(Re)defining conflicts: democratic legitimacy in socially sensitive court cases

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ARTICLE

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ABSTRACT

Socially sensitive court cases are often discussed within the framework of democratic legitimacy. According to critics, problems of democratic legitimacy would not only manifest themselves empirically (a lack of societal acceptance), but also normatively (a lack of justification of political power). Against the background of citizens and interest groups aiming to transform a social conflict into a legal one that is suitable for a criminal trial, this paper argues that a third conception of legitimacy is needed: both the common empirical focus on perceived legitimacy, as well as the pure normative focus on objective qualities of powerholders obscure the *social* dynamics of powerholders making claims to legitimacy and their audiences judging these claims. Drawing on recent theoretical work on legitimacy, this paper argues that *democratic* legitimacy neither resides in individuals' minds nor in objective qualities of powerholders. Instead, it will always need to be constructed in a constant dialogue between multiple audiences, who express their problems and conflicts, and powerholders that respond to them within the normative frameworks in which they operate. This dialogic approach to legitimacy thus implies conducting both empirical and normative research. After empirically studying the social practices of claims-making, dialogue and judgment through a media analysis, this paper turns to democratic theory in order to spark our institutional imagination on how to make the responses of courts more democratic, while still accounting for the normative limits in which they operate.

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1. INTRODUCTION

Many contemporary political theorists have started their critical evaluations of our current political landscape with a diagnosis of the 'crisis of democracy'.[1] As society has become more diverse, there seems to be a growing distrust in the very possibility of the institutionalization of social conflicts through parliamentary debate.[2] This lack of responsiveness might cause citizens to turn to courts in order to find an alternative outlet for their social dissatisfaction. Although general trust in the Dutch judicial system has always been relatively high, socially sensitive court cases inevitably cause a lot of controversy.[3] To some citizens, relying on courts might be a solution to a perceived democratic deficit, whereas for others this only gives rise to new problems of democratic legitimacy. According to these critics, problems of democratic legitimacy in socially sensitive court cases do not only manifest themselves empirically (a lack of societal acceptance), but also normatively (a lack of justification of political power).[4] Unelected judges are accused of making political choices without a clear basis in the law, so that these conflicts should be left to parliamentary debate instead.

As a starting point, this debate does not seem to benefit much from merely accusing the judiciary of 'judicial over-reaching' or 'activism', and thus of being 'anti-democratic'.[5] In reality, judges are simply confronted with these cases and cannot refrain from their ruling by referring to objectively defined normative principles such as the separation of powers. In this contribution, I therefore aim to conceptualize and research democratic legitimacy from a more bottom-up approach, thereby taking the societal context of these court cases into account. Both the common empirical focus on perceived legitimacy, as well as the pure normative focus on objective qualities of powerholders thus fall short, as the *social* dynamics of powerholders making claims to legitimacy and their audiences judging these claims are kept out of sight. Nevertheless, the normative framework in which courts are operating will indeed limit their ability to respond to all the conflicts that are being brought before them. Drawing on recent theoretical work on legitimacy, I will therefore argue that socially sensitive court cases should be understood and evaluated according to a third conception of legitimacy that is neither purely normative, nor purely empirical.[6] Instead, *democratic* legitimacy will always need to be constructed in a constant dialogue between multiple audiences, who express their problems and conflicts, and powerholders who respond to them within the normative frameworks in which they operate.

In order to illustrate the need for this third understanding of legitimacy, this article focuses on a specific procedure in the Dutch criminal justice system: the 'Article 12 procedure'. Article 12 of the Code of Criminal Procedure (CCP) allows citizens to complain about non-prosecution and is therefore an important correction mechanism for the monopoly position of the Dutch Public Prosecution Service (PPS). Article 12 is mostly used by citizens whose conflicts do not transcend their particular interests. One might think of a complaint after the non-prosecution of a simple theft or insult by one's neighbour. However, the procedure has also been instigated in more socially sensitive cases that do transcend complainants' interests and that of the alleged defendant. Two well-known examples are the case against the Dutch politician Geert Wilders because of his anti-Islam statements and the case against former ING CEO Ralph Hamers who allegedly dismissed warnings about money laundering. These legal conflicts cannot be completely stripped of their underlying social conflicts. Whereas complainants are in favour of a criminal trial, other citizens and powerholders might try to delegitimize the role of courts

1 See eg Donatella Della Porta, *Can Democracy Be Saved?* (Polity Press 2013); Pierre Rosanvallon, *Counter-Democracy. Politics in an Age of Distrust* (Cambridge University Press 2008).

2 As for the Netherlands, see, 'Enquete, vertrouwen in de Nederlandse politiek is enorm laag, NOS 20 September 2022, <https://nos.nl/collectie/13915/artikel/2445243-enquete-vertrouwen-in-de-politiek-is-enorm-laag> accessed 16 November 2022.

3 As could be illustrated by the controversy around the case *Urgenda Foundation v State of the Netherlands*, ECLI:NL:HR:2019:2006. See also S Roy, 'Urgenda II and its Discontents' (2019) 13(2) Carbon & Climate Law Review 130–141.

4 On legitimacy as an empirical and normative concept, see W. Hinsch, 'Justice, legitimacy, and constitutional rights' (2010) 13 Critical Review of International Social and Political Philosophy 39–42.

5 See e.g Jurgen de Poorter, 'Is Nederland verworden tot een dikastocratie? Over rechterlijke rechtsvorming en strategisch procederende belangenorganisaties' (2020) 49 NTB 105-113.

6 Anthony Bottoms & Justice Tankebe, 'Beyond procedural justice: a dialogic approach to legitimacy in criminal justice' (2012) 102 Journal of Criminal Law and Criminology 119–170.

by arguing that a criminal trial brings about negative societal side effects, such as a politicized judiciary or unrest in financial markets.

Such legitimacy problems should be made visible and understood properly before courts can provide normative answers to them. The remainder of this article therefore proceeds as follows. Section 2 elaborates on the Article 12 procedure and argues that commonly used empirical and normative conceptions of legitimacy are too reductive to understand and normatively respond to the legitimacy problems to which socially sensitive Article 12 cases give rise. Alternatively, I consider the 'dialogic approach' to be a more fruitful conceptualization, as it is able to account for both the social and the political dimension of legitimacy, as well as the connection between the two. In Section 3, I propose to empirically study legitimacy as dialogue by researching the social practices of claims-making, dialogue and judgment through a media analysis. Section 4 illustrates the empirical potential of the dialogic approach by presenting the findings of this media analysis of four socially sensitive Article 12 cases. These empirical results show that the conflicts on which courts rule are discussed within competing interpretative frameworks which affect the assigned responsibility of courts. Only with a better understanding of these empirical legitimacy problems might we try to think about normative responses to them. Section 5 therefore turns to democratic theory and explores the normative potential of legitimacy as dialogue: to what extent could it align our conception of legitimacy with the ideals of democracy? And more concretely, what kind of interpretative frameworks, as found in the conducted media analysis, should be adopted by courts in order to contribute to these democratic ideals? Section 6 discusses provisional conclusions and makes recommendations for further research.

