



UNIVERSITY OF AMSTERDAM

PAUL SCHOLTEN CENTRE FOR JURISPRUDENCE

LAW IN CONTEXTS

RESEARCH PROGRAM 2019-2024

PAUL SCHOLTEN CENTRE FOR JURISPRUDENCE

UNIVERSITY OF AMSTERDAM LAW SCHOOL

The field of legal studies has established itself as an academic discipline, partly by employing rather strict legal distinctions and categories: private vs. public law, domestic vs. international law, legal vs. social norms, and law vs. politics. At the same time, it has been acknowledged that law becomes meaningful and effective only in particular societal contexts. Contemporary positive law is the product of a long history of law in the making, dating back even to Roman times. Moreover, law expresses social norms and actively shapes behavior in society, government and the marketplace. Finally, positive law is not merely a set of legal rules but also has (both explicit and implicit) normative content. Legal prescriptions and legal categories are inherently intertwined with normative ideals, including human rights and the rule of law, that are partly incorporated in law, and partly function as critical yardsticks to assess positive law. Research at the *Paul Scholten Centre for Jurisprudence*, therefore, aims to achieve a critical understanding of law in varied contexts.

We study law by adopting a multidisciplinary and (methodologically) pluralistic approach. Our program advances from the proposition that a proper understanding of positive law presupposes a solid understanding of the contexts in which law functions: the contingent historical tradition from which our current legal system has emerged; how positive law is embedded in broader normative-philosophical debates on democracy, human rights, and the rule of law; and the ways in which the law in the books transforms into law in action and shapes behavior in society, government and organizations.

Our multidisciplinary study of law combines insights drawn from various legal-theoretical disciplines, including legal history, law & society, and legal and political philosophy, while also taking into account insights from adjacent disciplines, including sociology, anthropology, public administration, criminology, and psychology. Given the broad terrain covered by the various disciplines involved, the *Paul Scholten Centre* cannot claim to cover the whole field of jurisprudence. Instead, our research addresses specific legal questions and dilemmas, submitting the topics involved to an in-depth legal-theoretical analysis. This research is conducted at our Centre and, increasingly, in collaboration with other research centers at the Amsterdam Law School, especially in the partnerships forged in the context of the former *Law and Justice Across Borders* framework, the cross-Faculty *Amsterdam Centre for European Studies*, and the University-wide *Institute for Advanced Study* of the University of Amsterdam.

Research at the PSC is organized around three sub-themes:

1. The empirical and normative study of the legal professions;
2. The strained interrelations between democracy, the rule of law, fundamental rights, and instrumentalism;
3. Ethics, integrity and compliance: the *ex-ante* function of law.

Sub-theme 1:

THE EMPIRICAL AND NORMATIVE STUDY OF THE LEGAL PROFESSIONS

A study of law cannot be termed a success without a thorough survey of its practitioners. Judges, attorneys, legislative lawyers, public prosecutors, bailiffs and notaries are pivotal in providing citizens and companies with access to justice. They also play a crucial role in upholding the rule of law. Professional legal ethics and integrity are indispensable in the 21st century, especially in times when the legal professions face pressure from government and society, such as cutbacks in the legal aid system. In some respects, the formal-legal methods of handling disputes have become part of the problem rather than the solution, yet in many European countries, governments and private parties are turning to new forms of (online) alternative dispute resolution. The changes in the legal landscape will encourage the legal professions to innovate dispute resolution, make it less formalistic, yet legally accurate, ethical and cost-effective.

The work of legislative lawyers receives hardly any attention in the academic literature on the legal professions. This is remarkable, considering that good lawmaking is vital to modern democracies. For a research project entitled 'Lawmaking in Times of Populism: Balancing Values of Democracy and Rule of Law', **Nienke Doornbos**, in collaboration with Arnt Mein, senior lecturer at the Amsterdam University of Applied Sciences, interviewed 30 legislative lawyers at five different government ministries in the Netherlands. Which coping mechanisms do they use to strike the right balance between democratic values and the Rule of Law, especially in times when populism plays such a significant role in politics? Do legislative lawyers feel any particular loyalty when it comes to upholding the law? What if government ministers demand new legislation that contravenes existing legal frameworks or violates international human rights norms?

