baban*.

A 'jurisprudence of consequences' that addresses the effects of judgement and that is aware of the effects of past judgements, and use of the right, could provide effective judicial interpretations flowing from such empirical legal data as that collected from PrintRights. Such data problematises the current analysis of freedom that is not contextualised to the experience of being a deportable subject. Because they are subject to migration enforcement, undocumented migrants may be more likely to engage in expressive conduct other than speaking on a stage or in a protest – such as distribution of products with political messages. The message here is to provide not for an expansive definition of speech for migrants but for a jurisprudence that could minimally effectively protect the vulnerable expression of the deportable migrant to the point that an adjudicator could at least reach the merits of the claim. For example, where an undocumented migrant has shown that they have engaged in protected expression, and that expression was interrupted by migration enforcement action, the burden could switch to the state to prove that the interference was content-neutral. In order to 'secure' or 'give effect' to the freedom of expression for everyone, stopping and detaining a migrant pursuant to migration law enforcement (thus, migration policing, as opposed to policing to maintain public order) within a certain geographical and temporal window of public peaceful protest should be deemed *prima facie* content interference. To this end, an adjudicator should consider the chilling effect their definition of interference could have on the expression of other undocumented migrant rights-subjects. Reference can be made to empirical legal scholarship to understand the effect and extent of chilling on migrant expression.

4.2 *Article 32(a) VCLT: ELS as a Guide through Obscure of Interpretation*

This subsection will turn to an analysis of the freedom of assembly for undocumented migrants as informed by the case of Amsterdam City Rights. Freedom of peaceful assembly, enshrined in Article 21 ICCPR, protects the rights of “individuals to express themselves collectively” (Human Rights Committee, 2020, para. 1). In General Comment 37 of the ICCPR, the HRC clearly included undocumented migrants within the personal scope of the freedom of assembly.⁶ While there is ample empirical data available on undocumented migrant social movements and activism, there is little case law tying the reality of migrant organising with the legal norm of the freedom of assembly. In the absence of previous jurisprudence, where should the adjudicator look to inform a ‘jurisprudence of consequences’? Article 32 VCLT addresses the use of supplementary means of interpretation when meaning is obscure.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

‘Supplementary means of interpretation’ includes more than just the preparatory works and circumstances of a treaty’s conclusion (Lo, 2017). Interpretative principles, such as the principle of effectiveness, can and do serve as supplementary means of interpretation. In the absence of individual adjudication and specific guidance for the application of this freedom to the undocumented rights-subject, there is a gap in the current interpretation of what it means to effectively protect the freedom of assembly for undocumented migrants. In the language of the VCLT Article 32, the meaning of this right for these rights subjects is ‘ambiguous or obscure’.

The threshold for using supplementary analysis due to ‘ambiguous or obscure’ meaning of an Article 31 analysis is relatively low (Lo, 2017, p. 226). Where there are obscurities in the interpretation of a freedom, empirical legal scholarship can be referenced to understand how a right is used and what is needed for its effective protection. I will discuss one example of an ambiguity or obscurity within the normative content of the freedom of assembly from the ICCPR. The HRC’s General Comment 37 does not indicate what it means to include undocumented migrants within the sphere of protection, and this despite an extremely detailed guidance for

6. Para. 5 of General Comment 37 reads: “Everyone has the right of peaceful assembly: citizens and non-citizens alike. It may be exercised by, for example, foreign nationals, migrants (documented or undocumented), asylum seekers, refugees and stateless persons.”

the state and municipality on how to govern assembly in a way that respects the core of the right. Although undocumented migrants are formally included within the scope of the right, the General Comment generally contemplates a citizen, with formal political rights, as its rights subject. This tension can be found in the first sentence of the General Comment:

The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping *their* societies ... Together with other related rights, it also constitutes the very foundation of a system of *participatory* governance based on democracy, human rights, the rule of law and pluralism. (emphasis added)

The connection of the freedom of assembly to participatory democracy and governance is somewhat intuitive given the nature of this right, but it raises questions about the *demos* (the political community, or, 'the people') of this participatory process. Migrants, including undocumented migrants, are usually excluded from many formal political participation rights in the country of origin.⁷ Assembly enables 'individuals' to participate in shaping 'their' societies. The possessive 'their' is not connected to the ownership of citizens to their democratic system of governance through their constitution of 'the people'. Indeed, the only time citizens are mentioned in the General Comment is in conjunction with non-citizens statement of personal scope; that assembly is for citizens and non-citizens alike. Of note, General Comment 37 requires state parties to ensure effective facilitation of the right for members of groups that face discrimination or face 'particular challenges in participating in assemblies'. Does effective protection of migrant assembly require the opportunity for formal participation in political process? Or does effective protection of the freedom of assembly only require a duty not to interfere with the collective voice and gathering of undocumented migrants?

In instrumentalising effectiveness to alleviate obscurity of interpretation, the inferential process must find some standard, some horizon against which effectiveness could be measured. At what point can the exercise of the right be deemed effective? Eva Brems makes a relevant distinction here between a 'maximalist' and a 'minimalist' approach to human rights law (Brems, 2009). While a minimalist approach is geared toward avoiding human rights violation, a maximalist approach is a best-practice approach that works towards a horizon of human rights realisation. Brems critiques the minimalist violation-centred approach as inadequately attending to the spectrum of approaches to human rights that states might practice. Some states in some circumstances can do more

7. For example, Article 25 ICCPR limits passive and active voting rights to citizens. However, of note, there is a narrow right under international law for status migrants to vote in local elections and participate in consultative voice forums (See, e.g., CoE Local Participation Convention; UN Migrant Workers Convention).

than merely hover above the borderline of violation. The examples she provides to illustrate these different conceptions of duty fulfilment are indeed taken from the freedom of assembly. Brems quotes the text of Article 21 ICCPR and then comments:

Does this mean that a rule requiring authorisation of the police for a public demonstration is a human rights violation? Does it imply that the organisers of a demonstration have the freedom to choose the time and place of the demonstration? These questions concern the determination of the borderline. The answer cannot be given on the basis of the rule alone; it requires interpretation by an authoritative body. (Brems, 2009, p. 351)

Brems notes that while an adjudicator may be focused on where to locate the borderline of violation, certain states may go much farther than merely avoiding violation, espousing a higher voluntary commitment to human rights (Brems, 2009, p. 371).