2. CRIMINAL LAW AND LEGITIMACY: THE NEED FOR A DIALOGIC APPROACH

The modern Dutch criminal justice system has a rather professional and autonomous tradition, which can be illustrated by the absence of private prosecution. Since criminal law is a form of public law and thus gives the state the power to unilaterally interfere in the intersubjective relationships in society, the legislature decided that the supposedly neutral Public Prosecution Service (PPS) would be best equipped to decide on the question of the public interest.[7] Victims and interest groups, on the contrary, would only be concerned with their own private interests and one-sided goals. Still, the legislature admitted that a critical check by an independent judge was needed and, through the Article 12 procedure, citizens were allowed to complain about the decision not to prosecute. In order to do this successfully, three criteria need to be met. First, complainants have to be directly interested parties. These are mostly citizens who consider themselves victims, but also interest groups that specifically aim to protect the interests that would be affected by the non-prosecution. In any case, complainants need to prove that the non-prosecution affects their particular interests, so that Article 12 CCP does not provide a general right to complain about the PPS's attitude regarding investigating and prosecuting a certain case. The second and third requirements form the feasibility and the public interest of the prosecution. Not only did the legislature aim to avoid alleged defendants ending up in an invasive criminal trial without enough evidence or a clear basis in the Dutch Criminal Code, the principle of opportunity also requires the prosecution to be in the public interest. Contrary to the principle of legality – a legal basis is a necessary and sufficient condition for prosecution – Dutch citizens who aim to successfully instigate an Article 12 procedure need to argue that this prosecution brings about positive effects for society. Since laws often need to be interpreted and the public interest has no fixed meaning, Article 12 provides an important check on the PPS's monopoly position and discretionary power. That applies even more as the second corrective – the Minister of Justice and Security who could order a prosecution in a specific case – is not without controversy.[8]

As mentioned in the Introduction, citizens who instigate Article 12 cases can be divided into two general categories: (1) citizens who have a private interest in the prosecution and (2)

7 Explanatory memorandum, (1913–14) 286, nr. 3, 55.

8 Jan Crijns et al, 'Het OM uit positie? De institutionele positionering van het Openbaar Ministerie' (2022) 2 Boom Strafblad 45–54.

citizens or interest groups who try to transform a social conflict into a legal one. In the latter case, the underlying social conflict causes the prosecution to affect the interests of other members of society as well. Although citizens can fit into both categories, each brings about different empirical and normative legitimacy problems, both requiring distinctive methods and answers. The first category of Article 12 cases can be studied within the well-known procedural justice paradigm. Initially advocated by Thibaut and Walker in 1975, it has now generally been agreed upon that perceived legitimacy is greatly dependent on a fair procedure.[9] Later on, psychological studies not only claimed that the procedure was a relevant factor next to the eventual judgment, but also that procedural fairness was even more important than the perceived fairness of outcomes.[10] Regarding citizens who start an Article 12 procedure in their private interest, a qualitative study has already been conducted and indeed has shown that these citizens have an interest to 'feel heard'.[11] Similar studies on the experiences of victims in the area of criminal law have been criticized on normative grounds: when acted upon, it might endanger the rights of defendants and neglect the normative boundaries in which courts operate.[12]

Although it seems as if empirical and normative legitimacy scholars will always talk past each other, more recent contributions on legitimacy have highlighted the limitations of these purely normative and empirical accounts: both insufficiently acknowledge the political and dynamic character of legitimacy.[13] In short, these authors argue, legitimacy is neither located in fixed, rationally defined qualities of powerholders (as normative accounts argue) nor in the subjective beliefs of audiences (as argued by empirical accounts), but instead in the *public realm* where powerholders' legitimacy claims are continually questioned by citizens. In turn, these responses affect powerholders' legitimacy claims after which the sequence starts again. This 'dialogic approach' was first conceived by Bottoms and Tankebe who recasted the concept of legitimacy by formulating it as a 'perpetual discussion' between 'powerholders' and 'audiences'.[14] Legitimacy can therefore never be fully achieved and will always need to be (re) constructed in a ceaseless interactive process between powerholders and their audiences. This also implies that these scholars aim to bridge the gap between empirical and normative research: the normative responses of powerholders will always be informed by, but can never be fully consonant with, the 'real' concerns and conflicts of their audiences.

The second category of Article 12 cases – what I call socially sensitive cases – strengthen the argument that commonly used empirical and normative conceptions of legitimacy are too reductive to understand and normatively respond to the legitimacy problems to which these cases give rise. The Article 12 procedure against the PPS in the case against Geert Wilders clearly illustrated the need for such a third conception of legitimacy. At the time, there was a lively public debate about the Dutch multiculturalist society, and many citizens argued that politicians closed their eyes to the new challenges which this society faced. As a consequence, Geert Wilders' Freedom Party started gaining more and more followers. However, after the making of the movie Fitna and after repeatedly uttered statements about Muslims and Islam,[15] other citizens found the time had come that Wilders' freedom of speech should be limited by a criminal judge. After the PPS decided that this prosecution would not be feasible, these citizens instigated an Article 12 procedure. In this procedure, the court was faced with the

9 John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (LEA 1975).

10 EA Lind and TR Tyler, *The social psychology of procedural justice* (Plenum 1988).

11 L van Lent, M Boone and K van den Bos, Klachten tegen niet-vervolging (artikel 12 Sv-procedure). Doorlooptijden, instroom, verwachtingen van klagers en het belang van procedurele rechtvaardigheid (WODC 2016) <www.wodc.nl> accessed 16 November 2022.

12 Vincent Geeraets and Wouter Veraart, 'Over verplichte excuses en spreekrecht' (2017) 2 Netherlands Journal of Legal Philosophy 137–159.

13 See eg Thomas Fossen, 'Taking stances, contesting commitments: political legitimacy and the pragmatic turn' (2013) 21 Journal of Political Philosophy 426–450; Justice Tankebe and Alison Liebling, 'Legitimacy and criminal justice: an introduction' in A Liebling (ed), *Legitimacy and Criminal Justice: An International Exploration* (OUP 2013).

14 Bottoms & Tankebe (n 6).

15 Among which 'Demographics is the biggest problem. I am talking about what enters the Netherlands and what reproduces itself' (my translation). See 'De paus heeft volkomen gelijk', *Volkskrant* (The Hague, 7 October 2006), <https://www.volkskrant.nl/nieuws-achtergrond/de-paus-heeft-volkomen-gelijk~bc5024962/> accessed 16 November 2022.

question whether the prosecution, on the basis of the stipulations of hate speech and group insult, would be feasible and in the public interest. However, to many citizens, the conflict and the assigned role of courts could not be stripped of a societal context: this conflict would be about silencing a widespread political opinion, the problems with multiculturalism or ever increasing polarization. And those conflicts, it had been argued, should either be left to politics or to society itself.

