Looking Differently at Legal Change: Layering, Conversion, Drift, Displacement and Exhaustion in the Development of Dutch Construction Regulation

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Abstract

There are various approaches to studying legal change. Systematic analysis of legal, doctrinal change as produced by courts is one of these. Whilst this approach informs us about "what" has changed, it often does not inform us about "why" or "how" changes have come about. Yet, "why" and "how" questions are equally relevant to answer as "what" question if we wish to fully comprehend legal change. Related areas of scholarship (political science, public administration, and socio-legal scholarship) are traditionally more interested in the why and how of legal change. This article seeks to introduce the readership of KJLL to a dominant heuristic applied to study legal change in other areas of scholarship: theorizing on incremental change. This article first briefly reviews the development of this theorizing, and then applies it to study the development of over a hundred years of construction regulation in the Netherlands. It concludes with a discussion on how this theorizing may complement more traditional, doctrinal legal scholarship approaches in providing a more comprehensive understanding of legal change.

Keywords: Incremental institutional change, law and policy development, historical institutionalism, policy analysis, conversion, layering, drift

Ⅰ. Introduction

For long scholars have called for a multidisciplinary or interdisciplinary approach to understand legal change.[1] After all, to fully comprehend such change more is required than a systematic analysis of doctrinal change as produced by courts—the type of analysis carried out under traditional legal scholarship. Whilst a doctrinal approach might provide clear answers to questions of "what" has changed, it is often unable to answer questions of "why" and "how" changes have come about. Answering why and how questions is, arguably, equally important as answering "what" questions.

Legal change does not happen in the vacuum of courts, nor in the vacuum of government bureaucracy. Whilst these may be the arenas where changes are eventually formalizsed and administered, they are often not the arenas where legal change originates. Legal change, or at least the call for legal change, is more likely to originate "on the street" than in a courthouse or in a government department. Understanding the origins of legal change and the process towards legal change may help us to better understand the eventual changing of "law in the books." Such a broader understanding may not only help us to better understand how and why law in the books has changed, it may also help us to better understand whether the legal change of law in the books is transferable to other contexts and why (or why not). Such a broader understanding of legal change will ultimately aid comparative law research, which is becoming increasingly aware that "simply" comparing black letter rules in two or more settings is of limited avail without studying the contexts of those rules and how they have come about.[2]

This article is interested in exploring the value of a dominant approach to studying the process of legal change in fields related to doctrinal legal scholarship (particularly political science, public administration, and socio-legal scholarship) as a complementary approach to analyses of doctrinal change as produced by courts. It seeks to introduce the readership of the *KLRI Journal of Law and Legialislation* in theorizsing on incremental institutional change, a branch of theorizing from historical institutionalism. Since the early 2000s this theorizing has made rapid inroads in political science,

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1) Robert Clark, *The Interdisciplinary Study of Legal Evolution*, 90 The Yale Law Journal (1981); Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 Northwestern University Law Review (1997).

2) Marie van Hoecke & Mark Warrington, *Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law*, 47 International and Comparative Law Quarterly (1998); Jeroen van der Heijden, *The long, but promising, road from deterrence to networked enforcement*, *in* New Directions in the Effective Enforcement of EU LC and Policy (Sarah Drake & Melanie Smith eds., 2016).

public administration, and socio-legal scholarship. In these areas it is considered as one of the core theoretical perspectives to describe and comparatively analyzse institutional change (including legal change). It has, however, seen limited application by legal scholars. By no means does this article claim that the theoretical perspective presented here, incremental institutional change, is the only or the best complementary approach to doctrinal legal analysis. The theorizing is applied to better understand a specific situation of legal change in the Netherlands: the privatizsation of building code enforcement.

Ⅱ. Proposed private building code enforcement in the Netherlands

On 15 December 2011, the Dutch Minister of the Interior and Kingdom Relations formally proposed to change the approach to building code enforcement in the Netherlands. For close to a hundred years, this has been the responsibility of municipal building control authorities. The proposal for change came after close to a decade of debate, which will be further explored in the later chapters of this article. A central aspect of this debate was the limited responsibility of municipal building control authorities in situations of construction related incidents.

A brief explanation of the system of building control in the Netherlands might be in place here.[3] In order to be allowed to construct a building or considerably alter it in the Netherlands, a building permit is required. To obtain a building permit, plans for the proposed building or alteration are lodged with the local municipal building control authority. This authority assesses whether the plans comply with Dutch building regulations, particularly the Dutch Building Code (*Bouwbesluit)*[4]. If the authority concludes that the plans meet building regulations it issues a building permit. Upon obtaining the building permit construction work can be commenced. During construction the municipal building control authority will carry out inspections to assess whether the constructed work complies with the building permit issued. This process is very much in line with public systems of building code enforcement in other European countries.[5] To cover assessment and inspection costs Dutch municipal building control authorities charge a fee. Generally, fees for major

3) For an extensive discussion, see JEROEN VAN DER HEIJDEN, DE VOOR- EN NADELEN VAN PRIVATISERING VAN HET BOUWTOEZICHT (Instituut voor Bouwrecht. 2009).

4) For the most recent text, see https://www.onlinebouwbesluit.nl/ (in Dutch only; accessed 22 April 2016).

5) FRITS MEIJER, et al., BUILDING REGULATIONS IN EUROPE PART I (DUP Science. 2003).

construction works are relatively larger than those for minor construction works.

The positive assessment of building plans and inspections of construction work by municipal building control authorities are, however, no *guarantee* that a building, once constructed, fully complies with Dutch building regulation. These authorities are "only" required to assess "presumed" compliance based on available documentation and other sources.[6] The ultimate responsibility for compliance comes to the building owner and her representatives. This could, in theory, result in situations where the municipal building control authority concludes that a building plan or constructed building complies with Dutch construction regulation, but that in practice it does not. In the late 1990s and early 2000s such situations, came, indeed, came to the light after a number of fatal construction related incidents, namely predominantly building collapses. Could municipal building control authorities be held responsible for these situations? After all, they had initially issued building permits and approved construction work, giving, at the very least, the illusion that the buildings, which later collapsed, complied with Dutch building regulations and were thus safe for occupation.