The empirical data available on migrant organising, including Amsterdam City Rights, can fill in the gaps of maximalist and minimalist interpretations of effectiveness of the freedom of assembly. Amsterdam City Rights had fought for its right to be heard by the municipality. The years of organising to have their voice ‘heard’ were protected under a minimalist interpretation of effective protection of assembly. Consistent with the analysis of expression in Section 4.1, under a minimalist conclusion, one that guides the state away from violation, migration policing at peaceful and registered public assemblies with the intent of stopping the sharing of information would render the freedom of assembly ineffective for undocumented migrant activists and is likely a violation of the freedom of assembly. Amsterdam City Rights also shows the benefits of a maximalist approach to protecting assembly – where the municipality has reached out to the group to consult on policy that directly affects the group (as discussed in Section 2 when introducing the case). A maximalist approach to the freedom of assembly of undocumented migrants that is rooted in a municipality’s voluntary commitments to human rights protection could go a step further and offer not only the commitment to allow undocumented migrants to safely assemble and politically express, but a commitment to institution building in order to hear those voices that have no formal political membership.

4.3 *Article 32: ELS to Confirm Textual Analysis*

A third way to use empirical legal scholarship is in a confirmatory supplementary analysis under VCLT Article 32. I will discuss this third mechanism using the analysis of the freedom of association for undocumented migrants and the empirical case of the unionised undocumented migrant domestic workers in the Netherlands. Supplementary analysis under Article 32 VCLT can be engaged in the

face of obscurity, but also to confirm a textual interpretation. This interpretative mechanism is useful in the context of the freedom of association of undocumented migrants. The ICCPR Article 22 protects the freedom of association: “Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.” The material scope of this freedom protects the right to form and join an association, such as trade unions or private associations, such as a political party, professional or sporting club or an NGO (Joseph & Castan, 2013, sec. 19.13). There are varying treaty texts on the freedom of association under international human rights law, which must be reconciled when interpreting the breadth of this freedom for undocumented migrants under a systemic analysis of Article 31. In a systemic Article 31 analysis, international norms must be read in the context of other relevant international treaties. In this light, courts will often include in their review of the law a review of the provisions of other international instruments on subject. The relevant legal question for this section is, do undocumented migrants have the freedom merely to join trade unions, or do they also have the freedom to form their own associations?

This norm has been subject to an evolving scope through time. Article 15 of the 1951 Convention Relating to the Status of Refugees (Refugee Convention) and Article 16 of the ECHR, both developed in the 1950s, limited the freedom of association to trade union membership in the Refugee Convention and to non-political organisations in both instruments. The broad UN human rights treaties of the 1960s and 1970s had a wider applicability to ‘everyone’, without particular caveats for migrant associations. The 1990s saw an inclusion of political rights for documented migrants in the International Convention on the Rights of Migrant Workers and All Members of Their Families (ICMW) but limited associational rights for undocumented migrants. The ICMW grants undocumented migrants the right to join trade unions (Art. 26) but reserves the right to form associations to documented migrants (Art. 40). The Committee on Migrant Workers (CMW) quickly expressed in its first and second General Comments that this provision may be read with ‘broader’ human rights treaties, refuting a *lex specialis* reasoning that would interpret undocumented migrants as having the right only to join but not to form associations based on the ICMW (CMW 2011; CMW 2013). Throughout these three time periods, the International Labour Organisation has been consistent in interpreting the scope of the freedom of association broadly for migrants to include undocumented migrants (*Case no. 2121 (Spain)*, 2001). I conclude that the international norm on the freedom of association favours a broad reading for migrants –consistent with the ICCPR and ILO, and the General Comments of the Committee on Migrant Workers. Undocumented migrants have the freedom to form and to join trade unions.

I use empirical data on the FNV Migrant Domestic Workers to inform an analysis of effectivity, which confirms my Article 31 VCLT conclusion that undocumented migrants have the freedom to form and to join trade unions. Based

on the empirical data, I assert that this broader reading of the right effectively protects the freedom to join a trade union because the organising practices of migrant associations is intrinsically connected to joining a trade union. Migrant associations and trade unions are engaged in a practice of hybrid organising, where the right to join a union and the right to form an association are not severable from each other (Schwenken & Hobden, 2021). Here, a union member comments on the important role of grass-roots organising *within* the union:

You know, we're supposed to have a *bestuurder* ('administrator'), somebody that's an officer who strategizes with us, launches campaigns with us, studies the political situation, what is, how should we do things, etc. And then since 2020, they stopped being available ... In a way, that's positive because it made us stand on our own, organize ourselves, we're still having the name of the FNV behind us, because they are still, we're still part of them, they need us, they want us to be part of that [MDW16].

Rather than merely favouring the broader interpretation of the freedom of association, the empirical legal data indicated that the freedom to form associations is essential to the effective protection of the narrower freedom to join trade unions. Effective protection of undocumented migrants' right to join a union requires its companion, the right to form a migrant association. Migrant associations are essential for migrant domestic workers organising *within* the union – recognition from the union must be fought for by undocumented workers (Albin & Mantouvalou, 2016). Migrant associations ensure that the specific labour right needs of undocumented workers are met – needs that could not be addressed within the collective bargaining model of the union. Empirical legal scholarship here had a confirmatory function of interpretation based on effectiveness. The case study with the FNV Migrant Domestic Workers showed how the freedom to form migrant associations was essential for the effective exercise of the freedom to join a trade union, because the unique rights position of undocumented workers required self-organising to further the very particular interests of these workers within a trade union structure that is built around the collective bargaining solutions that do not fit the labour position of the undocumented migrant domestic worker. Empirical legal scholarship confirmed the textual analysis by examining the effectiveness of the freedom to join a trade union and the freedom to form a migrant association.