Without paying attention to these competing interpretative frameworks, courts would never understand where the empirical legitimacy problems in the Wilders case came from and thus how to normatively respond to them. Purely empirical and normative theories are not very informative in this regard, since they are unable to capture this interplay between the social and the political. Empirical accounts of legitimacy reduce the domain of the social to an aggregation of individuals' opinions or psychological states. This goes for previously mentioned studies on perceived procedural justice, as well as for legitimacy scholars who are more interested in the abstract values which citizens hold when they judge an authority to be legitimate.[16] However, the domain of the social cannot simply be reduced to an aggregation of individuals: citizens do not only hold normative values or their own opinions, but also collectively give meaning to social actions or events. As the Wilders case illustrated, citizens constantly construct new and conflicting interpretative frameworks through which these cases are understood. In this way, they collectively 'construct' the social world.[17] On a political level, courts are then expected to provide a response to the competing interpretations of the conflicts, but can only do so within the normative framework in which they operate. Purely normative conceptions of legitimacy do focus on this political aspect of legitimacy by contrasting an empirical reality with rationally defined principles that should guide the exercise of state power. However, these principles might remain silent. When directly interested parties are declared admissible, the legal criteria of feasibility and the public interest can still be open to interpretation: laws might be multi-interpretable and the public interest of the prosecution can never be unequivocally established in cases of conflicting interests. In such cases, courts might find themselves unable to ultimately ground their legitimacy claim in long established normative principles – such as neutrality or judicial independence – when applying the law.

Socially sensitive court cases therefore leave room for discussion on a social as well as on a political level. This has important implications for our conceptualization of legitimacy: it needs to account for the interplay between the domain of the social and that of the political which are both open to interpretation and disagreement. A promising theoretical attempt to account for this social and political dimension of legitimacy has been made by Loader and Sparks.[18] Although guided by Bottoms and Tankebe's formulation of 'legitimacy as a perpetual discussion' between 'powerholders and audiences', they remind us that dialogues between audiences and powerholder are not always held *in situ*. If the dialogic ideal were merely to be applied to procedures, little could be said about how legitimacy is generated and sustained in cases of *multiple* audiences, who as *citizens* only indirectly experience matters of policing or criminal justice through 'local rumour, or gossip or by means of media representation'.[19] Loader and Sparks therefore invite us to think harder about 'where power is held'; about 'the range of audiences subjected to, or affected by' this power; and about the 'deliberative settings' where 'inclusive dialogues' can be staged.[20]

Loader and Sparks thus aim to align the concept of legitimacy more closely with the ideals of democracy, thereby emphasizing that the problem of multiple audiences always causes legitimacy claims to remain 'unfinished'.[21] Hence, they argue that legitimacy should be conceived of as a dynamic and interactive concept that has more to do with 'change and

16 As for the latter empirical approach, see David Beetham, *The legitimation of power* (Palgrave Macmillan 2013).

17 For a (critical) commentary on social constructivism, see Ian Hacking, *The Social Construction of What?* (Harvard University Press 1999).

18 Ian Loader and Richard Sparks, 'Unfinished business: legitimacy, crime control, and democratic politics' in A Liebling (ed), *Legitimacy and Criminal Justice: An International Exploration* (OUP 2013).

19 ibid 110.

20 ibid 122.

21 ibid 121.

transformation' than with 'order and stability' or 'compliance and obedience', as the static normative and empirical conceptions of legitimacy are often accused of.[22] This argument greatly draws on the work of Rosanvallon, who defines democratic legitimacy as 'an "invisible institution" as well as a "sensitive indicator" of society's political expectations and the response to those expectations'.[23] Legitimacy thus resides in relationships and institutions and can help us to build 'a more democratic and deliberative politics of crime and its regulation'.[24] This conception of democratic legitimacy is still at an early stage and while Loader and Sparks are convinced it will produce 'a formidable as well as an exciting agenda', much more empirical and theoretical work needs to be done.[25]

Among the most useful aspects of Loader and Sparks' suggestions for further research is their follow-up question which arises immediately after defining legitimacy as dialogue: a dialogue between whom, on what terms and in what settings?[26] Drawing on this suggestion, this article aims to make a start studying dialogues through a media analysis (Sections 3 and 4) after which the normative, democratic potential of staging these dialogues in court will be explored (Section 5). When socially sensitive issues are at stake, dialogues and legitimacy claims are not exclusively staged in court, but are also represented, misrepresented and transformed by the media. The social conflicts underlying the legal conflict will produce dialogues and legitimacy claims that are often incommensurable. Especially outside the controlled, institutional settings of the courtroom, there is neither agreement on the terms of the dialogues, nor on the settings where they should be staged. If legitimacy as dialogue wants to account for the interplay between the social and the political, the social practices of claims-making, dialogue and judgment should therefore first be studied empirically, before it can spark our institutional imagination on how to make the responses of courts more democratic, while still accounting for the normative limits in which they operate. In the next Section, I will therefore elaborate on the importance of studying 'competitive framing' or social meaning-making for addressing the question of democratic legitimacy in socially sensitive cases.

3. THEORICAL FRAMEWORK AND METHODOLOGY

3.1 THEORETICAL FRAMEWORK: COMPETITIVE FRAMING

In socially sensitive Article 12 procedures, complainants aim to transform social conflicts into legal ones by the use of 'legal framing'.[27] Through this technique, citizens frame their grievances as a legal conflict, so that this conflict might possibly find its way to a criminal trial. They strategically link the relevant legal concepts together to create legal possibilities which support their cause. In this way, complainants respond to the PPS's initial legitimacy claim which states that this transformative potential should be denied on the basis of the three criteria that should normatively guide the decision to prosecute. However, the interlocutors in the dialogue over social meaning-making are not limited to the complainants and the PPS. It can be in the interest of other members of society to redefine the intended legal conflict, since defining an issue as 'criminal' will not be applauded by everyone. Through 'counter framing', citizens with conflicting interests will try to define the complainants' legal conflict away, and therefore delegitimize it along with their desired solution. They might even change conflicts in order to support their own cause. As a consequence, these dynamics of 'competitive framing' will produce dialogues over multiple interpretations of social reality, along with multiple defined conflicts and solutions.[28]

The present media analysis, therefore, does not aim to make general claims regarding the (psychological) effects of these dynamics on citizens' individual perceptions. Its main empirical

22 Bottoms & Tankebe (n 6) 139.

23 Pierre Rosanvallon, 'The Metamorphosis of Democratic Legitimacy: Impartiality, Reflexivity and Proximity' (2011) 18(2) Constellations 119.

24 Loader and Sparks (n 18) 112.

25 ibid 122.

26 ibid 111.

27 On legal framing, see Gwendolyn Leachman, 'Legal Framing' (2013) 61 Studies in Law, Politics, and Society 25–59.

28 On competitive framing, see D Chong and DN Druckman, 'A theory of framing and opinion formation in competitive elite environments' (2007) 57 Journal of Communication 99–118.

goal is the systematic study of competing dialogues between audiences and powerholders which allows us to better understand the hegemonic struggle over the formation of the conflicts on which courts rule. It does so by drawing on existing framing literature which has shown that politically sensitive issues are commonly debated within five classical frames: a conflict frame, a responsibility frame, a human-interest frame, an economic consequences frame and a morality frame.[29] After a brief analysis of news coverage of four socially sensitive Article 12 cases, it became clear that some frames needed a slight adjustment. All cases had been interpreted through framing strategies that are embedded in the existing framework of criminal law. The methodology had therefore been partly deductive (by using pre-defined frames) and partly inductive (by having a more open view on establishing the frames). The following five frames were deemed suitable for a systematic, empirical analysis of the social practices of claims-making, dialogue and judgment in socially sensitive Article 12 cases.