Under the Dutch civil law system it is complicated to hold municipal building control authorities responsible for such situations. Only situations of severe neglect by these authorities allow for this. But evidencing severe neglect on the side of building control authorities is not easy as these authorities are only required to assess "presumed" compliance based on available documentation and other sources.[7] For long, critical legal scholars have argued that this system of paid-for building control with limited responsibility on the side of municipal building control authorities results in a situation where building owners pay for a service (building control by municipal building control authorities), but that the service they receive (building permits, construction work inspections) is of little value since municipal building control authorities cannot be held responsible for providing flawed services.[8] The series of construction related incidents only fuelled their criticism, and increased their calls for a change in the system.[9]

When reviewing the more traditional doctrinal legal literature on Dutch building control, this is, in a nutshell, the story that unfolds when seeking to understand why

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6) P.J.M. DRION & B.J. SCHUELER, PRIVAAT-EN PUBLIEKRECHTERLIJKE AANSPRAKELIJKHEID VOOR GEBREKKIGE BOUWWERKEN § 33 (WEKA Uitgeverij. 2005).

7) *Id.*

8) C.L.G.F.H. Albers & P.C.M. Heinen, *Civiel en strafrechtelijke aansprakelijkheid van gemeenten bij falend bouw- en woningtoezicht*, 158 DE GEMEENTESTEM (2008).

9) R. DE WAARD & G.J. VAN LEEUWEN, DE ORGANISATIE VAN HET BOUW- EN WONINGTOEZICHT. NAAR EEN GEMEENTELIJK BOUWBELEID EN ANDERE ONTWIKKELINGEN IN BESLUITVORMING EN TOEZICHT (Elsevier Overheid. 2005).

the Minister of the Interior and Kingdom Relations proposed to change the Dutch system of building control in 2010. However, looking at this example of (proposed) legal change through another theoretical lens, a fully different story unfolds.

Ⅲ. Theorizing on incremental institutional change: An alternative lens for studying legal change

Scholars from the political sciences, public administration, and socio-legal scholarship have introduced a wide variety of theoretical perspectives that can be used for studying legal change as complements to traditional doctrinal legal scholarship.[10] When overviewing these perspectives, a broad distinction can be made between those studying major changes as a result of exogenous shocks, and those studying ongoing incremental change. A typical example of the former is the famous work by Baumgartner and Jones on punctuated equilibriums.[11] The punctuated equilibrium model argues that most institutions (including law, regulation, and policy) remain relatively stable for long periods of time and are sometimes punctured by a sudden exogenous event. Wars or financial crises are examples of such sudden events. Yet, what to call a "puncture?" Incidents such as the Deepwater Horizon oil spill of 2010[12] or the Global Financial Crisis of 2008[13] may be presented convincingly as endogenous shocks, but what about smaller "shocks" such as the explosion of BP's Texas City Refinery in 2005[14] or the severe

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10) For an overview of these theoretical perspectives see among others Gilbert Capano & Michael Howlett, *Introduction: The Determinants of Policy Change: Advancing the Debate*, 11 JOURNAL OF COMPARATIVE POLICY ANALYSIS (2009); R. A. W. RHODES, et al., THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS (Oxford University Press. 2006); Jeroen van der Heijden, *Different but equally plausible narratives of policy transformation: a plea for theoretical pluralism*, 34 INTERNATIONAL POLITICAL SCIENCE REVIEW (2013).

11) FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS (University of Chicago Press. 1993); FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS - SECOND EDITION (University of Chicago Press. 2009).

12) Richard Kerr et al., *Will Deepwater Horizon Set a New Standard for Catastrophe?*, 328 SCIENCE (2010).

13) James Crotty, *Structural causes of the global financial crisis: a critical assessment of the 'new financial architecture'*, 33 CAMBRIDGE JOURNAL OF ECONOMICS (2009).

14) Malcolm P. Cutchin et al., *Concern About Petrochemical Health Risk Before and After a Refinery Explosion*, 28 RISK ANALYSIS (2008).

devaluation of the South African Rand losing over half of its value between 1999 and 2001.[15] Also, as some scholars have discussed, shocks (large or small) do not always result in institutional change, and institutional change does not always come from exogenous shocks.[16] Over the years, such critiques have resulted in an alternative model to explain institutional change; that of incremental change as found in the historical institutionalism literature. It holds that institutions change continuously, but gradually over time.[17] Although sometimes considered opposite models,[18] I prefer to look at these as complementary approaches to studying and understanding institutional change[19] that all allow to explain similar examples of legal change by providing different narratives.[20]

The theorizing on incremental institutional change has seen much development and use over the last two decades. A small group of scholars has been particularly active in developing this theoretical perspective (Jacob Hacker, James Mahoney, Paul Pierson, Wolfgang Streeck, and Kathleen Thelen) and their work is widely followed—I will refer to this group as "the Incrementalists" throughout this article. Particularly the introduction of various change mechanisms by the Incrementalists seems to resonate particularly well with political scientists, scholars of public administration, and socio-legal scholarship when studying legal change. These mechanisms are: *layering*, *conversion, drift*, *displacement* and *exhaustion*.[21]

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15) Ronald Macdonald & Luca Antonio Ricci, *Estimation of the equilibrium real exchange rate for South Africa*, 72 SOUTH AFRICAN JOURNAL OF ECONOMICS (2004).

16) PAUL PIERSON, POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS (Princeton University Press 2004).

17) John L. Campbell, *Institutional Reproduction and Change*, *in* THE OXFORD HANDBOOK OF COMPARATIVE INSTITUTIONAL ANALYSIS (Glenn Morgan et al. eds., 2009).

18) James Mahoney & Kathleen Thelen, *A Theory of Gradual Institutional Change*, *in* EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY, AND POWER (James Mahoney & Kathleen Thelen eds., 2010).

19) Jeroen Van der Heijden, *A short history of studying incremental institutional change: Does Explaining Institutional Change provide any new explanations?*, 4 REGULATION & GOVERNANCE (2010).

20) Jeroen Van der Heijden, *Different but equally plausible narratives of policy transformation: a plea for theoretical pluralism*, 34 INTERNATIONAL POLITICAL SCIENCE REVIEW (2013).