5 CONCLUSION

I have provided three illustrations of how empirical legal scholarship can be engaged by those tasked with interpreting the scope of human rights. Relying on the doctrinal method from the VCLT, I have shown how to incorporate the principle of effectiveness into an Article 31 or Article 32 analysis. The conclusions

provided herein do not need to be limited to the application of the VCLT or human rights norms. Parallels may be found even in areas of climate litigation within the human rights context – filling the gaps of normative standards and the meaning of ‘real risk’ (*Case of KlimaSeniorinnen v. Switzerland*, 2020; *Case of Urgenda Foundation v. The Netherlands*, 2019; Scholten, 2025). Beyond human rights, however, using empirical data to problematise assumptions of effectivity; fill in normative gaps; and confirm a textual analysis can have wide methodological application in law – as my fellow contributors in this volume have shown. In appealing for legal analysis that incorporates empirical data, this chapter also encourages future research on the way individuals use human rights norms to inform such ‘jurisprudence of consequences’. As shown previously, such research has the potential to reveal what is missing from jurisprudence and what could be gained by effective interpretation. Human rights scholarship on effectiveness often has as its focus the acts of protection, implementation or violation by the state. In my take on the ‘jurisprudence of consequences’, I encourage more attention to the use of the contents of rights by individuals. ‘Consequences’ are not a unidirectional causative arc from jurisprudence to everyday life but a back and forth discussion between rights-holder, adjudicator, state and scholar. In the world of human rights, such a discussion can have as its lodestone the horizon of effective protection.

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PUBLIC PARTICIPATION LAWS IN ACTION: EMPIRICAL INSIGHTS FROM THE ENERGY TRANSITIONS IN THE NETHERLANDS AND NIGERIA

Lorenzo Squintani, Edwin Alblas, Otelemate Dokubo and Maria Radulescu

In recent years, the transition towards sustainable energy systems has brought to the forefront questions of how decisions affecting the environment should be made – and by whom. Central to this discourse is the concept of public participation, which is defined as the process through which members of the public are able to engage in decision-making related to policies, plans and actions that shape their living environment (Stern & Dietz, 2008). This participatory process plays a pivotal role in the energy transition, where the implications of decisions are far-reaching and deeply interwoven with societal values and concerns.

Legal frameworks increasingly mandate public participation in the development of energy-related policies and plans (Squintani & Perlaviciute, 2020). In the European context, the Aarhus Convention (1998) has been instrumental in shaping these rights, framing public participation as a subjective right designed to empower individuals – present and future – to live in an environment adequate for their health and well-being (e.g. Kingston et al., 2021).

As in other fields of governance, it is essential to conduct impact assessments of participatory regimes to evaluate their practical significance and effectiveness (Miller, 1965). Public participation is often expected to result in more substantively sound, democratically legitimate and broadly accepted decisions – referred to, respectively, as the substantive, normative and functional goals of participation (Fiorino, 1990). The central question, however, remains, do regulatory frameworks governing public participation actually facilitate the realisation of these goals?

In 2021, Perlaviciute has categorised many scholarly works on public participation by focusing on the criteria influencing the effectiveness of participatory procedure in achieving the participatory goals into dialogue, diversity, deliberation and decision-making power (Perlaviciute, 2021). Yet legal scholars only recently started looking at the implication of social sciences findings

on public participation for (the drafting of) “law, legal norms and the legal system” (Bijleveld, 2023, p. 12). Dokubo et al. have refined each category from a normative perspective and analysed three main regulatory approaches to public participation, highlighting the mismatch between social sciences insights on effective public participation and the regulatory standards in place today (Dokubo et al., 2024). Yet no studies have examined how and whether this mismatch is experienced (and potentially shaped) by those actors actually responsible for implementing public participation laws in practice, i.e. public officials, and how this influences public participation processes on the ground.

In line with the concept of a ‘jurisprudence of consequences’, we address this lacuna by empirically assessing the consequences of public participation laws. In addition, we push scholarship in the study of jurisprudential consequences by shedding new light on the scientific assumptions underlying participatory frameworks and its impacts in practice. As an overarching research question, we assess how civil servants responsible for participatory process view public participation, especially as regards the relevance of the criteria shaping the effectiveness of participatory processes (dialogue, diversity, deliberation and decision-making power). We present the findings from two qualitative studies, each conducted in a different jurisdiction, in the Global North and in the Global South, both playing a central role in the development of renewables in their respective continents: The Netherlands will play a central role via the development of renewables in the North, whereas Nigeria is one of the main energy producing countries in Africa. We bring to the foreground public officials’ perspectives on and experiences with public participation. Section 2 provides the analytical framework shaping the case studies, i.e. the scientific insights on public participation, the regulatory frameworks on the energy transition in the Netherlands and Nigeria, with a focus on public participation requirements. Section 3 explains the methodology used in the case studies, and Section 4 presents the findings. The discussion in Section 5 is aimed at advising legal scholarship and practitioners about the “effectiveness in general of measures such as may be chosen from” (Bijleveld, 2023, p. 10).

2 ANALYTICAL FRAMEWORK: PUBLIC PARTICIPATION AND THE ENERGY TRANSITION IN THE NETHERLANDS AND NIGERIA

2.1 *Scientific Insights on Public Participation: The 4Ds Framework*

As indicated previously, Perlaviciute has synthesised and grouped social science insights on the criteria for effective public participation into four categories: a) dialogue, b) deliberation, c) diversity and d) decision-making power – together referred to as the 4D normative standards (Perlaviciute, 2021).

Dialogue is understood as the exchange of information or opinions between at least two parties (e.g. Swidler & Swidler, 2014), typically in the form of a so-called two-way dialogue (Hamilton & Wills-Toker, 2006). In this regard, the literature indicates that early engagement – i.e. when all options are still open – is critical to the success of public participation processes (Hindmarsh, 2010).

Diversity should be ensured in terms of age, race, beliefs, values, sex and education – even within a single community. This not only builds credibility for developers, both public and private, but also enhances opportunities to integrate diverse local insights and values into the decision-making process (e.g. Dietz, 2013; Ellemers & Rink, 2016; Franklin, 2022; Rădulescu et al., 2022).

Deliberation considers the attitude of participants towards participatory processes and asserts that diverse values should be highlighted, aligned and managed by facilitators (Rădulescu et al., 2020). Moreover, those responsible for the process should recognise and address participants' perspectives (Blacksher et al., 2012). In general, participatory processes should allow for understanding differences and similarities, and discussions should focus on reaching agreement on a course of action (Hamilton & Wills-Toker, 2006).

Decision-making power refers to the influence that public perspectives, expressed during participation, have on final outcomes. Arnstein's 'ladder of citizen participation' suggests that the more dominant the public's role in decision-making, the more effective the participation process is likely to be (Arnstein, 1969). Furthermore, participants are more likely to be actively engaged if they believe their input can influence the outcome (McCool & Guthrie, 2001). If this is not the case, participation may be seen as 'tokenistic' or even 'fake', potentially fuelling societal unrest (Perlaviciute, 2021).