Judges, in particular, are faced with challenges: increasingly complex cases, failed or failing digitization projects, high caseloads, managerial interference. Insights gleaned from the field of social psychology show that judges, like most human beings, are vulnerable to bias, especially when confronted with highly routinized work. Research on this sub-theme addresses these developments

Ethics, core values, and rules of conduct for the legal professions are a continuous subject of debate, both in the Netherlands and abroad. **Jonathan Soeharno** was part of the 2018 committee that revised the code of conduct for Dutch lawyers, and has lectured on ethics for judges and public prosecutors since 2009. Recently, he visited the judicial training programs in Lviv (Ukraine) and St. Petersburg (Russia), and gave a presentation at the Melbourne International Legal Ethics Conference. He has frequently written on the logical and normative aspects of judicial decision-making (monograph in 2017) and the education of the legal professions (preadvies 2018).

from an empirical and normative perspective and through interdisciplinary research. For example: When adjudicating, what role does an individual judge's attitude play in routine judicial decision-making? How can judges maintain their independence in a work setting that is governed by New Public Government principles? Does the legal ethics framework – including the core values of the legal professions, codes of conduct, the disciplinary system and the instrument of the oath – still meet the requirements of contemporary society?

Sub-theme 2:

THE STRAINED INTERRELATIONS BETWEEN THE RULE OF LAW, DEMOCRACY, FUNDAMENTAL RIGHTS, AND INSTRUMENTALISM

Historically, the tension between democracy, the rule of law and fundamental rights has been conceptualized in terms of the triangle of *The Prince, the Law, and the People*. The three evolved interrelatedly, against the background of historical, political and cultural developments. **Guus van Nifterik** studies these interrelations from the perspective of Hugo Grotius, i.e. his ideas on sovereignty, the involvement of society in government, the possibility of rights-transfer and the implications of natural law for positive law. The works of Grotius are regularly referred to in order to underpin theories of democracy, the rule of law, and fundamental rights, both at the national and the international level. Grotius' historical texts can inspire, yet sometimes they also discourage. But a critical and contextual understanding of what Grotius actually said remains essential for a thorough understanding of what those ideals imply today.

Liberal democracies are built upon the organizing ideals of the rule of law, democracy, and fundamental rights. Art. 2 TEU, for example, argues that the project of European integration is “founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.” At the same time, the unavoidable tension between these foundational ideals makes liberal democracies inherently prone to instability. Indeed, in recent years, it has become increasingly clear that, as a community of values, Europe has plunged into a deep and perhaps existential crisis. Examples include the rise in several of the Member States of populist movements that expressly reject minority rights, constitutional checks and

balances, and the rule of law.

Another way of understanding this strained relationship is by focusing on the tension between the rule of law and instrumentalism. Law distinguishes itself from other normative systems by its specific juristic rationality. Protecting the rule of law implies following a specific juristic rationality that is deemed pivotal both to upholding the procedural safeguards that protect individual rights against unlawful state interference and upholding the rule of law. However, theorists with an instrumentalist orientation argue that this focus on procedure hampers law's effectiveness in generating redistributive justice in the welfare state, countering climate change, and offering protection against terrorism. Should the *legal* exercise of power, emphasizing legal procedure, always be given the utmost priority, or should democratic majorities be allowed to have their way instead?

Following in the tradition of our previous research program, *the Rule of Law at the limits*, our research into this sub-theme will not be limited to addressing concrete examples of these tensions, e.g. the migration crisis or the invocation of the state of exception following terrorist attacks. We will instead study the ultimate source of this crisis – the strained interrelationships between the foundational ideals of constitutional democracies. How should liberal democracies attempt to solve dilemmas involving conflicting fundamental rights, or conflicts between fundamental rights on the one hand and the rule of law or democracy on the other? When do the decisions of international human rights tribunals like the ECtHR become problematic from the perspective of democratic legitimacy? To what extent are *preventive* anti-terrorism measures – internet bans and asset freezes that constrain human rights – compatible with the concept of the rule of law?

The official objective of the EU common migration policy is the ‘efficient management of migration flows’ (Art. 79 TFEU). To fix Europe's failing asylum system, EU policymakers and legal experts have called for a more highly-integrated Common European Asylum System (CEAS). Similarly, in an attempt to ensure the effective management of the EU's external borders while remaining respectful of fundamental rights, the EU has tried granting more power to FRONTEX, the European Border and Coast Guard Agency. This includes genuine physical operational powers, and comprises plans for a permanent corps of 10,000 EU border guards. **Bas Schotel** examines how the logic of ‘efficient management’, a more integrated CEAS, and an EU vested with physical operational powers affect the individual legal protections afforded to migrants and refugees. He investigates this question by drawing on legal theory, legal history and the history of the administrative state.