Conflict frame: this frame emphasizes conflicts between individuals, groups or institutions. It was expected that the underlying social conflict would produce multiple perceived conflicts.

Victim frame: this frame is a slight adjustment to the human-interest frame which brings a human face or an emotional angle to the presented issue. Since criminal law is often associated with victims for whom the Article 12 procedure also provides a last resort, it was expected that this frame would be recognized in the news coverage.

Utility frame: this frame forms an adjustment to the economic consequences frame, so that broader societal consequences of the proceedings and the judicial decision-making would also be taken into account. The principle of opportunity requires the prosecution to be in the interests of society, which could be contested or confirmed by different audiences.

Norm frame: this frame is a variation of the morality frame, so that it also encompasses judicial decision-making. Next to serving the interests of victims and bringing about positive effects in society, criminal law has an important moral and declaratory dimension: it defines a set of public wrongs and holds wrongdoers to account.[30] However, criminal law does not have a monopoly on defining norms and other discourses (eg professional) could be used to delegitimize defining certain conduct as criminal.

Responsibility frame: this frame assigns responsibility to citizens, groups, a sector or the government to resolve a specific issue of conflict.

The primary purpose of the media analysis was therefore to systematically research dialogues between multiple audiences and powerholders which can help us to better understand where the empirical legitimacy problems in socially sensitive Article 12 cases come from. More specifically, I selected four Article 12 cases and researched the dialogues to which these cases gave rise. The case studies therefore focused on two empirical questions: (1) the way in which multiple audiences used framing-strategies to (de)legitimize the transformation from a social to a legal conflict and (2) the way in which multiple powerholders (other than courts) responded to these conflicting political expectations.

3.2 METHODOLOGY

The media analysis proceeded from a thematic analysis of news articles surrounding four socially sensitive cases: the Wilders case, the Martijn case, the Henriquez case and the Libor case.[31] Each case had been accompanied by the media-dynamics of framing and counter framing: complainants' attempt to frame social conflicts as legal ones competed with other rationalities such as politics, morality, disciplinary law or economics which could cause other citizens and powerholders to argue that the conflicts should find an outlet elsewhere.

29 See eg H Semetko and P Valkenburg, 'Framing European Politics: A Content Analysis of Press and Television News' (2000) Journal of Communication 93–109.

30 See RA Duff, *The Realm of Criminal Law* (OUP 2018) 50.

31 On thematic analysis in general, see V Braun and V Clarke, 'Using thematic analysis in psychology' (2006) Qualitative Research in Psychology 77–101. As for the four cases, see respectively Gerechtshof Amsterdam 9 January 2009, ECLI:NL:GHAMS:2009:BH0496; Gerechtshof Leeuwarden 21 November 2011, ECLI:NL:GHLEE:2011:BU4940; Gerechtshof Den Haag 30 March 2017, ECLI:NL:GHDHA:2017:840 and ECLI:NL:GHDHA:2017:841; Gerechtshof Den Haag 19 May 2015, ECLI:NL:GHDHA:2015:1204.

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As illustrated in Section 2, the question whether the politician Geert Wilders should be prosecuted for his anti-Islam statements arose in the midst of an intense public debate about the Dutch multiculturalist society. At the time (2008–2009), appeals to anti-discrimination laws would generally be dismissed by both the political left and right in favour of an almost unlimited freedom of speech. Although Geert Wilders' Freedom Party was not necessarily widely supported because of its substantive ideals, the party did capture the zeitgeist: the era of 'political correctness' would now be over and all matters could and should be subject to political and societal debate.

The social and political context had been quite the opposite in the case of the possible prosecution of the association, Martijn, in 2011. Whereas the societal acceptance of paedophilia and the legalization of sexual relationships between adults and children – the official aim of Martijn – was once labelled the epitome of Dutch tolerance, paedophilia quickly became one of the last few taboos. Hence, the complaint of the parents of an abused child, stating that the perpetrator had received 'tips and tricks' from the association, had been discussed within the broader debate about the proper place of paedophiles in Dutch society.

The Henriquez case concerned the possible prosecution of five police officers who were involved in the fatal arrest of an Aruban citizen, Mitch Henriquez, in 2015. As a visitor at a music festival, Henriquez declared that he carried a weapon while pointing at his crotch, causing him to be arrested and choked to death after he resisted. The official narrative on the website of the Public Prosecution Service stated that Henriquez only lost consciousness whilst being transported to the police station. However, this narrative would quickly be contested by bystanders who filmed the arrest and its aftermath, showing that Henriquez had already become unwell during the arrest. The incident generated significant attention in the media and brought about a lively public discussion about police violence and ethnic profiling. Moreover, riots broke out in the area where the festival took place, as the inhabitants had lived experiences with these matters. After only two police officers were prosecuted, Henriquez' family filed an Article 12 complaint against all five police officers, as well as an aggravated prosecution for the two who had already been prosecuted.

Finally, the Libor case concerned the question of undoing a settlement with the Rabobank after the bank, like many others, had been involved in manipulating the Libor interest rate. The settlement had been questioned by both the general public and parliament, since it contained a clause that individual bankers would not be prosecuted. Instead, Rabobank had promised general improvement, including subjecting some of its employees to disciplinary measures. Legally, the settlement did not imply Rabobank's guilt, which fact had also been explicitly repeated by the bank's CEO. Against the background of the financial crisis in 2008, this case had also been debated within its broader societal and political context: it caused discussions about class justice and the lack of accountability within the financial sector.

The news articles have been gathered from the database NexisUni and concerned articles from the five national newspapers with the highest circulation rates (*Trouw, Volkskrant, NRC Handelsblad*, *Telegraaf* and *Algemeen Dagblad*). Since I intended to research dialogues over the transformative potential of legal framing, the data collection started from the moment that this dialogue took a clear form in the media. In the cases of Wilders, Martijn and Libor, this had been the moment of non-prosecution. In the Henriquez case, however, the starting point had been the incident itself, since from this moment onwards the dynamics of legal framing and counter framing were already omnipresent. In each case, the judicial decision finalized the data collection. Second, after the search terms 'Wilders', 'Libor', 'Pedofielenvereniging Martijn' and 'Henriquez' had been used, it needed to be decided which articles were suitable for further analysis. Since the dialogues over institutionalizing socially sensitive conflicts through a prosecution were my primary interest, I excluded articles that did not make any reference to possible prosecution. For instance, Wilders had often dominated the news with his general activities as a politician, so that out of 1,100 articles, only 56 were suitable for coding. The search term 'Libor' brought up 524 articles out of which 236 could be analysed, since many articles were about new fraudulent practices which were compared with Libor (eg Euribor) and about other banks and legal cases that had been investigated abroad. Not much needed to be filtered out after searching for 'Henriquez' and 'Pedofielenvereniging Martijn': respectively 349 out of 354 and 61 out of 61 articles remained for systematic analysis.