2.2 *The Dutch Regulatory Framework on Public Participation in the Energy Transition and the 4Ds Framework*

Under the European Green Deal,¹ the European Union (EU) has set the targets of lowering emissions by 55% by 2030 compared to 1990, while also ensuring a just transition (Jendrośka et al., 2021). The Netherlands is bound by these EU targets. The Dutch Climate Law establishes the overarching framework in the context of tackling climate change, which is further implemented in a wealth of other regulatory instruments.² Local authorities play a central role in the implementation of the Dutch Climate law, with the Regional Energy Strategies

1. *European Commission 'The European Green Deal' (Communication) COM(2019) 640 final.*

2. *Klimaatwet, OJ 2019, 253.*

indicating how 30 regions in the Netherlands (at times overlapping with a single (large) municipality, others with multiple municipalities or a whole province) aim to contribute to the national goals on renewable energy.³

Public participation is considered a key factor for achieving the climate goals in the Netherlands.⁴ Its regulatory framework governing public participation is composed of two main acts, the General Administrative Law Act (GALA)⁵ and the Environmental and Planning Act.⁶ Content-wise, the Dutch regulatory framework follows the substance of the Aarhus Convention and EU law, which can therefore best be used to explain the approach to public participation adopted in the Netherlands.

Under this Convention, Article 6 sets participatory standards for decision-making on specific activities with potentially significant adverse environmental effects, such as the authorisation of renewable energy sources. Article 7 applies to environmental policies, plans and programmes, while Article 8 focuses on generally binding rules, such as subsidy schemes for solar panels on household rooftops (Squintani & Perlaviciute, 2020).

Although an exact study on the Dutch participatory framework in light of the 4Ds framework is not found in the literature, considering its substantive resemblance to the provisions of the Aarhus Convention, a recent study focused on the Aarhus Convention from the perspective of the 4Ds framework. Dokubo et al. established that the Convention copes best with dialogue and decision-making power insights (Dokubo et al., 2024). From a diversity perspective, the Convention only follows a non-discrimination-based approach, which is based on a one-size fits all set of participatory rights, with no attention paid to the inclusiveness of vulnerable and/or marginalised groups. It is thus based on a homogeneous understanding of society. A non-binding recommendation issued under the umbrella of the Convention, the Maastricht Recommendations 2015,⁷ provides a set of suggestions on the inclusiveness of vulnerable and/or marginalised groups, but the impact of such recommendations seems limited (Forns & Rehage, 2024). The Convention is also silent on deliberation, leaving responsible parties without guidance on how to fulfil social sciences insights on this criterion.

3. For an overview of the Regional Energy Strategies, see <https://regionale-energiestrategie.nl/default.aspx> (accessed September 2024).

4. *Klimaatplan*, Section 3, November 2019 | Publicatie-nr. 1019-15

5. *Algemene wet bestuursrecht*, Stb. 1992, 315.

6. *Omgevingswet*, Stb. 2016, 156.

7. UN ECE Maastricht Recommendations on Promoting Effective Public Participation in Decision-Making in Environmental Matters, prepared under the Aarhus Convention (2015).

2.3 *The Nigerian Regulatory Framework on Public Participation in the Energy Transition and the 4Ds Framework*

Notable steps have been made towards renewable energy development in Nigeria. For example, renewable energy policies and regulatory frameworks such as the Electricity Act,⁸ and the Nigerian Climate Change Act,⁹ are being enacted to regulate the development of renewable energy projects.

In Nigeria provisions for public participation are contained in the various energy and environmental laws and policies. First, Section 30 of the Climate Change Act mandates the Secretariat of the National Council on Climate Change to prepare and publish its public engagement strategy for the upcoming year. Besides, the Electricity Act of 2023 prohibits the issuance of any licence for the production, transmission and distribution of (renewable) electricity until the objections and representations from the public have been received, considered and determined. Moreover, it mandates companies that have applied for a licence under the Act to publish, within 30 days after the application, a notice of the application in both in a local and a national newspaper, stating the period within which the public can make their voice heard. Third, the Environmental Impact Assessment (EIA) Act encourages the development of procedures for information exchange, notification and consultation between organs and persons when proposed activities are likely to have significant environmental effects.

When looked at from the perspective of the 4D framework, Dokubo established that while Nigeria's laws mostly comply with the standards on decision-making power, the Electricity Act fails to require that adequate information about the intended project be provided. In addition, Dokubo argues, the Nigerian Climate Change Law and the EIA Act fail to prescribe suitable methods of communication to be adopted (Dokubo, 2024). From a diversity perspective, Nigerian law is based on the idea of a homogeneous society, whereas the country is, in fact, made up of persons who speak different languages, are of various races and genders, belong to different classes and have a different educational status. Yet a one-size-fits-all approach is followed under the analysed Acts. Besides, the Nigerian energy and environmental laws and policies fail to fulfil most of the requirements on deliberation, save the EIA Act, which creates a semblance of deliberation by way of mediation when the public raises concerns about the project during the dialogue stage (Dokubo, 2024).

8. The Electricity Act 2023, <https://placng.org/i/wp-content/uploads/2023/06/Electricity-Act-2023.pdf> (accessed 19 September 2024).

9. Nigerian Climate Change Act 2021, <https://faolex.fao.org/docs/pdf/NIG208055.pdf> (accessed 19 September 2024).

3 METHODOLOGY FOR THE CASE STUDIES

Both case studies used semi-structured interviews modelled on the 4Ds framework, with public officials responsible for public participation. These officials were selected by means of purposive and referral sampling. In the Netherlands, the case study focused on public servants working in the Province of South Holland, as the Climate Law makes the Regional Energy Strategies (RES) the central instrument for shaping the energy transition. The Province of South Holland provided a useful case study as its territory is divided into seven RES regions, varying from low-density population regions to high-density ones, thus resembling the diversity occurring throughout the Netherlands. In total, 36 interviews were held with public officials working on public participation processes in different capacities (e.g. policy advisor or communication officer) between December 2021 and February 2022. In total, 40 representatives were interviewed, 7 from the RES regions boards, 25 from municipalities (out of 47 municipalities in the region), 5 Provincial Council Members, 1 representative of the Province of South Holland, 1 representative of the Environmental Service Office and 1 representative of a local Water Board. In Nigeria, the case study focused on the federal and state representatives. Between March 2024 and April 2024, we interviewed 13 participants who were officials working with the Federal Ministry of Environment (5) and State Ministry of Environment (3), the Rivers State Ministry of Power (1), the Rural Electrification Agency (3) and the Nigerian Environmental Standards and Regulation Enforcement Agency (NESREA) (1). The participants were all officials who have been involved directly in public participation in the development of energy projects at the state and federal levels in Nigeria.