21) Kathleen Thelen, *Historical Institutionalism in Comparative Politics*, 2 Annual Review of Political Science. 369 (1999); Kathleen Thelen, *Timing and Temporality in the Analysis of Institutional Evolution and Change*, 14 STUDIES IN AMERICAN POLITICAL DEVELOPMENT (2000); Kathleen Thelen, *How Institutions Evolve: Insights from Comparative-Historical Analysis*, *in* COMPARATIVE HISTORICAL ANALYSIS IN THE SOCIAL SCIENCES (James Mahoney & D. Rueschemeyer eds., 2003); KATHLEEN THELEN, HOW INSTITUTIONS EVOLVE: THE POLITICAL

A. Layering

Layering refers to a situation of gradual institutional transformation through a process in which new elements are attached to existing institutions. Essential about layering is that the new does not replace the old, but is added to these and so gradually change their status and structure. The mechanism was first identified by Eric Schickler, who shows that:

Different interests emerge as particularly important in different eras, that multiple interests typically shape each instance of institutional change, and that specific institutions develop through an accumulation of innovations inspired by competing motives, which engenders a tense layering of new arrangements on top of preexisting structures.[22]

B. Conversion

Conversion refers to a situation of "redeployment of old institutions to new purposes."[23] The institutions themselves are considered not to change but are harnessed to serve new ends. The term conversion was first used by Wolfgang Streeck in a book chapter titled *Beneficial Constraints: On the Economic Limits of Rational Voluntarism*.[24] Streeck does not provide a definition for the term. He uses the term to clarify the transition "of labor productivity-enhancing practices from managerial techniques into the rights of workers, and thus into constraints on management."[25] Streeck is interested in how actors or organizations under changing external conditions might learn to use the new situation to their own advantage. The new situation may be an opportunity to them.

ECONOMY OF SKILLS IN GERMANY, BRITAIN, THE UNITED STATES AND JAPAN (Cambridge University Press 2004); JAMES MAHONEY & KATHLEEN THELEN, EXPLAINING INSTITUTIONAL CHANGE: AMBIGUITY, AGENCY AND POWER (Cambridge University Press 2010); Wolfgang Streeck & Kathleen Thelen, *Institutional Changes in Advanced Political Economies*, *in* BEYOND CONTINUITY: INSTITUTIONAL CHANGE IN ADVANCED POLITICAL ECONOMIES (Wolfgang Streeck & Kathleen Thelen eds., 2005).

22) ERIC SCHICKLER, DISJOINTED PLURALISM. INSTIUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRES 15 (Princeton University Press 2001).

23) Streeck & Thelen, *Institutional Changes in Advanced Political Economies* 31 (2005).

24) Wolfgang Streeck, *Beneficial Constraints: On the Economic Limits of Rational Voluntarism*, *in* CONTEMPORARY CAPITALISM: THE EMBEDDEDNESS OF INSTITUTIONS (J. Rogers Hollingsworth & Robert Boyer eds., 1997).

25) *Id.* at 203

C. Drift

Drift refers to a situation of changed impact of existing institutions due to shifts in the institution's environment and a lack of adjusting the existing institution to the changing institution's environment.[26] Jacob Hacker has been particularly active in developing the mechanism alongside conversion and layering.[27] Hacker considers drift as a situation of "changes in the operation or effect of policies that occur without significant changes in those policies' structure."[28] A typical example is regulatory ambiguity, when institutional rules allow for a wider interpretation by those subject to the rules than intended by those involved in setting them. Hacker considers drift, like layering and conversion, as processes of adaptation.[29]

D. Displacement

Displacement refers to a situation in which "new models emerge and diffuse which call into question existing, previously taken-for-granted organizational forms and practices."[30] Displacement differs from punctuated equilibrium literature in that the new institution is introduced in competition with the existing institution, rather than immediately displacing it. It differs from layering, as under this mechanism the new institution eventually replaces the old: "The removal of old rules and the introduction of new ones."[31] Note that displacement differs from layering, conversion and drift in that under these three mechanisms existing institutions remain in place – may this be partly, fully or symbolically.

E. Exhaustion

Exhaustion refers to a "process in which behaviors invoked or allowed under existing rules operate to undermine these… [leading to] institutional breakdown rather than change."[32] The Incrementalists are somewhat hesitant to include this

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26) *Supra* note 23, at 24-26.

27) Leigh Hancher & Michael Moran, *Organizing Regulatory Space*, *in* CAPITALISM, CULTURE AND ECONOMIC REGULATION (Leigh Hancher & Michael Moran eds., 1989).

28) *Id.* note 44, at 246.

29) Jacob S. Hacker, *Policy Drift: The Hidden Politics of US Welfare State Retrenchment*, *in* BEYOND CONTINUITY (Wolfgang Streeck & Kathleen Thelen eds., 2005).

30) *Supra* note 23, at 19.

31) Mahoney & Thelen, *A Theory of Gradual Institutional Change* 15 (2010).

mechanism within the group discussed before exactly because it does not so much address institutional change but institutional breakdown. Yet, as for instance highlighted by Busemeyer and Trampusch,[33] particular parts of institutions may over time become redundant or even hostile to the original goal of an institution.

Ⅳ. Proposed private building code enforcement in the Netherlands through the Incrementalists' lens

To understand the proposed legal change to building code enforcement in the Netherlands through the Incrementalists' lens, it is useful to go further back in time than I have done when discussing this example earlier in this article. In fact, to fully comprehend this proposed change it is useful to assess a period of roughly 125 years of legal change inof construction regulation and enforcement in the Netherlands. I will do so in what follows by discussing five distinct periods in the development of Dutch construction regulation and enforcement.[34] Each period is discussed using the Incrementalists' theory and concepts, and each period is briefly concluded with a brief summing up of the main institutional changes traced through the lens provided by the Incrementalists.

A. Middle Ages up to 1901: the birth of an institution

Building processes were being regulated in the Netherlands as far back as the Middle Ages (13th to 16th centuries). The requirements for existing and future buildings were set in so-called "civic bylaws," which had a decidedly local character.[35] Adherence to these requirements was monitored by clerks of work, usually carpenters or masons who, besides checking that buildings were erected within the

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32) *Supra* note 23, at 29.

33) M Busemeyer & Christine Trampusch, *Liberalization by Exhaustion*, 59 ZEITSCHRIFT FüR SOCIALREFORM (2013).

34) These five stages are commonly used in discussing institutional developments in the Netherlands and broadly relate to the period towards the development of a night-watchman state, the night-watchman state, the pre-welfare state, the welfare state, and the neo-liberal state. See further J. M. DE MEIJ, et al., INLEIDING TOT HET STAATSRECHT EN HET BESTUURSRECHT (Kluwer. 2004).