Sub-theme 3:

ETHICS, INTEGRITY AND COMPLIANCE:

THE EX-ANTE FUNCTION OF LAW

A standard view in law is the *ex-post* approach, whereby legal research looks at what the proper rules and procedures are for dealing with unwanted behavior that has occurred in the past. But how does law shape future behavior? Law also plays a vital *ex-ante* function in that it seeks to organize and regulate behavior in society, the marketplace, and government. Research into this sub-theme addresses the ways legal rules interact with individual and organizational behavior. It uses qualitative and quantitative methods to expand existing knowledge about law's *ex-ante* behavioral processes. Research at the PSC focuses on both individual and organizational processes. For instance, it studies individual variation in so-called *Rule Orientation*, indicating the extent to which people find the rule breaking of others to be acceptable. This concept has been found to be a key predictor of rule-breaking behavior and provides fundamental new insights into how law's impact on behavior is moderated by individual characteristics.

Another example is the line of research into *toxic corporate culture*, which studies how the structures, values, and practices of organizations can lead them to acquiesce to rule breaking. It provides a fundamental critique of simplistic approaches to corporate misconduct that focus excessively on liability and punishment while failing to address the deeper cultural settings in organizations. This line of research seeks to give the *ex-ante* function of law a more central place in legal analysis and training. To do so, the research maps the behavioral assumptions made by lawyers tasked with performing *ex-ante* roles (e.g. prosecutors, regulators and compliance managers) and analyzes where those assumptions do and do not align with existing scholarly knowledge. The

Homo Juridicus, Benjamin van Rooij's ERC Consolidator Project, seeks to develop a behavioral jurisprudence that accounts for and corrects faulty assumptions about human conduct prevalent in legal thinking and practice. By studying prosecutors, regulators and corporate counsel in the U.S., Europe and China, it develops unique empirical data on how those lawyers tasked with behavioral roles think human conduct could be improved. It contrasts these assumptions with those current in the social and behavioral sciences. The data will illustrate the degree of variation in lawyers' assumptions about behavior. It will form the basis for a reform of legal education and research that brings law's *ex-ante* function more to the forefront. Just as behavioral economics has corrected traditional economic thinking, the *Homo Juridicus* project will correct traditional thought on behavior in the field of law. The project will be conducted by Benjamin van Rooij as PI, along with one postdoc and three PhD researchers.

academic end-goal is to develop a behavioral jurisprudence that corrects the flawed *ex-ante* behavioral assumptions in legal theory and training, and that helps guide law in fulfilling its *ex-ante* function. This research has very strong practical implications: It offers insights into how law can better deal with some of the greatest behavioral challenges of our time.

Another development in the realm of compliance is that institutions, companies and professions are expected to create a culture of integrity. Specifically, the *Corporate Governance Code 2016* demands that a board sets and integrates values within the organization – and can be held accountable for (not) doing so. Also, among professions and institutions, an integrated approach can be seen to be gaining

ground, whereby values are incorporated through – among other things – codes of conduct, line management, appraisals and training programs. The research examines the normative aspects of this approach: How should culture, integrity, ethics or values be understood? And what is their relation to law?

METHODOLOGICAL APPROACH

Researching the various sub-themes that constitute our research program requires a cross-cutting, multidisciplinary and pluralistic methodology that not only takes positive law and legal developments into account, but also political, economic, social and historical contexts and conditions. More particularly, this research program draws on and combines the expertise of legal theorists, e.g. legal philosophers, legal sociologists and legal historians, as well as specialists from adjacent fields, including sociology, anthropology, public administration, criminology, and psychology. Characteristic of this interdisciplinary approach is the attempt to move beyond traditional doctrinal legal research and to examine the meaning of legal concepts and institutions in their normative, societal and historical contexts. This allows us to focus on the actual legal institutions and practices that give effect and meaning to the values of democracy, the rule of law, and human rights.

Should the state introduce mandatory childhood vaccination in the face of imminent outbreaks of infectious disease? This question lays bare myriad conflicts between fundamental rights and state interests: the right to bodily integrity, and the freedom of religion and conscience of non-vaccinating parents (art. 9 ECHR) as opposed to the responsibility of the state to protect public health and vulnerable citizens and the right to health of unvaccinated children (art. 3 of the UN Convention on the Rights of the Child). In his research, **Roland Pierik** addresses these questions, both in academic publications and outside academia: in academic blogs, in op-eds in Dutch newspapers, and on national TV. Moreover, he advises the Dutch Government as a member of the *Health Council of the Netherlands* and its standing *Vaccinations Committee*.

The multidisciplinary approach taken by the program implies a combination of various research methods. These can be divided into three main categories. First, the program encompasses legal theoretical and philosophical methods. These aim to further our understanding of concepts like democracy, the rule of law and human rights – as well as their normative implications – and include conceptual analysis, theories of justice, discourse analysis, and critical legal theory. Second, law and society methods are employed. This consists of qualitative empirical methods such as interviewing, participant observation, and the analysis of legal and policy documents but also makes use of experimental and quantitative methods such as factorial surveys, cheating experiments, self-reported surveys, the econometrical analysis of large datasets, and the systemic meta-analysis of prior bodies of quantitative work. Finally, the program employs legal historical methods. These are aimed at understanding the historical development of (the interrelations between) the foundational ideals of democracy, the rule of law and human rights and at analyzing the lessons that can be learned from the past to better understand our current situation. These methods include source criticism, conceptual history, and discourse analysis.