The studies began with the formulation of an interview guide, designed to collect data on the perception of public officials working on public participation in the two countries when looking at the 4Ds framework and the extent to which this framework is reflected in the respective regulatory and political frameworks, and related implementation practice, on public participation in the energy transition. Ethical approval was provided by the University of Groningen. The data was derived from online, semi-structured interviews using Google Meet or Teams. After obtaining explicit consent, participants were asked about their position in their various ministries, their personal experience with public participation, their opinions on the advantages and disadvantages of each of the 4D elements of public participation, their assumption on the opinions of the colleagues on their views, their awareness of the laws and policies for public participation, particularly relating to the 4Ds, the possible advantages and disadvantages of the legal provisions, and possible areas for improvement in the laws from the perspective of public participation. The interviews were transcribed and

anonymised in accordance with data protection guidelines.¹⁰ The transcripts were further analysed using inductive approaches for coding based on applied thematic analysis (Guest, 2012) via the ATLAS.ti software. The emerging codes were further categorised into various code groups.¹¹

4 FINDINGS

4.1 *Public Officials' Perceptions in the Netherlands*

4.1.1 *Dialogue and Deliberation*

During the interviews, it quickly became apparent that Dutch public officials do not see a distinction between dialogue, i.e. the organisation of a two-way communication setting, and deliberation, i.e. the willingness to listen to opposing arguments and discuss different options. Accordingly, in the findings from the Netherlands, we report these two categories together.

As regards dialogue and deliberation, a certain commitment is expected from both the organising party and citizens in order to ensure a two-way communication setting: municipalities are committed to *"ensuring proper participation, carried out in accordance with certain guidelines"* (Interview G8), and citizens are expected to have an open attitude and participate in a constructive manner (Interview R2b). It was considered important to avoid yes-no contradictions, because they are *"too static"*: *"if you, as a government, shout 'yes' six times louder, then the other person will not at some point also say: 'no, okay'"* (Interview G12). The challenge mentioned here is that participants in a participation process regularly evaluate the participation process based purely on the outcome of the process. As one of the respondents stated,

I have often heard: 'you are not listening'. While I have already had the most long, extensive discussions with those people. Then I thought we were really listening, but in the end a different decision was made.
(Interview G2)

Such criticisms of the process can subsequently have major consequences; for example, one respondent shared that village consultations criticised *"the participation that has been done"*, after which *"the council did not dare"* to adopt a decision (Interview G1).

10. General Data Protection Regulation 2018; The Nigerian Data Protection Act 2023.

11. We cannot ensure that today's views are the same as those emerging from the interviews. Moreover, despite the similar interview guide, the interviews were conducted in the native languages by native speakers, and we cannot ensure that the interviewers followed the same behaviour during the interviews. We account for these limitations by avoiding a one-on-one comparison and focus on the general impression that can be derived by the interviews.

Several respondents, largely based on previous (negative) experiences, had ideas and best practices about how the dialogue could be improved in the future. According to the respondents, it starts with facilitating a constructive dialogue with the starting attitude: explaining *“why you come to do what you come to do”* (Interview G5), and make it clear which phase of the process is currently taking place (Interview R4b). The latter also serves to prevent people from dropping out because, for example, it is not (yet) concrete enough (Interview R4b). To ensure that a constructive, reasoned conversation can be initiated, it was further emphasised that it is important to ensure that the conversation is small-scale (Interview G15a). The different working methods looked at how to ensure that everyone has the opportunity to give his or her input. For example, during digital meetings *“we invite people to ask questions and we answer them all. We have turned all conversations and all questions into Q&As. That was really a huge job at times”* (Interview G14). Another example mentioned here is to offer people the opportunity to provide input after meetings. This mainly serves to allow people who *“would normally keep their mouths shut to participate in the discussion in a very accessible and easy way”* (Interview G18a).

It is clear that facilitating dialogue can be quite a challenge, especially when emotions run high (Interview G5). As one of the respondents admitted, *“I personally find dealing with resistance to be one of the most difficult things”* (Interview G5). Various methods were shared to de-escalate tension when emotions are running high and to see *“what’s bothering you, what’s bothering me”* (Interview G18a). First of all, it was stated that it is important to start the conversation with *“the people with the emotions”* and *“not with everything and everyone involved”* (Interview R4a). If emotions are really high, a possible solution seems to be to focus on personal, one-on-one contact with *“people they trust”* (Interview G3). However, this *“requires a lot of time and attention”* (Interview G3). What was emphasised here was that just ‘rationalising’ top-down decisions during participation processes is in any case ‘disastrous’ (Interview G17).

The importance of the discussion leader was emphasised several times, as the need was felt for one who can *“make things successful by really taking people seriously and letting them have their say”* (Interview G11). A discussion leader can also help in the background, for example, to ‘remove irritations’ (Interview G11). According to the respondents, it is important that the moderator is not only knowledgeable about the content (Interview G11) but also socially strong (Interview G24a). Some municipalities have already started actively working on this (Interview R7b).

4.1.2 *Diversity*

With regard to diversity, respondents were asked whom they would, ideally, like to have ‘at the table’ in public participation processes. The answers were

‘everyone’, or at least every interested party (Interviews G2-4; G16a; O3; S3). It is also important that you *“make a very sincere and careful effort, at every step, to inform people”* (Interviews R4b; R4a). In a general sense, representativeness was mentioned as an indicator: involving a broad representation of different groups in society, not only looking at demographic data such as age or gender, but also at whether someone is a homeowner or renter, for example (Interview G3). An underlying theme is to ensure that a variety of interests can be addressed in a participation process. For example, respondents thought about ‘affordability’ (Interview G8), ‘health of the people living nearby’ (Interviews S4 and S5), and the ‘quality of life of people’ (Interview S5).