35) E.H.A. KOCKEN, VAN BOUWEN, BREKEN EN BRANDEN IN DE LAGE LANDEN; OORSPRONG EN ONTWIKKELING VAN HET MIDDELEEUWS STEDELIJK BOUWRECHT TUSSEN + 1200 EN + 1500 (Kluwer 2004).

building line, performed only perfunctory inspections on quality. In some of the larger municipalities, however, an agency was set up to inspect compliance with such regulation: the building police.[36] This in particular was to prevent the devastating city fires that plagued the major and densely populated cities, for instance the fires that almost fully destroyed Amsterdam in 1421 and 1452. Intriguingly, these two fires and their consequences may be considered a typical punctuated equilibrium illustration: directly after the 1452 fire, the Amsterdam city government decreed that from then on houses had to be built of stone instead of wood, which was the normal practice, and that thatched roofs had to be replaced by tiled roofs. This was an un-preceded governmental intervention.[37]

Yet, it would take some more centuries for the national government to intervene more seriously with construction regulation—but once started, it did so with ever increasing speed. In the second half or the 19th century steadily expanding industrialization and the accompanying growth in population brought about a fundamental change in the relationship between the government and the construction sector. Thanks to various publications, which drew attention to the problems of housing urban populations, especially laborers, it gradually became clear that legislation and public accountability were essential if proper, qualitative housing was ever to be realized. A "report to the King" from the Royal Institute of Engineers in 1853, setting out standard requirements for workers' dwellings, and a handbook by the physician Coronel in 1872, which addressed public health care, are regarded as two landmark publications.[38] The structural and design standards in the reports and the connection they make between public health and housing can be seen as the first push towards the Housing Act of 1901. This is a fairly common development in that era, with similar developments in, for instance, the United Kingdom and France. That having been said, the rise of socio-political ideology in the Netherlands also prompted the Dutch government to take a greater interest in housing and construction regulation. This ideology is reflected in, amongst others, the work of "a new generation of architects," which emerged at the end of the 19th century and placed a strong emphasis on the social relevance of architecture.[39]

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36) J.G. Wijnja & H. Priemus, De toekomst van het bouw- en woningtoezicht (Delftse Universitaire Pers. 1990); F.H. Van den Berken, Reeks Bundels Bouwvoorschriften I: Woningwet en Bouwbesluit (Sdu Uitgevers. 1997).

37) SCHELTEMA, P. 1866. *Inventaris van het Amsterdamse archief: Eerste deel,* Amsterdam, Stads Drukkerij.

38) N. De Vreeze, Woningbouw, inspiratie en ambities. Kwalitatieve grondslagen van de sociale woningbouw in Nederland (Woningraad 1993).

39) E.H.A. Kocken, *De bijzondere betekenis van de Woningwet en de bouwverordening t.a.v. de*

1. Through the Incrementalists' lens

The theorizing and mechanisms of gradual institutional change do not provide much guidance in explaining this particular period. After all, these early days of Dutch construction policy led to the "birth" of the institution, and it is only after this birth that it can start changing. Nevertheless, if desired, this period could be explained as one of displacement: the growing cities in the Netherlands and related issues with health and safety led to a questioning of existing institutional settings – that is, the absence of construction regulation. This led to introduction of construction regulation, especially to ensure fire-safety, and the introduction of a building-police. Ongoing societal change, then, called for further expansion of this construction regulation.

B. 1901-1940: regulating construction by limiting local governments' autonomy

Prior to 1901 the Dutch government took no official interest in construction regulations, but a changing society asked for intervention. The Dutch government's response to these changes was the introduction of the Housing Act. The Housing Act (1901) incorporated regulations, which demarcated the powers of the municipalities and the responsibility of the government in public housing.[40] Through the Housing Act the Dutch government aimed at making the occupancy of poor housing impossible and aimed at improving the construction of houses that met some basic requirements of public health and safety. This was done, amongst others, by lending housing corporations money for the construction of so-called Housing Act-dwellings.[41]

Through the Housing Act, municipalities were required to introduce a so-called construction ordinance (*bouwverordening*). This construction ordinance regulated land use and set local construction bylaws. Municipalities were not given a standard text or guidelines for form or content. Nor were there any legal obligations with respect to the enforcement of construction regulation.[42] This "solution" was chosen to find a medium between municipal autonomy and rule from above.[43] In practice

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gemeentelijke verantwoordelijkheden op het gebied van het bouwen, BOUWRECHT (1974).

40) *Supra* note 38.

41) H.T. SIRAA et al., MET HET OOG OP DE OMGEVING; EEN GESCHIEDENIS VAN DE ZORG VOOR DE KWALITEIT VAN DE LEEFOMGEVING (Ministerie van VROM 1995).

42) *Supra* note 38.

this solution meant that the municipalities could decide for themselves how to incorporate the prescribed subject matter in the bylaws, and they could make additions to any extent they saw necessary. Needless to say, this led to huge differences in and a patchwork of municipal bylaws across the country. In the first twenty years of the Housing Act the extent of the interests served with the same were not sufficiently understood. This led to two major issues.[44] First, the patchwork of often closed and local character of these municipal bylaws made it difficult for builders to work in different regions and had a negative impact on the supply of housing. At the same time the urban population grew, making the need for new housing all the more urgent. Second, the enforcement of construction regulation was still in an abysmal state, especially in the smaller municipalities. Usually, inspections were carried out part-time by a municipal official or the local carpenter.[45]

It was not until the Act was amended in 1921 that enforcement became obligatory at municipal level: from this point onwards municipalities had the duty to provide for enforcement. This amendment also formalized requirements related to construction permits, seeking to make the practice of issuing construction permits uniform throughout the Netherlands. The permit was only to be declined if construction work did not comply with regulations.[46] Furthermore, the Provincial Executive was granted power to intervene in those municipalities where, in their perception, enforcement was carried out insufficiently.[47] This amendment both grants more power to municipalities by formalizing the enforcement of construction regulation and the introduction of a "municipal monopoly" on construction permits, and at the same time limits their autonomy by introducing national regulation. A second amendment from this period, the 1931 amendment, has a similar intention: the scope of the Housing Act is stretched to cover all buildings – i.e. besides housing also other building types were now regulated through the Housing Act.

Another noteworthy move towards more uniformity of local bylaws was made through the so-called "1927 Guideline." This initiative by private sector organizations from the building sector provided a tool for small sized municipalities to introduce and implement standardized construction bylaws.[48] On the one hand,

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43) Johan Christiaan Boogman, Geschiedenis van het moderne Nederland. Politieke, Economische en Sociale Ontwikkelingen (De Haan 1988).

44) *Supra* note 38.

45) Wijnja & Priemus, De toekomst van het bouw- en woningtoezicht (1990).

46) D.A. Groetelaars, Instrumentarium locatieontwikkeling. Suringsmorelijkheden voor gemeenten in veranderende marktsituaties. Stedelijke en Regionale Verkenningen 32 (Delft University Press 2004).

47) *Supra* note 45.

this would ease the burden for these smaller municipalities in complying with national requirements; on the other hand, it gave these private sector organizations strong influence in the development of construction regulation in these municipalities. It would take, however, until after World War II for such attempts to streamline construction regulation had effect.