Subsequently, the remaining news articles were perceived through the five frames, which were coded when recognized. Some articles contained multiple framing strategies, which would then all be coded. In addition, I coded who had been framing this conflict (eg the PPS, complainants, the police, politicians, experts or a 'regular' member of society). Since this was all an interpretative process, the articles were coded manually in order to lose as little meaning as possible. Moreover, as these articles only got meaning through their relationships, a qualitative instead of a quantitative approach was used to study the social practices of claims-making, dialogue and judgment. After coding, I analysed how framing strategies were used to define and redefine conflicts and how these framing strategies affected the assigned responsibility of the court as an institution for conflict resolution. Whereas conflict frames, victim frames, norm frames and utility frames could all be used to construct (competing) interpretative frameworks through which the conflicts themselves can be understood, responsibility frames are most directly related to the question of legitimacy. After all, disagreement about the interpretations of the conflicts will inevitably lead to disagreement about their resolution.

4. RESULTS: THE SOCIAL PRACTICES OF CLAIMS-MAKING, DIALOGUE AND JUDGMENT

The findings of the media analysis are presented from a dialogic perspective. Starting from the initial dialogue between the PPS and the complainants, who both used framing techniques in order to justify why conflicts should or should not find an outlet in a criminal trial, I will then set out the responses of other audiences and powerholders (other than the judge) to these competing stances.

4.1 STARTING A DIALOGUE: COMPLAINANTS' RESPONSE TO THE PPS'S LEGITIMACY CLAIM

4.1.1 Frames by the PPS

Although criminal justice actors increasingly aim to be responsive through accommodating the voice of the public, in each case the non-prosecution had been made public in a professional, autonomous way.[32] In three cases, the PPS justified this claim by the infeasibility of a conviction, meaning that the relevant facts did not constitute an offence as stipulated in the Dutch Criminal Code. According to the PPS, Wilders criticized a religion (not its believers) which would be a topic for public debate, the crimes committed by some members of Martijn could not be attributed to the paedophile club itself and only two out of five policemen committed acts that could have directly caused the death of Mitch Henriquez.

Only the settlement with the Rabobank needed further justification through the principle of opportunity, since it was clear that in this case a conviction would be feasible. Rather, the controversy was about the effectiveness and efficiency of the settlement compared with a criminal trial: both a high fine and disciplinary measures had already been imposed and there would have been no added value in prosecuting the bank, since banks themselves cannot be incarcerated. In summary, the PPS did not only frame this conflict as being about norms, as in the other three cases, but also as a matter of utility: taking all positive societal effects of the settlement into account and comparing it with a criminal trial, this settlement would have been an 'appropriate solution' for society.

Next to formally defining the conflicts that were responded to as being about norms and utility, the PPS did make some public statements that would fit within a victim frame. It showed compassion to Henriquez' relatives and, while justifying the non-prosecution of Wilders, it explicitly stated that feelings and emotions of the Muslim community, albeit understandable, could not be a sufficient reason to define certain statements as 'criminal', so that a criminal judge could not be responsible for the resolution of this conflict.

4.1.2 Frames by complainants

The news coverage of all four cases contained interviews with complainants, or their lawyers, which allowed the reader to get a glimpse of their interpretations of the conflicts. Contrary to

32 On legitimacy and public opinion see L Noyon, JW de Keijser and JH Crijns, 'Legitimacy and public opinion: a five-step model' (2020) 16 International Journal of Law in Context 390.

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the PPS, they argued that the criminal court would be the responsible institution for conflict resolution, since they found that other powerholders, whether politicians, the police or the PPS, had not provided a sufficient outlet for these conflicts. More interesting for our purposes is that their positive expectations of the criminal trial diverged and that these expectations, contrary to common assumptions underlying 'penal populism', were not necessarily about harsh punishment.[33]

In legal terms, being a 'directly interested party' is a condition of admissibility for the complaints procedure. However, these legal categories are often detached from citizens' ordinary lives and the interviews showed that, in some way, all complainants used a victim frame to represent themselves. An obvious instance of this victim frame was found in the Henriquez case: Henriquez' family expected the court to bring about 'justice for Mitch', who had been the victim of excessive and pointless police violence. They corrected accusations that he had been under the influence of drugs and spoke about how the event had affected their lives. Next to using a victim frame to express personal suffering, the other three cases showed that it could also be used as a political category. In the Martijn case, complainants argued that their conflict was not just about them and their daughter having been the victims of sexual abuse, but that they instigated the procedure for all children who could possibly be affected by this problem. Although the complainants in the Martijn case limited the group of (possible) victims to children (and their parents), the Libor and Wilders cases illustrated that this victim frame could encompass an even broader political category. In these cases, complainants argued that anyone could have been the victim of the Rabobank's fraudulent practices and Wilders' statements. Complainants in the Libor case argued that not just Rabobank's clients could have paid too much, but that all members of society could still be caught in a financial system in which all necessary stability and trust would by now have faded. Complainants in the Wilders case used a similar argument, stating that not only Muslims, but in fact anyone could have been a victim of Wilders' influence on our social climate. Victim frames were therefore used as an instrument to represent the complainants as directly interested parties, and also as a possible means for identification with them: *they* should be thought of as one of *us*. In other words, the complainants seemed to argue that their conflict with the PPS was, or at least could be, our conflict. Interestingly, contrary to the complainants in the other three cases, some organizations and individuals that asked for the prosecution of Geert Wilders explicitly stated that they did not only want to be perceived as victims, but rather as critical citizens making use of their democratic rights. After all, it was argued, Muslims are too often blamed for their lack of participation in society and lack of respect for its democratic and liberal values.

According to complainants, the conflicts would not only be characterized by (possible) shared suffering brought about by the alleged defendant, they would also be characterized by the violation of shared norms. Complainants found that certain public norms, which they situated in the realm of criminal law, had not been sufficiently confirmed and assigned the responsibility to the court to do so. However, the legal category of feasibility had also been interpreted rather loosely and complainants often spoke about norms broadly understood. For instance, the complainants in the Martijn case argued on moral grounds that such a club, propagating sex with children, cannot and should not be accepted. Next to referring to morality, professional norms also seemed to be confused with those of criminal law. After facing the report of the internal police investigations, in which the behaviour of all five policemen had been judged disproportionate and inept, Henriquez' family proclaimed that by now it was clear that these policemen had acted as one and could therefore all be prosecuted. The report of the financial regulators who had been investigating the Libor case caused the same confusion, since the negligence attributed to the board only related to professional standards. However, the complainants in the Wilders case did make clear reference to the relevant criminal offences and argued that the PPS had unjustifiably dismissed case law of the European Court of Human Rights which could have made the prosecution feasible. In fact, one professor, hired to provide the PPS with legal advice, had advocated this view on the matter, but it was unclear to the complainants why the argument had been dismissed. Moreover, they could not understand how this artificial distinction between a religion and its believers could be justified: was it not people, rather than copies of the Koran, whom Wilders wanted to leave the country?

33 On penal populism, see David Garland, 'What's Wrong with Penal Populism? Politics, the Public, and Criminological Expertise' (2021) 16 Asian Journal of Criminology 257.