Still, getting a representative group of residents around the table is a challenge for many municipalities, partly because some groups are difficult to reach (Interview G4). According to the respondents, it is always the same type of people who join public participation processes; mainly older men with a strong knowledge base and a lot of affinity with the theme. The pattern that can be deduced from this is that supporters and opponents of energy projects are overrepresented, while the middle group is missing. In addition to the pool of perspectives and ideas becoming smaller, a risk was also regularly mentioned, namely that *‘loud shouters’ often receive much more attention than the ‘silent majority’* (Interviews R3a; R7b; G10a). For each underrepresented group, this group has a knowledge disadvantage compared to the ‘usual suspects’ (Interview G18a). This also brings challenges in getting everyone to the same level of knowledge during participation processes (Interview G10).

Respondents were then asked whether they had ideas and working methods in mind, or perhaps had already used them, to get and keep a representative group of people ‘around the table’. An approach used here is to start broadly using various resources and online and offline channels (Interviews G16a; G24a) and then supplement this with strategies specifically aimed at the target groups that still appear to be missing after measurements (Interview R3a). Regarding working methods for specific target groups, the switch to digital working methods seems to have played a positive role, especially among (young) families, where people could *‘just watch and log in from home’* (Interviews R7b; G10b). Various resources are used for young people, including learning programs at secondary schools, where young people are given the opportunity to participate in discussions and be involved within their study programme (Interview R7a). Finally, a ‘Tinder’-based app was also mentioned, on which young people can indicate their preferences for certain energy strategies by ‘swiping’ (‘Swipocratie’) (Interview G5). Various other means are used to ensure that other difficult-to-reach target groups are still reached, such as visual communication without spoken text, to make messages

accessible to people who are poorly literate or non-Dutch speaking (Interview G15a).

Some respondents proposed a results-oriented approach, in which quantitative targets are set in advance for each target group that can be tested afterwards (Interview S2). In this context, many respondents were cautious about a possible obligation to achieve a predetermined result about how many people must participate in the process. At the same time, the importance of being clear about what efforts have been made, and what the results have been, has been recognised. For example, if during the process it turns out that groups are missing, the organiser can show based on an obligation to make an effort that adjustments have been made in order to ultimately obtain a representative picture of the groups and their interests in a certain area (Interview S3).

4.1.3 *Decision-making Power*

Respondents were asked to what extent there is currently any influence that citizens can exert on the outcomes of a decision-making process. Several respondents pointed to a difference between influence 'on paper' and in practice. For example, a municipal official shared that, although it had been communicated to residents in a participation process that a lot of influence could be exerted: *"It is actually not very clear to me to what extent that really happened"* (Interview G2). In other cases, that influence was seen much more clearly. An example mentioned is a wind farm, where the council already had doubts about the location, and the residents' opinion was ultimately *"accepted as decisive not to do it either"* (Interview G24a). At the same time, various examples of participation processes were also mentioned in which citizens were in practice unable to play a meaningful role in the realisation of the final decision. Such processes, according to one of the respondents, only serve to give residents the *"feeling that they can contribute ideas"* (Interview G6). This is disastrous not only for your own trajectory, according to another respondent, *"but also for all future colleagues who also want to participate somewhere"* (Interview G12; similarly interviews G4 and G24a).

As to the question of how much influence the public would have in an ideal world, respondents first stated that the degree of influence *"depends very much on the trajectory and how much room there is in it"* (Interview G18a). More concretely, the perspectives on influence appeared to differ greatly among the participants. For example, some respondents stated that the influence of citizens should be very great, even when this conflicts with *"the pace at which we roll out the energy transition"* (Interviews G8; G13). At the same time, it was also noted that the general interest, and the importance of the energy transition, must remain in view, even if this means that unpopular decisions must be taken (Interview G1). Other respondents stated that, while in public participation the extent to which a

representative group participates may sometimes be questionable, the democratic process of elections in the Netherlands already provides a ‘representative medium’ (Interview G2). The government was said to then be the appropriate body to weigh up interests (Interview O2). One of the respondents expressed the importance of realising that although public participation is *“very important and your policy will be better if you enter into collaborations and have the conversation”*, public input is only one of the inputs required in decision-making (Interview G6).

4.2 *Public Officials’ Perceptions in Nigeria*

The interviews revealed four major stages of the public participation process, namely (a) scoping exercise, (b) EIA display stage, (c) town hall meetings or public review, and (d) post project commencement engagement. For the presentation and analysis of the findings from the interviews, the four stages of public participation identified by the participants, as outlined previously, can and will be further grouped under the 4Ds of public participation.

4.2.1 *Dialogue*

Public participation usually begins with dialogue, initiated by way of a scoping exercise, which is the

first phase by which the public gets aware about the project ... Initially, it will just be the proponent and the regulator. But at the scoping stage, which is the first stage by which public participation is introduced into the project. (Interview N1)

Here, they ‘call a few people from the community’ (Interview N4) to ‘sit down and discuss’ (Interview N9). They discuss *“the type of environmental impacts, what is the magnitude, what are the environmental parameters that should be considered”* (Interview N1). In the case of dialogue, participants highlighted a plethora of advantages of dialogue. Information sharing between the proponents and the communities was said to be a major advantage to the process. Respondent N1 noted that *“the first advantage is that it gets the citizen the required information”*. On the other hand, the communities also pass valuable information to the project proponents. This information can be cultural, informing them that *“we have sacred places outsiders are not supposed to encroach... Women are not supposed to be there”*. They can also give information on *“other renewable energy companies that might have even come into their community to sample their community”* (Interview N4). Dialogue was also said to build trust in the project (Interview N8), increase the confidence of the community towards the proponents (Interview N1), bring forth diverse opinions in the project development (Interview N11), broaden the scope of the project beyond what the proponent envisaged (Interview N4), and serve as a tool to know the community’s level of exposure to solar technology or renewable

energy technologies (Interview N10). Nevertheless, a few disadvantages were also highlighted by some participants, one of which was exploitation. The participants stated that there were instances where the *“people want to take advantage of proponents”* (Interview N1) and that dialogue gives room for *“the government or community to demand more things”* from the proponents (Interview N2). Selfishness was also highlighted as a disadvantage as the main question asked by members of the communities is *“what am I going to gain from this?”* (Interview N3). Further, resistance against projects (Interview N8) and receiving ignorant feedback (Interview N11) were also stated to be disadvantages of dialogue.