1. Through the Incrementalists' lens

This period could be framed in the Incrementalists' terms as a period of displacement and layering: the Housing Act is introduced to replace all forms of local construction in the Netherlands. In doing so, the Dutch government significantly diminished municipal autonomy (displacement). Then, once in place, new rules and regulations are continuously added to the newly implemented Housing Act. This results in the Housing Act getting more and more embedded in Dutch policy and thickening in complexity. Yet, as a result of far reaching discretionary space, municipalities can undermine the Dutch government's attempt to gain control. Further, in the slipstream of these developments, new actors seek a way into this developing institutional setting (all instances of layering).

C. 1940-1981: towards uniform construction regulation

World War II (1940-1945) was an important factor in the run-up to government involvement in the construction sector. Both the German invasion and retreat resulted in massive destruction. Already during the War, attempts were made for reconstruction. Construction activity had been tightly centralized during the war to optimize the success of these reconstruction efforts. Yet, in practice not much construction activity was undertaken during the War. In the post-war period this centralization was continued. The national government's influence in socio-economic affairs became widely expanded and institutionalized:

> It was, however, more or less generally agreed that government intervention was desirable to prevent serious upsets in the economy. [Construction] policy should be geared to facilitating developments, which the business community eschewed or could not finance, but were nonetheless important to the future of Dutch society.[49]

The government also played a more active role in societal developments after the

48) *Supra* note 45.

49) *Supra* note 38, at 266 (my translation).

War. "In addition to regulating, the government assumed an increasingly prominent role in matters of arbitration, performance and management."[50] One of the trends, which the business community "eschewed or could not finance," was the growing demand for housing. Various reasons prevented this demand from being adequately satisfied in the years immediately following World War II. First, there was a shortage of skilled construction workers; work routines had disappeared during the war and investment opportunities were in need of improvement. Second, with building material being scarce and expensive, building practice needed to be made more efficient.[51] Third, the existing housing stock was of poor quality.[52] In short, not only more and cost-effective housing was needed, also better housing was needed.

One of the approaches to meet these growing qualitative and quantitative demands for housing was subsidizing by the Dutch government. Subsidizing worked two ways. On the one hand, the government could decide where to subsidize and by so steer construction quantity. On the other hand, the government could set requirements to obtaining subsidies and by so steer construction quality. The Dutch government used its powers under the Housing Act to introduce quality-based conditions for subsidies. The aim was to ensure that the limited resources were used optimally.[53] In 1944, guidelines were issued for the construction of emergency housing; these were followed in 1946 by guidelines for mainstream subsidized construction of housing. These were then revised at regular intervals and are considered a highlight in the development of qualitative norms for state-subsidized housing.[54]

Yet, subsidies showed insufficient to meet the growing demand for housing. Also, a combination of highly prescriptive construction regulations and the patchwork of municipal bylaws undermined efforts to solve the huge housing shortage and to use standardized building elements and components.[55] In the 1950s, a Ministerial Committee of inquiry was set up to investigate how these issues can be solved. The

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50) N De Vreeze, Kwaliteit in discussie. Woningbouw onder invloed van bezuinigingen en deregulering 144 (Van Loghum Slaterus 1989) (my translation).

51) L. Van der Laan & B. Lamberts, *Noodwoningbouw en volkshuisvesting*, *in* Architectuur en stedebouw in oorlogstijd. De wederopbouw van Middelburg, 1940-1948 (K. Bosma ed., 1988).

52) Christ Thijssen, *The Technical Quality of the Post-War Multi-Family Housing in the Social Rented Sector in the Netherlands*, 6 Journal of Housing and the Built Environment (1991).

53) *Id*.

54) *Supra* note 38.

55) Hendrik Jacob Visscher, Bouwtoezicht en kwaliteitszorg. Een verkenning van alternatieven voor de technische controles door het gemeentelijk bouwtoezicht (Delft University Press 2000).

major recommendation by this Committee was to implement a uniform set of national construction regulation. Municipalities were however not willing to give up their power of setting municipal bylaws.[56] To break this situation, the national government introduced a directive for uniform construction regulations (*Besluit Uniforme Bouwvoorschriften*) in 1956. This directive took precedence over the municipal bylaws, and applied to all construction plans in the Netherlands. On paper this gave the Dutch government considerable influence, but reality proved to be more complicated. In order to prevent all too much resistance from municipalities, these were still allowed to draw up and implement construction bylaws in addition to the directive as they saw fit. It goes without saying that this stood in the way of uniform application of the directive.[57]

In 1962, the initial and by then oft amended and highly complex Housing Act was fully replaced by a new Housing Act. Aiming at solving issues resulting from municipalities' local practice, this new Act required municipalities to lay down a construction ordinance based on specified criteria. It however did not specify a standardized national text. The Housing Act of 1962 was due to go into effect halfway through 1965. In 1965, the Association of Dutch Municipalities, instigated in 1921 to represent the interests of its members at a central government level, produced its model construction ordinance with the aim of establishing nationally acceptable minimum standards for housing and other buildings. The 1965 model was accepted by local municipalities and the Dutch government alike, and became the norm for state-subsidized housing.[58] The specifications were expressed as far as possible in functional terms, and deviated from the former common practice to draw up prescriptive requirements and descriptions. The model aimed at improving legal protection for parties in the construction sector through uniformity of local bylaws. The model was not mandatory but was generally adopted by the municipalities as a municipal construction bylaw.[59] Nevertheless, as the model allowed the municipalities to grant exemption from requirements and add further requirements of their own, each municipality was more or less free to draw up its own local construction bylaw. To a certain degree this happened and by so stood once more in the way of introducing uniformity into the municipal construction bylaws.[60]

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56) D.H.J. Van der Woude, Bouwnijverheid § 1 (Thieme Meulenhoff 1997).

57) *Supra* note 38.

58) *Supra* note 38.

59) Bert Niemeijer, *Urban Land-Use and Building Control in The Netherlands: Flexible Decisions in a Rigid System*, 11 Law & Policy 121(1989); Thijssen, Journal of Housing and the Built Environment (1991).