Next to this classical function of criminal law to declare and confirm public wrongs and to hold those who violate them to account, complainants used a utility frame to define their conflicts. To them, the criminal trial seemed to be instrumental in achieving certain goals, which exceeded complainants' private interests. Henriquez' nephew, reacting to the demonstrations and riots that broke out after the incident, stated that he also wanted to know why the police had used this much violence. Instead of referring to the traditional function of 'truth-finding' in a criminal trial – determining only those facts that are necessary for a verdict on the defendant's guilt – he told the newspapers he would be unable to rest until he knew exactly what had happened that day and why: was it macho behaviour or racism? Complainants in the Martijn case aimed to open society's eyes to the societal problem of child abuse and the complainants who felt injured by the Libor fraud considered the possible verdict to be instrumental in claiming damages: a verdict of a criminal judge would pave the way to claiming damages in a civil case, eliminating the financial risks of anyone intending to bring such a case. Finally, complainants in the Wilders case mainly emphasized the court's function as a public forum. Responding to the PPS's argument that a criminal trial is ill-suited to raising debates about a religion, they argued that this was not the debate they were after. First, they aimed to underpin their claim that Wilders' hate speech had negatively affected the social climate by providing scientific and anecdotal evidence. Second, they hoped Wilders would use this trial to clarify and nuance his generalized statements about Muslims. Whereas according to the PPS this would all be a matter of public debate, complainants argued that Wilders had never engaged in such a debate. A third expectation was that the procedure would allow Muslims to have a voice in a public debate that until now had been dominated by white elites, and thus it might also foster their integration.

4.2 (RE)DEFINING CONFLICTS: THE PROBLEM OF MULTIPLE AUDIENCES AND MULTIPLE POWERHOLDERS

Although complainants indeed used framing techniques to transform social conflicts into legal ones, these conflicts were never completely stripped of their underlying societal conflicts. Not only did complainants argue that courts should declare them admissible and decide on the correct application of criminal law, they also entrusted courts with the responsibility to bring about certain positive effects for society. After all, courts were considered to contribute to the solution of the societal problem of child abuse (Martijn) and to answer the sensitive question about ethnic profiling (Henriquez). In the other two cases, courts were expected to enable a forum for debate (Wilders) or provide citizens with a ground for claiming damages (Libor). The news coverage surrounding these cases illustrated that the ambiguous character of these conflicts made them vulnerable to counter-framing by other audiences and powerholders which often negatively affected the assigned responsibility of courts to decide on these conflicts.

Indeed, the use of victim frames affected the public perspective on the complainants' claim to represent society, as it brought about a clear division between 'us' and 'them'. In the Martijn case, complainants seemed to have no trouble convincing both other citizens and powerholders of their claim to represent society and particularly its children. By the time complainants instigated the Article 12 procedure, this conflict already had two more possible outlets: through politics (a parliamentary debate and the preparation of a new law) and through the Minister of Justice and Security who had been under political and societal pressure to instruct the PPS to start either a criminal trial or a civil case to ban the association. Although some newspapers did interview members of Martijn and some artists and writers argued that in fact these 'dehumanized' and often 'harassed' members were the actual victims, this could not prevent their exclusion from 'We, the ordinary Dutchmen', as was signed under a citizens' initiative. It took only 15 days until this initiative had received enough signatures to legally force the Dutch parliament to start a debate about the question whether or not to ban the association. In the Henriquez case, the public also sympathized with the complainants, although some used Henriquez' death in order to support their own cause. To the annoyance of Henriquez' family, who did not primarily use this victim frame as a political category, riots broke out and many citizens were already convinced this had been a matter of ethnic profiling. Although citizens were now united in taking sides against the five policemen, both the Mayor of The Hague and various politicians mainly responded to these allegations of ethnic profiling by either denying it or proposing measures to address it. Other citizens argued that this had only

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been one incident and that Henriquez should not have declared that he possessed a weapon. However, complainants argued in response, no appropriate response to this 'incident' had yet been formulated: the five police officers were still at large and would later be guaranteed to keep their jobs.

In these cases, victim frames were used to form shared identities by uniting against a shared 'enemy'. Such formations of shared identities through victim frames seemed to be less successful in the Wilders case. In this case, citizens mocked complainants as 'Don Quixote', instead of defining their conflict as 'a battle', as the Martijn case had been defined. Instead of 'critical democratic citizens' who would stand up for 'our social climate', articles surrounding the Wilders case often stated that these complainants only represented their private interests and that it was not up to the court to respond to these private feelings of being insulted. Moreover, 'as always', Muslims would turn to the government for help, but did not even deserve to be called victims, since their position in society was not that bad. This argument was also used by Muslims who feared for their reputation which, according to them, was finally on its way to being restored. In this case, victim frames delegitimized the transformation of a social to a legal conflict. Although victim frames were barely visible in news coverage surrounding the Libor case, this case also showed that victimhood remains a category to be deserved: experts claimed that individual damages would be negligible and sometimes even non-existent, since the Libor interest rate had been manipulated both up and down.

When the conflict in question had merely been framed as one about norms, judgments on the responsibility of courts to resolve the conflict were relatively stable. Even when the complainants' cause was not explicitly supported, it had generally been accepted that it was the courts' responsibility to clarify whether criminal law could or could not be applied to a conflict. The Wilders case seemed to be the only exception: citizens, politicians and jurists often argued that the sole political character of this conflict would make courts unfit to even make a decision about the applicability of criminal law, let alone to actually apply it in a criminal trial. Although political questions and competing normative discourses, namely moral and professional, were also present in the other three cases, these alternative discourses did not seem to interfere much with the acceptance of the courts' traditional role to resolve conflicts about the interpretation of the law. Both citizens and powerholders supported or at least accepted this role: it would protect values such as legal certainty, judicial independence, equality before the law and transparency.

Legitimacy problems in particular arose when this transformative potential of legal framing had not been accepted. In these newspaper articles, norm frames were absent and utility frames were used to (de)legitimize the courts' responsibility regarding the solution of the conflict. In this regard, each case followed the same pattern. First, after complainants instigated an Article 12 procedure, their conflict was often framed as merely being about a social problem. However, there seemed to be no agreement on the exact nature of this problem: Henriquez' arrest had been interpreted as ethnic profiling or excessive police violence and the Wilders case would concern political correctness, the problems with multiculturalism or ever increasing polarization. Depending on the interpretation of these social problems, it would then be argued that a criminal trial would not solve it. Obviously, the broader the definition of these problems – the Libor fraud had been attributed to problems of capitalism and Henriquez' attitude towards the police would be illustrative of a general crisis of authority – the less likely the criminal trial was considered to be an appropriate solution to them. Subsequently, powerholders and experts proposed more effective measures to resolve the issue (e.g. bodycams to prevent ethnic profiling and police violence or cultural programmes that would intrinsically motivate bankers to comply).

Next to framing the conflicts as being about social problems, both citizens and powerholders had also interpreted them as social conflicts when speaking about relationships between groups which had gone sour. In these articles, for example when referring to the witch-hunt for paedophiles or the polarized debate about our multiculturalist society, it had been argued that criminal trials would make these social conflicts worse: a criminal trial stigmatizes the defendant and those who identify with him as being 'criminal', thereby only promoting division instead of unity. Next to the argument of ineffectiveness or making existing social conflicts or problems worse, politicians and experts objected that these criminal trials would

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only bring about new societal problems and conflicts: police officers would become too careful to guarantee our safety (Henriquez), the judiciary would be politicized and lose its authority (Wilders), and the reputation and trust of the financial sector, barely restored after the crisis in 2008, should not be harmed again, since we could all be affected by it (Libor). The Martijn case was a little different in this regard: only the members, supported by a few writers and experts, argued they were dependent on the association in order to provide an outlet for their feelings. Others would be happy to live without it and – based on some submitted letters – preferably also without its (possible) members. Moreover, only a few medical experts and members of the association problematized the effectiveness of criminal law regarding the solution of the societal problem of child abuse: the club had only around 60 members at the time.