4.2.2 *Deliberation*

Deliberation comes next by way of public review or town hall meetings. During the meetings or public review, the citizens, project proponents, consultants and officials of the relevant agencies will be present. Here *“the assessors will be evaluating the reports, and the consultants with the proponents will be making presentations, and there will be counter-questions”* (Interview N1). Objections are also raised during this stage. For example, in a situation where *“they want to site a project in a place that is sacred, community people will say, no, don’t do it here”* (Interview N2). Basically, *“the essence of this review is to know more about the project, then get the community feedback”* (Interview N11). During the deliberation with stakeholders, proponents can inform the stakeholders about the advantages and disadvantages of the projects (Interview N12) and create awareness (Interview N9). Deliberation also helps to avoid conflict (Interview N6), foster community development through economic benefits, streamline feedback for easier decision-making (Interview N10) and tackle project concerns (Interview N8). Nevertheless, conflict was also cited as a disadvantage of deliberation. The conflict is mainly internal between the elders, youth and other members of the community (Interview N13). Aggrieved persons can claim that *“the persons that put in place will speak for them, have sub-charged them”*, which can lead to conflict (Interview N5). Other disadvantages of deliberation include selfishness, spreading of false information due to lack of understanding (Interview N4), exploitation (Interview N1) and delay of project due to ‘repetition of thoughts’ (Interview N9). Furthermore, participants pointed out that it does not end at deliberation before the project commencement, as the process is *“continuous throughout the lifecycle and the lifespan of the project and there’s always stakeholder understanding and participation”* (Interview N4).

4.2.3 *Diversity*

When asked about the extent of diversity and inclusion at the various stages of the process, participants stated that the law needs to *“do more in terms of engaging the stakeholders and making sure they participate”* (Interview N8); similar statements were made in Interview N9, stating that the law *“should ensure that*

people, the vulnerable, the most affected community are well represented". During another interview it was stated that a minimum number of participants should be required and not left to the 'discretion of the officers' (Interview N1). Moreover, two main concepts emerged, (1) representative participation and (2) individual/direct participation. These two types of participation alternated at the different stages of the process. For representative participation, persons who are considered *"the mouthpiece of the communities they represent, like I mentioned, the CDC, the women group, the youth group ... Like the chiefs as well."* (Interview N12) are involved in the decision-making process. As regards individual/direct participation, it could be noticed that the display stage is open to the entire public, and anyone can submit their comments and questions about the project. Eleven (11) out of thirteen (13) participants confirmed positive actions are taken to ensure that vulnerable persons are adequately represented. Two participants suggested that *"that environmental impact affects women, children, and old people more"* (Interview N4), as *"clean cooking affects them ... so we engage them"* (Interview N6).

The steps taken to include vulnerable persons in the process are as follows: (1) writing to their organisations to invite them, (2) enquiring about their absence in meetings, (3) setting the meeting in a close location, (4) including female officials to have separate discussions with women who are not culturally allowed to mix with the opposite gender, (5) conducting a "train-the-trainers type workshop" to sensitise the officials about the advantages of actually having women in a separate room.

Diversity and inclusion in the public participation processes also has its advantages. Bringing diverse groups to the process *"enlightens the people"* (Interview N4). Three (3) participants stated that it also brings different points of view to the process, as the economic interests, tribes and functionality are different. Another advantage of diversity is that it brings diverse expertise and solutions to the process (Interview N9), as *"what the women may know, men may not know or the youth may not know"* (Interview N2). Most times, there are already set designs for the projects, *"but there are other people who have been trained in different parts of the world who have this knowledge that can help you to contribute to it"* (Interview N1). Three (3) participants suggested that diversity also makes room for innovative ideas and recommendations for the project. Diversity and inclusion also create a sense of belonging (Interview N2), as *"everyone feels represented"* in the process (Interview N5). It also exposes the knowledge gap between the proponents and the public (Interview N3), causes happiness (Interview N13), and makes for easy replication of similar projects in other communities (Interview N4).

Diversity and inclusion in the process also has its disadvantages. Among these are power tussles (Interview N2), project delays (Interview N9), chaos (Interview

N5), exploitation of the proponents by the public (Interview N1), feeling of bias by members of other communities who witnessed the process (Interview N4), selfishness (Interview N6), withholding of vital information by members of the community who do not wish to share their views in public (Interview N3), and dissenting views (Interview N6).

4.2.4 *Decision-making Power*

Concerning decision-making power, all participants confirmed that the inputs and comments from the public during the public participation process were considered during the decision-making process. The feedback and comments from the engagement process are considered *“important and they are also tailored into decision-making”* (Interview N10).

On the extent of influence given to the public, two participants stated that the communities have the power to stop a project from being approved and halted, while two other participants stated that there was limited influence. Interviews N6 and N8 stated the following:

[T]he influence is more in shaping the best practice and shaping how we go into the community, not that there's so much influence that they can change the trajectory of what the strategy was in the first place [Interview N6] and [W]e filter, we don't take everything into account ... sometimes they might not even know what is good for them ... You consider, not interfere. (Interview N8)

A major advantage of decision-making power as highlighted by the participants is that the community will *'take ownership of the project'* (Interview N2). Taking ownership of the project will, in turn, ensure security of the proponents' assets as it will make the public protect and guard the project *'with their whole mind and heart'* (Interview N10). In addition, when the community takes ownership of a project, *“there will be no conflict, there will be no issue”* (Interview N1). The participants mentioned three disadvantages of decision-making power. In Interview N10 was indicated that giving the public decision-making power can *“delay decision-making because you want to get everyone's feedback”* and that the public can also give uninformed feedback *“because they might not have the kind of exposure or technical expertise that you require”*. Furthermore, Participants 1 and 4 pointed out that the public tends to exploit the proponents by making excessive demands, threatening that if they are not met, they *'will not support the project'*.

5 DISCUSSION

In general terms, in both countries, participants recognised the importance of the scientific insights on public participation. Moreover, a propensity to integrate the existing regulatory and policy standards on public participation in the energy

transition, in particular as regards the diversity criterion, emerged from the interviews. Yet respondents also highlighted practical limitations and potential drawbacks in pursuing the normative standards on effective public participation, as highlighted in social science research.

When we focus on the specific aspects of the 4Ds framework, the following emerges.