60) Nicolaas Petrus Maria Scholten, Technische en juridische grondslagen van de

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In the Incrementalists' terminology we witness again a period of layering: the Housing Act is thickened with more rules being added to it. Especially the move towards a uniform and national set of construction regulations may be considered a continuation of the diminishing of municipal power by the Dutch government. Yet, municipalities did not give up their power that easily, and through their representative body achieved to add their own preferred regulatory requirements to Dutch construction regulation. Later in this period a situation of conversion can be identified: where the Housing Act originally was implemented to improve the quality of housing, it now becomes an instrument to protect the different parties in the industry from "random" behavior by municipalities. This conversion may be considered to have started by layering, and reflects earlier discussed patterns or sequences of mechanisms of incremental institutional change in the literature. Intriguingly, and as an aside, where World War II is often considered the trigger for rapid policy change under a punctuated equilibrium model, looking at the example of Dutch construction policy through a historical institutionalist's lens tells a different story. Although World War II undeniably has had a major impact on the development of this policy, it cannot be considered to have changed the direction or path of development all too much. It may however have sped up the Dutch government's attempts to diminish municipal autonomy.

D. 1982 – 2003: nationwide uniformity of construction regulation

The differences amongst municipal construction bylaws resulted in inequality of justice between citizens and firms in different municipalities. That is, a similar design for a building meeting national construction regulations could be accepted in one city, but not the other due to differences in local bylaws. The Dutch Constitution does not allow for such inequality. Furthermore, in the 1980s, the Europeanization of Europe's member states becomes a fact. Treaties amongst member states aim at preventing inequality of justice. Given the fragmented construction bylaws of Dutch municipalities, inequality of justice seemed inevitable for foreign construction organizations that wish to operate in The Netherlands. The Association of Dutch Municipalities again took the initiative to come to further uniformity of construction regulation in the Netherlands. It requested a revision of construction policy by claiming that the quality of housing and construction is a public good that has to be

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TECHNISCHE BOUWREGELGEVING. WONINGWET EN BOUWBESLUIT (TNO Bouw 2001).

protected by the national government. The Dutch Ministry of Housing, Urban Planning and the Environment took up this request,[61] but did so indirectly.

In 1982, specific goals were defined in the national government's Coalition Agreement seeking to simplify and reduce regulations across a range of sectors. The goals that were set in this Coalition Agreement laid the foundation for the so-called MDW operation (*Marktwerking, Deregulering en Wetgeving*, which translates as: market forces, deregulation and law), which involved the modernization of legislation and regulations from 1994 to 2003. The aims of this operation were to lower the costs for businesses and members of the public, to create more scope for market forces, and to improve the quality of legislation. These goals are fully in line with and inspired by international trends towards privatization and new public management that became *en vogue* in the 1980s.[62] With regards to construction policy, the Coalition Agreement explicitly stated that superfluous rules and regulations should be scrapped, particularly with regard to the technical aspects of housing; and, that the construction regulations themselves had to become more uniform.[63]

In mid-1983, an action plan (*Actieprogramma Deregulering*) was submitted to the House of Representatives, which marked the start of deregulation of construction regulation. It was hoped that deregulation would ultimately increase freedom, improve legal security and stimulate equality of status for members of the public, as well as ease the burden on businesses and government. The action plan also described how the government's proposals for improvement could be incorporated in a Building Decree, a set of uniform construction regulations, which would apply throughout the Netherlands. The aim of the Building Decree was to ensure unity and transparency in building regulations.[64] In the same period a policy document on the future of public housing was issued by the Ministry of Housing, Urban Planning and the Environment: 'Public Housing in the 1990s' (*Volkshuisvesting in de jaren '90*). This policy document marked the end of an era of housing policy.[65] Governmental involvement in housing through construction regulation would from here on focus

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61) *Supra* note 56.

62) Christopher Hood, *The "new public management" in the 1980s: Variations on a theme*, 20 ACCOUNTING, ORGANIZATIONS AND SOCIETY 93 (1995); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR (Addison-Wesley Publishers 1992).

63) TWEEDE KAMER DER STATEN GENERAAL, ACTIEPROGRAMMA DEREGULERING (WONING) BOUWVOORSCHRIFTEN 17913, NO. 7 (Sdu Uitgevers 1983).

64) P.J.J. VAN BUUREN et al., HOOFDLIJNEN RUIMTELIJK BESTUURSRECHT. ZESDE DRUK (Kluwer 2009).

65) *Supra* note 38.

on quality only, and no longer on quantity.

The Building Decree was implemented in 1992 and set out minimum standards for intended and existing constructions. Standards were drawn up in performance based terms, as it was hoped that this would improve innovation in the construction sector, following another international trend—that of performance based regulation—that became *en vogue* in the 1980s.[66] The Building Decree was drawn up in a strict systemized manner. The introduction of the Building Decree in 1992 was accompanied by an amendment to the Housing Act. Through this amendment the Building Decree became mandatory and de facto replaced the construction regulations as set in previously discussed model building ordinance.

On paper, things now looked good: a uniform set of construction regulations was in force. General practice, however, proved to be more obstinate. An evaluation of the amended Housing Act carried out in the mid-1990s[67] revealed that the construction sector favored the systematic approach of the Building Decree and endorsed the principle of performance-based requirements. However, it also indicated that the envisaged simplicity was being obstructed by a complex reference structure pertaining to norms and Ministerial arrangements, and by the legalese in which the regulations were couched. The evaluation of the Building Decree triggered another revision of the Housing Act. The new version came into effect along with a converted Building Decree in 2003. This new Building Decree tried to solve the former complex reference system by introducing so called "table legislation"—a set of tables that determine what construction regulation apply to which parts of intended or existing construction work.

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Again this period is characterized by layering, in particular with the addition of the Building Decree to the Housing Act. In doing so, the Dutch government strengthened the protections provided by the Housing Act to different parties in the construction sector. Furthermore, it followed the earlier path: limiting municipal autonomy in construction policy. Interestingly, in this period municipalities appear to have had little chance to (successfully) use veto powers as they did in the previous period. We also see a move away from government involvement in social housing: the Housing Act remained in place, but was increasingly used for regulating construction quality, reverting towards the intentions of 1901. This may again be

66) Brian Meacham et al., *Performance-based building regulation: current situation and future needs*, 33 BUILDING RESEARCH & INFORMATION 91 (2005).

67) VROM, EVALUATIE VAN DE HERZIENE WONINGWET (Sdu Uitgevers 1996).

framed as conversion started by layering. Besides, the active move away from stipulating public housing quality may be considered an example of exhaustion: with construction regulation becoming more and more uniform for all construction work in the Netherlands, there is lesser need for a particular focus on regulating social housing quality by the Dutch government.