Although individual researchers generally focus on methodological approaches that are

In the past decade or so, the EU has faced a number of crises, including security crises related to terrorism, the financial crisis and the refugee crisis. In response to these crises, the EU and its member states have frequently resorted to emergency powers. Examples include the state of exception proclaimed in France after the Paris terrorist attacks, emergency interventions by the ECB to save banks, and emergency responses to the refugee crisis. The frequent use of emergency powers has had a major impact on European values such as democracy, the rule of law and human rights. **Marc de Wilde** provides a historical and philosophical analysis of how emergency powers affect those values. More particularly, he examines how and in which contexts emergency powers become a threat to the very constitutional values they are intended to protect.

characteristic of their respective fields, the program is based on the conviction that these methodological approaches are complementary and mutually reinforce one another. For instance, a normative (philosophical) assessment of specific tension between the rule of law, democracy, and fundamental rights can only hit its target if it is informed by an empirical (sociological) analysis of the dilemma as well as the (unintended) effects of the policies that generated the tension. Moreover, both normative and empirical analyses of legal dilemmas should adhere to historical path-dependency. Here we can think of the shared – *and simultaneously inherently contested* – traditions of democracy, the rule of law and human rights, as well as the historical conditions under which legal and institutional guarantees of those values have either proved successful or failed.

The research program actively encourages individual researchers to keep their eyes open for relevant input from related and adjacent fields, including their methodological approaches. They are encouraged to participate in regular research seminars and joint research activities, such as conferences, workshops, and joint publications.

Given its inherently interdisciplinary character, and as the meta-juridical research institute of the Law School, the *Paul Scholten Centre* explicitly aims to be(come) the pivotal hub of legal-theoretical, i.e. empirical and normative, study of the law at the Amsterdam Law School.

THE PAUL SCHOLTEN CENTRE FOR JURISPRUDENCE:

- promotes and facilitates original and cutting-edge research within the field of jurisprudence – in the broadest sense;
- encourages its members to actively contribute to national and international debates and publish their work in international peer-reviewed academic journals;
- organizes research colloquia and conferences in order to support the critical exchange of views on individual and collective research;
- initiates and encourages research collaborations with other researchers and institutes within the University of Amsterdam Law School, and at the national and international level;
- aims for the valorization and dissemination of the outcomes of our academic research by means of professional education, membership on advisory committees (such as the Health Council of the Netherlands), and research-based interventions in legal, societal and political debate. This includes op-eds in national newspapers and contributions to radio and TV programs and academic blogs;
- supports and facilitates efforts to seek and obtain external funding for its members.

RECENT KEY PUBLICATIONS:

- De Wilde, M. (2018). Why Dictatorial Authority Did Good, and not Harm, to the Roman Republic: Dictatorship and Constitutional Change in Machiavelli. *Ratio Juris*, 31(1), 86-99. DOI: [10.1111/raju.12194](https://doi.org/10.1111/raju.12194)
- Doornbos, N., & de Groot-van Leeuwen, L. E. (In press). The Dutch Legal Profession: Developments and Challenges. In R. Abel, O. Hammerslev, & H. Sommerlad (Eds.), *Lawyers in 21st-Century Societies*, Hart Publishing. <https://www.bloomsburyprofessional.com/uk/lawyers-in-21st-century-societies-9781509915156>
- Pierik, R. (2018). Mandatory Vaccination: An Unqualified Defence. *Journal of Applied Philosophy*, 35(2), 381-398. DOI: [10.1111/japp.12215](https://doi.org/10.1111/japp.12215)
- Schotel, B. (2018). Legal Protection as Competition for Jurisdiction: The Case of Refugee Protection through Law in the Past and at Present. *Leiden Journal of International Law*, 33(1), 9-32.
- Van Rooij, B., & Fine, A. (2018). Toxic Corporate Culture: Assessing Organizational Processes of Deviancy. *Administrative Sciences*, 8(3), 1-38.

RECENTLY OBTAINED RESEARCH GRANTS:

- **Benjamin van Rooij**: ERC Consolidator Grant: *Homo Juridicus*.
- **Hadassa Noorda**: NWO Rubicon grant: *Protection of individual liberty in times of terrorism*.
- Marcel Verweij (Wageningen) & **Roland Pierik** ZonMw PhD grant: *Indirect vaccination*.