As regards dialogue, the interviews showed that offering opportunities for organisational parties and the public to discuss and listen to each other is an important factor within the participation culture in the Netherlands and Nigeria. This corresponds with scientific insights into public participation. It has also become apparent that an overly strict distinction between the concepts of dialogue and deliberation appears to be a somewhat overly distinction from a practical point of view. Furthermore, it appears that facilitating a constructive dialogue is strongly associated with providing sound procedures, whereby offering transparency and professionalising the procedures were found to be very important. This more procedural approach to dialogue and deliberation is clearly reflected in the working methods provided to ensure dialogue. The need for offering sufficient time frames, and the challenge to do so in practice, was evident in both countries. In Nigeria, this was underlined by the suggestion of allowing more time for public comments than the prescribed 21 days.

As the participation plans and interviews have shown, diversity ranks high on the agenda of respondents. There is also a clear idea about which social groups and opinions are over- or under-represented in participatory processes. In addition, several ideas have emerged with regard to how to better reach and engage underrepresented groups. In both countries, responsible parties are willing to go beyond the regulatory requirements in order to engage with vulnerable and/or marginalised groups during participatory processes. Particularly in Nigeria, the strong positive convictions held by public officials regarding diversity and inclusion have proven to be a key factor in overcoming the challenges posed by stakeholders' discriminatory and exclusionary attitudes, despite any perceived disadvantages (Maznevski & Di Stefano, 2000). These convictions have driven officials to take numerous steps and initiatives to ensure that all individuals are adequately represented in the process. This approach is likely to yield the well-documented benefits that diversity and inclusion bring to participatory efforts (Ellemers & Rink, 2016). Nevertheless, this proactive approach is not guaranteed across all areas and cases, and the lack of enforcement standards on the matter decreases the accountability of responsible parties as regards the level of inclusiveness of participatory processes.

In the Netherlands, it was interesting to see that in addition to demographic characteristics and human values, specific attention was paid to involving the 'silent middle ground'. It therefore appears that in the experience of the respondents, treating this category as a separate group is very important for promoting diversity. This was not the case in the Nigerian interviews. It is unknown why this difference has been observed. We cannot exclude a difference in attention on this aspect during the interviews. Nor could such a finding be linked to the increased attention given to the importance of creating public support for renewable energy in the Netherlands (Perlaviciute et al., 2023). The lack of support is indeed at times associated with the lack of participation of moderate members of the public (Liu et al., 2022).

As regards deliberation, the interviews in both countries highlighted the importance of stimulating open-minded discussions. In Nigeria, the attitudes and actions of the officials towards the importance of deliberation align with studies suggesting that sense-making discourse is crucial for the success of projects (Hamilton & Wills-Toker, 2006) and that proactive measures should be taken to address potential challenges during the process (e.g. Hamilton & Wills-Toker, 2006). In this context, the officials highlight that the public often prioritises egoistic values – focusing on financial and personal gains – over biospheric values, such as environmental protection and also the common interest of the community. To counter this, they make efforts to educate the public about potential environmental impacts and take steps to ensure that the views and interests of all groups are safeguarded. They achieve this through focus group discussions and segmentation. In the Netherlands, it is especially interesting to note, in this context, that in addition to involving the rational arguments of the public, it was also found very important to take into account the emotions of participants in participation processes and also use these as a 'catalyst' to ascertain the motivations of residents and the reasons which lie behind certain emotions.

Concerning decision-making power, it turned out that the degree of influence that the public can have in South Holland and Nigeria varies greatly from one process to another. However, the existing scientific literature on public participation indicates mainly that the influence of the public should go to the highest rungs of Arnstein's ladder ('decide for yourself'). There is therefore a certain discrepancy between academic literature and administrative practice in South Holland and Nigeria. We noted a clear awareness of the importance of empowering the public in decision-making. However, the respondents held divergent views on the degree of influence the public should have. The concept of 'giving the public as much influence as possible' then takes on a relative character: as much as possible within a chosen framework that determines the scope of decision-making power.

The question is, of course, what the chosen level of influence means for the possibility of achieving the desired goals of public participation. In the Netherlands, the interviews did reveal a strong awareness of the possible impact of a low level of influence on creating support, especially when it has previously been communicated that citizens will be able to influence, but this is ultimately not the case. Frequent reference was also made here to 'expectation management', whereby the scope of influence is communicated clearly and transparently to the participants.

Furthermore, studies have linked lack of influence in decision-making processes to the reluctance to participate (Fox, 2009; McCool & Guthrie, 2001), which is one of the issues and challenges the officials pointed out in Nigeria. The low turnout rate in participation processes in Nigeria was further acknowledged as one of the major issues, and respondents suggested that legislation should establish a minimum number of required participants. While this suggestion may be worthwhile, it may not guarantee active participation within the process itself. However, setting a minimum number of participants does not address how much influence these individuals will actually have over the project. It is therefore unclear if a minimum number requirement will help in gaining the public's trust and active interest in the process.

6 CONCLUSIONS: THE CLOSING OF THE GAP IS A TWO-WAY STREET

For the first time in the literature, this chapter has shown public officials' perceptions on public participation accounting for social sciences insights and existing regulatory and policy frameworks in the analysed jurisdictions, the Netherlands and Nigeria. The mismatch between the law in the books and the law in action highlighted in earlier literature is recognised by public officials, at least in the analysed jurisdictions. In both countries, public officials recognise the relevance of social sciences insights and have shown the willingness, supported by factual evidence based on real-life cases, to implement the social sciences insights, despite specific regulatory or policy requirements on the subject matter. In both countries, officials highlighted the positive and negative experiences with integrating the social sciences insights into participatory practices and frameworks.

In particular, a too scholarly distinction between dialogue and deliberation does not seem to be of practical use to guide public officials in how to improve public participation processes. Moreover, a strict approach to the decision-making power criterion does not seem to align with the mandate of public officials, at least in certain procedures. In both jurisdictions there is also evidence of willingness to go beyond the regulatory and policy requirements in order to close the gap and related possible difficulties.

In conclusion, the empirical findings shows that the *closing of the gap is a two-way street*. On the right side of the road, the findings reinforce the importance of reconsidering existing regulatory and policy frameworks on public participation in the energy transition, especially as regards diversity. On the other side of the road, the findings show the importance of (re-) discussing the conceptualisation of public participation, to make it less scholarly and more practice oriented.

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