E. 2003 – 2015: Uniform regulation, different enforcement practices

As highlighted before, on paper things now looked good. But then, on April 24, 2003, an incident throws a spanner in the works: a balcony snaps off a recently occupied condominium building, claiming two lives. The incident attracts vast political and media attention. Yet, the incident does not stand by itself, and the media and policy attention reflects the attention given to a fire in a pub on New Year's Eve 2000, claiming fourteen lives and leaving many patrons, mostly teenagers, maimed for life.[68] Even more, looking back at construction related incidents in the Netherlands a pattern is traced, starting in the late 1990s with the collapse of a parking deck on top of a conference centre in Tiel, an average sized Dutch town. According to different inquiries,[69] all incidents share a similar cause: insufficient enforcement of construction regulation by local construction authorities.

These incidents and inquiries support the next logical step in the evolution of the Dutch construction regulation: the focus of attention shifts from uniformity of construction regulation to the enforcement of these regulations – the final bastion of municipal autonomy. Already in 2000, following on from the pub fire, the Ministry of Housing, Spatial Planning and the Environment formally addresses the lack of adequate enforcement of construction regulation by local construction authorities.[70] In collaboration with the Association of Dutch Municipalities, a guidebook is developed to support municipalities in improving their construction control departments. In parallel, the Association of Dutch Municipalities starts an "Action

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68) For an extensive discussion of this incident, *see* Van der Heijden, INTERNATIONAL POLITICAL SCIENCE REVIEW (2013).

69) COMMISSIE ALDERS, EINDRAPPORT CAFÉBRAND NIEUWJAARSNACHT (Phoenix & den Oudsten. 2001); COMMISSIE OOSTING, PUBLIEKSUITGAVE EINDRAPPORT (PHOENIX & DEN OUDSTEN. 2001); OVV, BRAND CELLENCOMPLEX SCHIPHOL-OOST EINDRAPPORT VAN HET ONDERZOEK NAAR DE BRAND IN HET DETENTIE - EN UITZETCENTRUM SCHIPHOL-OOST IN DE NACHT VAN 26 OP 27 OKTOBER 2005(Onderzoeksraad voor Veiligheid. 2006); VROM, Patio Sevilla. Onderzoek naar het instorten van balkons, Ceramique blok 29 (2003).

70) Tweede Kamer der Staten Generaal, nota Mensen, Wensen, Wonen, 27 559, nr. 2 (Sdu Uitgevers 2000).

Program Construction Regulation." In 2003 the Ministry once more proposes an amendment of the Housing Act, specifically aiming at improving the enforceability and enforcement of construction regulations.[71] Three major changes are proposed: construction regulation should become easier to understand; the Housing Act should be aligned with Dutch Administrative Law; and, more instruments should be introduced for regulatory enforcement.

Dutch municipal construction authorities do not take lightly the acquisitions made from the inquiries. In the early 2000s these authorities had organized themselves in the Dutch Association of Construction Authorities. In 2003 this association made known that municipal construction authorities were unable to fully monitor compliance to construction regulation: "100% supervision is beyond our capability!" They exclaimed.[72] Staffing is found to be one of the major problems: municipal construction authorities by and large lack staff, both qualitative and quantitative, to deal with all work provided. A second problem is found in the differences in approaches toward control tasks among municipalities.[73] Notably, about a year later, the Minister of Housing, Urban Planning and the Environment, politically responsible for the enforcement of construction regulation, echoes the claim made by the Association in a speech to the House of Representatives: "It is a misconception to assume that an [inspected construction plan or construction work] fully complies with construction regulation."[74]

This claim seems to provide political support for the state of affairs at municipal construction authorities. These authorities however do take action to improve the state of affairs. In 2003 the Association starts a project aiming at bringing more uniformity in inspection and enforcement practice by municipal construction authorities. They develop a protocol that introduces structured work processes and an inspection regime based on risk-assessment—in practice this means that more risky construction faces a more rigid inspection regime than less risky construction. A nationwide minimum level of enforcement is agreed upon by the members of the Association as being sufficient to enforce construction regulation on a level that should provide a reasonable level of safety. Currently a majority of Dutch

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71) TWEEDE KAMER DER STATEN GENERAAL, WIJZIGING VAN DE WONINGWET (VERBETERING HANDHAAFBAARHEID EN HANDHAVING BOUWREGELGEVING), VERGADERJAAR 2003-2004, 29392, NO. 6 (Sdu Uitgevers 2004).

72) VBWTN, NIEUWSBRIEF CKB. PROJECT COLLECTIEVE KWALITEITSNORMERING BOUWVERGUNNINGEN. NO. 3 (Vereniging Bouw-en Woningtoezicht Nederland 2003).

73) Jeroen Van der Heijden et al., *Problems in enforcing Dutch building regulations*, 24 STRUCTURAL SURVEY 319 (2007).

74) *Supra* note 71, at 7-8 (my translation).

municipalities applies the protocol. In practice, however, this is a formalization of a working method that has been the state of affairs in many Dutch municipal building control authorities for many years: first focus on construction work that poses the highest risk, and, when resources allow, focus on construction work that poses less risks. In the 1980/90s, for example, it became general practice for Dutch municipal building authorities to keep "black books" of suspect builders and designers. Work from these actors would face a more stringent enforcement process, than work from builders and designers with a good reputation. This risk-based thinking and practice may be considered the frontrunner of the later resulted in the risk-based enforcement protocol.[75]

Interestingly, the Minister of Housing, Urban Planning and the Environment considers this national minimum level as "adequate," in that municipalities that meet this level fulfil their duty to provide for the enforcement of construction regulation as stipulated in the Housing Act.[76] In fact this implies that after years of struggling and muddling through, the practice of what was considered as insufficient regulatory enforcement was formalized as "adequate practice." The difference with the former state of affairs is that enforcement practice is now structured by protocols—that is, in those municipal construction authorities that follow the protocol. Further, as of 2009 the Dutch government and the Association of Construction Authorities have been closely collaborating in improving the risk-based protocol in line with ongoing changes in Dutch construction policy. It may be concluded that where the Dutch government and the Association were slightly hostile towards each other in the early 2000s, they now consider each other as valuable partners in further developing construction regulation in the Netherlands that ensures national uniformity but keeps in mind the local possibilities and constraints faced by municipalities in implementing construction policy. Even more, in doing so they have achieved to bring "3,000 rules back to 100 points of inspection."[77]

In parallel with these developments, the Ministry of Housing, Urban Planning and the Environment together with the Ministry of Finance began to explore the possibilities for an alternative approach to construction regulation in the early 2000s. An independent Committee, chaired by a former Minister of Housing, Urban Planning and the Environment, was asked by the Ministries to explore alternatives for construction regulation enforcement in the Netherlands. In 2008, the Committee

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75) Jeroen Van der Heijden & Jitske De Jong, *Towards a better understanding of building regulation*, 36 Environment and planning B, Planning & Design (2009).