5. NORMATIVE IMPLICATIONS OF LEGITIMACY AS DIALOGUE: COURTS AS A DEMOCRATIC FORUM?

The media dynamics of competitive framing brought about a cacophony of legitimacy claim and response-sequences between multiple audiences and powerholders. Conflicts were defined and interpreted in many ways, causing discussion and confusion as to what conflicts courts would eventually respond to. Whereas complainants aimed to transform social conflicts into legal ones, other citizens either supported them or used the technique of counter-framing to delegitimize the assigned responsibility of courts. In the case of powerholders, this technique had been used to justify their own legitimacy claims. As a result, these conflicts would be about private feelings, social identities, competing norms, social problems, or social conflicts. If we translate these dynamics to judging legitimacy as dialogue, we would need to conclude that these dialogues were not real dialogues: both powerholders and citizens often talked past each other by redefining the conflicts.

One important normative question thus remains: to what extent does the normative framework of Article 12 CCP allow *courts* to democratically respond to these ambiguously defined conflicts? This question requires taking a step back as, like legitimacy, democracy is also considered to be an essentially contested concept. Legal scholars who argue that socially sensitive court cases involve activism or judicial overreaching seem to derive courts' democratic legitimacy from the law. To them, democracy seems to be the exclusive domain of parliament. So far as socially sensitive court cases are concerned, this conception of democracy seems to be too detached from reality: the inactivity of 'ordinary politics' had often been the reason why these cases had been instigated in the first place. As for the Article 12 procedure specifically, it also masks legitimate conflicts that relate to the question where in a democracy political power resides and should reside. It had not been a judge, but the PPS as a powerholder which first applied the criteria of feasibility and the public interest. These criteria cannot always be applied with mere reference to the law. Notwithstanding our competing conceptions of democracy, we could at least agree that no powerholder must remain unchecked. However, when citizens instigate an Article 12 procedure which provides this check, the political decision is shifted to courts. It is therefore also insufficient to argue that these courts should just stage inclusive dialogues in order to align our conception of legitimacy with the ideals of democracy. Courts are not just a forum for participation and contestation, they are also an acting and institutionalizing *power* in the absence of a 'neutral' decision.

Loader and Sparks were not concerned with this problem of courts exercising political power: they wrote more generally about 'a better politics of crime'.[34] Their main focus on treating democracy as 'unfinished' and the potential of the concept of legitimacy to 'interrogate and unsettle existing arrangements of police and penal power' might cause us to lose sight of the fact that courts are more than a forum for contestation and participation, and are in need of democratic legitimation themselves. Interestingly, Loader and Sparks draw their ideas from Rosanvallon whose project is not merely *deconstructive* (allowing for critique), but primarily *re-constructive* (how to democratically institutionalize society's political expectations). For our purposes, elaborating on Rosanvallon's project might therefore be helpful in order to advance our normative understanding of a conception of democratic legitimacy as dialogue that is useful in present, increasingly polarised times.

34 Loader and Sparks (n 18) 120.

To Rosanvallon, modern democracy is inherently dialogic: it is a constant interplay between a fragmented society (the real) and a political community (the symbolic). Like his mentor Lefort, Rosanvallon understands *modern* democracy as the political regime where a society institutes itself.[35] To both, the essence of modernity is the lost fixed order of the social world, meaning that the modern individual has no assigned role or place in society and is now destined to make his or her own choices in life. This historicity has important consequences for the political question on how to collectively organize our society, as it implies the rejection of any natural or supernatural source of legitimacy (eg God, a monarch or natural law). Since modern societies need to compensate for their lack of natural order, mediating institutions will always be needed, so that a symbolic body (the political community) *stands in* for the actual people and their conflicting interests.[36] Mediating institutions could thus never pretend that this symbolic body is consonant with the actual people of a society: only totalitarian societies claim 'the people' to be a homogeneous whole through which the gap between a fragmented society and a symbolic political community could be closed.

Rosanvallon and Lefort therefore dismiss normative theories of democracy that base their conception of democracy upon certain *a priori* principles in order to be able to criticize totalitarian tendencies.[37] Such 'objective' principles cannot provide a modern democracy with normative foundations: 'the people' is democracy's only source of legitimacy, but this construct will always remain indeterminate, as it could never capture a fragmented society. This modern political freedom might indeed drive societies towards totalitarianism.[38] After all, in search of security and certainty citizens and powerholders are easily seduced to overcome ever-present social conflicts under the guise of a 'harmonious society'. Although Rosanvallon and Lefort acknowledge that totalitarianism is democracy's inherent pathology, they remind us that democracy's openness not only allows for individual freedom, but also forms a democratic society's constructive and cohesive force: as new conflicts always arise, both powerholders and citizens will continually need to reflect on the identity of their *symbolic* political community against the background of *actual* conflicting interests and viewpoints.[39] Democracy is therefore characterized by a 'society working upon itself': through the continuous institutionalization of a society's *real* conflicts, the *symbolic* identity of a political community is constantly questioned by citizens and (re)constituted by mediating institutions.[40]

Rosanvallon and Lefort thus argue that modern democracy coincides with the institutionalization of conflicts. In other words, it implies a never-ending dialogue between a fragmented society and powerholders who continually aim to construct a symbolic political community, but will never fully succeed. This line of democratic thinking could advance our normative understanding of democratic legitimacy as dialogue. A democratic 'response' to society's conflicts could not be ultimately justified through *a priori* principles, but neither does it imply just making audiences feel heard or solving all of their conflicts and problems. Indeed, political power should be directed to tackling society's actual conflicts or problems, but speaking on behalf of a political community always remains a symbolic act of power that inevitably leads to disappointments in a society that is in fact fragmented.

Contrary to Lefort, who entrusted parliaments with the task of staging society's conflicts, Rosanvallon aims to expand our 'democratic vocabulary' beyond elections, as these seem to fall short of responding to new democratic demands.[41] Given the premise that in a modern democracy both the domain of the social and that of the political are open for interpretation,

35 Pierre Rosanvallon, 'The Political Theory of Democracy' in Oliver Flügel Martinson et al (eds), *Pierre Rosanvallon's Political Thought* (Bieleveld University Press 2019) 33. As for Lefort's political theory, see Claude Lefort, *Democracy and Political Theory*, trans. D. Macy (Cambridge Polity Press 1988).

36 Rosanvallon (n 35) 30.

37 ibid 37–38 where Rosanvallon argues for an 'open universalism' in order to connect 'academic democratic theory' and 'civic conversation'.

38 ibid 35.

39 For the same reasons, Rosanvallon draws a clear line between populism and democracy. See, Rosanvallon (n 35) 27.

40 Pierre Rosanvallon, 'The Decline of Social Visibility' in John Keane (ed), *Civil Society and the State* (Verso 1988) 211.

41 See generally, Pierre Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Harvard University Press 2011).

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democratic institutions should always enable citizens to challenge powerholders whose legitimacy claims mask these indeterminacies of democracy. There is no reason why such acts of 'counter-power' could only be institutionalized by parliaments. There might be other institutions that have the potential to stage conflicts, transform them, and speak on behalf of a political community, even though they might not originally have been thought of as 'democratic forums'.[42] Therefore, Rosanvallon argues, thinking modern democracy involves two important tasks: making society's conflicts visible and thinking about how various democratic institutions could institutionalize them by creating new 'forms of commonality' which could help to (re) constitute a political community.

The media analysis indeed made society's conflicts visible and instigating Article 12 procedures could be considered an act of 'counter-power' that challenges the PPS's legitimacy claim. However, it is less clear how courts could reconstruct a political unity. Nevertheless, the empirical findings could be connected to Rosanvallon's work. Courts that are involved in socially sensitive Article 12 cases need to address three criteria: (1) are these directly interested parties; (2) is this prosecution feasible; and (3) is it of public interest? Therefore, their responses to a fragmented society often require a symbolic 'reframing' of the actual defined conflicts. Framing the conflicts as being about private feelings, social norms, social identities, social problems, and social conflicts would dismiss the fact that the three legal criteria are *political* categories whose application could be informed by the factual domain of the social, but will always need to transform it. In the Wilders case, for instance, citizens do not have to be labelled as 'victims who need help from the government'; also critical, democratic citizens could be considered to be directly interested parties. Moreover, both complainants and legal scholars argued that the prosecution had a sufficient basis in the existing legal material, so that a prosecution was at least feasible.[43] However, reframing the underlying social conflicts as a conflict about the application of the legal norms of hate speech and group insult would also imply that the criminal judges in the subsequent criminal trial are responsible for answering a legitimate, *political* conflict about how to collective organise Dutch society. After all, acquittal would mean instituting a society where freedom of speech prevails, whereas a conviction would emphasize the politician's political bond with other citizens on the basis of non-discrimination. Therefore, the eventual ruling about the application of the stipulations of hate speech and group insult inevitably touched upon the identity of a political community and the norms it should uphold.

This inevitable 'political response' of courts does not necessarily need to be understood as undemocratic: it rolls back unaccountable power of the PPS and allows a society to examine, (re)affirm, or revise its political identity against competing interests. Indeed, some citizens will have to be disappointed as their conflict cannot be solved with the use of criminal law. One might think about the question of ethnic profiling in the Henriquez case. In such cases, the upheaval around the Article 12 procedure could form an incentive for other powerholders to provide an outlet for these conflicts. However, when courts are convinced that these are directly interested parties and that the prosecution is feasible, the subsequent criminal trial could potentially contribute to the (re)constitution of a common world and could therefore also be argued to be in the public interest. Like parliaments, the criminal trial is one of the political stages where the rules that give form to the life of the polity can openly be discussed by citizens and interpreted by the court as a mediating institution whose ruling then (re)constitutes a political community. This last political moment allows a democratic society to become visible to itself as a symbolic unity: it touches upon the question of how we – as a political community – collectively organize society. The fact that citizens might have a different understanding of their political community does not mean this dialogue between courts and the public had been illegitimate on normative grounds: it could continue in parliament and might even result in changing the law after which the continuous dialogue between multiple audiences and powerholders starts again.

42 Whereas Rosanvallon's *Counter-Democracy* (n 1) addresses democracy as a social form and discusses multiple acts of counter-power (next to that of voting), his most extensive work on democratic legitimacy (n 41) focuses on the democratic potential of institutions.

43 Rick Lawson, 'Wild, Wilders, Wildst. Over de ruimte die het EVRM laat voor de vervolging van kwetsende politici' (2008) 33(4) NJCM-Bulletin 469.

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6. CONCLUSION

Socially sensitive Article 12 cases illustrate that our conception of legitimacy needs to account for the interplay between the domain of the social and that of the political which are both open to interpretation and disagreement. Democratic legitimacy as dialogue could therefore be a viable alternative to the commonly used normative and empirical conceptions of legitimacy, which fail to see the connection between these two domains. However, democratic legitimacy will always need to be *constructed* in a constant dialogue between multiple audiences, who express their problems and conflicts, and powerholders who aim to speak on behalf of these audiences within the normative frameworks in which they operate. Empirically, the dialogues about the competing interpretations of the conflicts allowed us to better understand the controversy that often arises when socially sensitive issues are being transferred to courts: disagreement about the definition of the conflict inevitably leads to disagreement about its resolution. Normatively, legitimacy as dialogue is able to account for the essence of our modern democracy: the constant interplay between a fragmented society and the symbolic political community that powerholders try to construct. We could therefore conceptualize legitimacy as dialogue according to Rosanvallon's definition of democratic legitimacy: as an 'invisible institution' as well as a 'sensitive indicator' of society's political expectations and the response to those expectations.

This conceptualization of democratic legitimacy not only aims to bridge the gap between empirical and normative research, it also enables us to think about democracy outside the domain of ordinary politics. In the context of criminal law, Rosanvallon's re-conception of democratic legitimacy as dialogue could shift our fearful, liberal perspective of 'the tyranny of the majority' to a more democratizing spirit: citizens are in principle being perceived as political subjects who, in constructive dialogues with their powerholders, are invited to have their say in matters of public interest and, more generally, in the way society should be collectively organized. In this sense, the Article 12 procedure could also have a democratic potential: it rolls back unaccountable power of the PPS and extends it to citizens. When the complaint is approved, a new dialogue over the facts and application of the relevant norm will follow in a criminal trial. Eventually, the judicial decision speaks in the voice of the political community.

Obviously, this concerns only a democratic *potential* of courts and much more empirical and theoretical work needs to be done. Courts will need to find effective ways to clearly communicate to what conflicts they could respond within their normative frameworks and what conflicts should be left to other powerholders. Space forbids me to elaborate on what frames were eventually accepted in the four cases, but it would be interesting to research the way in which courts demarcated the conflicts as well as the subsequent responses of audiences to this new legitimacy claim. We also have to think about what happens to the dialogic ideal in a case where the complaints are approved. For instance, how does the setup of the criminal procedure affect the previously described democratic potential of courts? Defendants might remain silent and their lawyers might try to politicize the court. Moreover, the PPS could make a plea for acquittal. Both the involved court and the lawyers that represent the complainants could therefore seem to be unable to (re)frame the conflict as one about the application of norms and the related question of the identity of a political community. This scenario is the tragic story of the criminal trial against Geert Wilders that followed after citizens successfully instigated the Article 12 procedure. It illustrates that the normative potential of democratic legitimacy as dialogue is not easily implemented in courts. Indeed, as Loader and Sparks argued, legitimacy as dialogue might offer us an exciting research agenda. It had been my intention that this article would be precisely that: an invitation to enter this dialogue about democracy which, according to Rosanvallon, does not only *have* a history but *is* a history.[44]

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44 Rosanvallon (n 35) 37.

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