76) Jeroen Van der Heijden, De voor-en nadelen van privatisering van het bouwtoezicht (Instituut voor Bouwrecht 2009).

77) ELSINK, N. 2010. Integraal Toezichtprotocol. *HandHaving,* 3**,** at 32.

issued a ground-breaking report, with the title "Private where possible, public where necessary."[78] This report suggests various alternatives, including the possibility to include private certified inspectors as parties for the enforcement of public construction regulation – this follows enforcement regimes of private inspectors or private certifiers for the enforcement of construction regulation that have been in force around the globe for some decades now.[79] This particular idea for privatized enforcement lands well with the construction sector and the then Minister of Housing, Urban Planning and the Environment, but not with the Association of Construction Authorities.

What follows is a seven-year battle between proponents and opponents of privatized enforcement, with the former highlighting international positive experiences and the latter highlighting international negative experiences. Proponents highlight that inspection processing times may go down, simply because there will be more inspectors, and that inspection quality may go up because private inspectors have the opportunity to specialize in a specific type of construction work. Opponents highlight that public accountability may be at risk when private inspectors are de facto hired by the individuals and organizations whose work they inspect, and they warn that a system of private inspectors may put the financial position of municipal building control authorities at risk as they will lose income and thus may have to fire large numbers of their staff. In response the Ministry of Housing, Urban Planning and the Environment carries out pilot studies to assess whether the opportunities and risk do, indeed, materialize as expected. These pilots run from 2008 to 2011. The Ministry finds no reason to consider that private construction regulation enforcement will result in public accountability shortfalls in the Netherlands. Still, it takes another two years for the then responsible Minister to propose an amendment of construction legislation in 2013, and yet another three years for the Parliament to accept this amendment or turn it down in 2016 – at the time of writing this article this decision is still in the air.[80]

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78) COMMISSIE DEKKER, PRIVAAT WAT KAN, PUBLIEK WAT MOET (Dutch Ministry of Housing, Spatial Planning and the Environment 2008).

79) JEROEN VAN DER HEIJDEN, BUILDING REGULATORY ENFORCEMENT REGIMES. COMPARATIVE ANALYSIS OF PRIVATE SECTOR INVOLVEMENT IN THE ENFORCEMENT OF PUBLIC BUILDING REGULATIONS (IOS Press 2009).

80) And at the same time we see a global explosion of building energy and environment certification, an approach to building regulation and regulatory enforcement that is often fully driven by private sector actors, that started in the early 1990s, *see* Jeroen Van der Heijden, *On the potential of voluntary environmental programmes for the built environment: A critical analysis of LEED*, 30 JOURNAL OF HOUSING AND THE BUILT ENVIRONMENT (2015).

Again this period is characterized by layering. The amendment of the Building Decree in 2003 brings structure into the 1992 version, and a number of additional rules. What is more intriguing here is that the balcony incident is by no means the trigger, or puncture, that causes the implementation of the radical 2003 amendments of the Housing Act and the Building Decree. Furthermore, the shifting focus from standardizing construction regulations to standardizing enforcement practice fits the trend towards decreasing municipal autonomy and protecting different parties in the construction sector, which started with the very introduction of the Housing Act in 1901. That is, to lower the discretionary space for municipalities. Besides this ongoing trend, this period also provides an example of drift: the introduction of the Association of Construction Authority's protocol erodes the Housing Act may be considered an active use of the Association's veto powers, and a filling in of the discretionary space left. It is now formally agreed upon that construction regulation cannot be fully enforced, which degrades the Housing Act partly to symbolical regulation. Note, this could also be explained as an example of exhaustion, with the existing practice of municipalities undermining construction policy. In addition, the reduction of the institutional setting from "3,000 rules back to 100 points of inspection" could be presented as an example of institutional exhaustion. The introduction of private construction regulation enforcers is, as it looks now, another example of layering: a new type of actors will be added to the existing institutional setting.

Ⅴ. Discussion and conclusions

This article discussed a much debated example of proposed legal change—the privatizsation of building code enforcement in the Netherlands. When lookinged at the example by reviewing the more traditional doctrinal legal literature from the Netherlands, it was concluded that particularly legal scholars are critical to the limited responsibility of municipal building control authorities for assessing compliance with Dutch building codes. A series of fatal construction related incidents fuelled their critique, and increased their calls for a change of the system of building control in the Netherlands. Ultimately the responsible Minister proposes to change the system in 2010. This could be evaluated as a big win for those legal scholars who have been critical towards the system for such a long time.

Yet, when looking at the same example through the lens provided by the Incrementalists a different narrative unfolded. That is, it may be argued that, since the introduction of the Housing Act in 1901, the national government has aimed to reduce local governments' autonomy and powers in terms of construction

regulation. First, it added layer on layer of amendments to the Housing Act, paving the way for uniform construction regulation in the Netherlands. Then, it began a process to take away local governments' final bastion of autonomy in the construction regulatory framework: the enforcement of construction regulations. Throughout the period, different agents used their powers either to transform construction policy (the national government mostly), to prevent it or bend it for their own ends (the Association of Dutch Municipalities and the Association of Construction Authorities). In applying the Incrementalists' theorizing it could even be argued that the various fatal incidents have had limited or no impact on the Dutch government's move towards reducing local governments' autonomy and powers: that is, the narrative indicated that the proposed introduction of private building control was a result of incremental policy changes along a more or less fixed path. In this narrative legal scholars play a very minor role.

Combined, the narratives give a much fuller understanding of the example of proposed legal change in the Netherlands. Of course, it could be questioned whether my lengthy discussion has gone too much into details and has looked too far back in time. But it has helped to understand the broader contextual conditions and motivations that explain the proposed legal change—conditions and motivations that remained out of sight when solely relying on more traditional doctrinal legal literature. These are, for example, different from contextual conditions and motivations to introduce private building control in Canada in the 1980s and in Australia in the 1990s—a lack of capacity and an ongoing deregulation agenda.[81] And such differences may explain the ongoing critique, particularly from municipal building control authorities in the Netherlands, to the proposed change towards private building control. For comparative legal scholarship such insights are essential as they may help to explain why a specific legal setting may work well in one context and not in another. It is, in my opinion, through comparative studies and by being open to insights from other disciplines that we will create and expand knowledge about what types and forms of legislation are promising, in what context and why, and which are less promising.

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81) Jeroen Van der Heijden, *Interacting state and non-state actors in hybrid settings of public service delivery*, ADMINISTRATION & SOCIETY 99-121(2015).

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