CRIME AND CUSTOM IN THE DUTCH CONSTRUCTION INDUSTRY

Marc Hertogh

University of Groningen
Faculty of Law
Department of Legal Theory
M.L.M.Hertogh@rug.nl

Abstract

In 2001, the construction industry in the Netherlands was at the heart of many public and political debates. A television documentary suggested that all major construction companies were involved in an illegal clearing system that colluded in price offers for public works. After this TV program, the Dutch parliament decided to conduct a parliamentary enquiry which showed a widespread use of cartels and structural 'bid rigging' within the Dutch construction industry. Despite the fact that the clearing system of the Dutch construction industry was prohibited by the European Commission in 1992 and by the 1998 Dutch Competition Act, Dutch builders continued their illegal activities as if nothing had changed. This case raises several important questions. Why were these practices so widespread in the Dutch construction industry? Why did Dutch contractors continue these practices even after they were made illegal? And – in more general terms – what does this case tell us about the interplay between state-regulation and self-regulation? Most previous studies focus on the lack of compliance in the Dutch construction industry with antitrust law. By contrast, this paper uses a 'constitutive' approach. Rather than focusing on legal compliance, I will use the theoretical framework of legal consciousness to focus on people's understandings of law. Thus, rather than asking *how much* does law matter, this paper asks: *how* does antitrust law matter in the Dutch construction industry?

Key words

legal consciousness, antitrust law, cartels, self-regulation, legal compliance, bid-rigging

CRIME AND CUSTOM IN THE DUTCH CONSTRUCTION INDUSTRY

Marc Hertogh[1]

1. INTRODUCTION: FIDDLING WITH MILLIONS[2]

In 2001, the construction industry in the Netherlands was at the heart of many public and political debates. A television documentary (entitled 'Fiddling with Millions') suggested that all major construction companies were involved in an illegal clearing system that colluded in price offers for public works. After this TV program, the Dutch parliament decided to conduct a parliamentary enquiry which showed a widespread use of cartels and structural 'bid rigging'[3] within the Dutch construction industry (PEC 2002a). Although collusion in the construction industry is not extraordinary and is also well documented in other countries (McMillan 1991; Gupta 2001; Lee & Hahn 2002; Transparency International 2005), the Dutch collusion scheme is exceptional in its scale, durability and the way it is institutionalized (Doree 2004, 149). Despite the fact that the clearing system of the Dutch construction industry was prohibited by the European Commission in 1992 and by the 1998 Dutch Competition Act, Dutch builders continued their illegal activities as if nothing had changed. According to the Parliamentary Enquiry Committee (hereafter PEC):

[1] Thanks to Friso Jansen for his help in collecting and reviewing the literature.
[2] An earlier and less comprehensive version of this case study was previously published in Dutch, see Hertogh (2005).
[3] Wikipedia defines 'bid-rigging' as: 'a form of fraud in which a commercial contract is promised to one party even though for the sake of appearance several other parties also present a bid. (..) It is a form of price-fixing and market allocation, often practised where contracts are determined by a call for bids, for example in the case of government construction contracts.'

> 'This seems to indicate that the "culture" of the construction industry (…) has played a more important role than the rules of the Dutch and the European government.'[4] (PEC 2002b, 134)

This case raises several important questions. Why were these practices so widespread in the Dutch construction industry? Why did Dutch contractors continue these practices even after they were made illegal? And – in more general terms – what does this case tell us about the interplay between state-regulation and self-regulation? In addressing these issues, this chapter focuses on how contractors think about Dutch competition law and EU antitrust regulations. Most previous studies focus on the lack of compliance in the Dutch construction industry with antitrust law. This is often explained by the fact that these rules were not sufficiently enforced by the authorities. According to Van den Heuvel, 'prosecution of cartel offenses had no priority in the Netherlands' (Van den Heuvel 2005, 138). As a result, he has suggested to 'introduce more serious sanctions' and to 'regulate contacts between the authorities and the business world more strictly'(Van den Heuvel 2005, 148) By contrast, this chapter uses a 'constitutive' approach. Our aim is to move 'away from tracking the causal and instrumental relationship between *law and society* toward tracing the presence of *law in society*'(Ewick and Silbey 1998, 35; emph. added). Rather than focusing on legal compliance, I will use the theoretical framework of legal consciousness to focus on people's understandings of law (cf. Fleury-Steiner and Nielsen 2006, 1). Thus, rather than asking *how much* does law matter, this paper asks: *how* does antitrust law matter in the Dutch construction industry? This case study is primarily based on the proceedings of the public hearings of the PEC with a large number of contractors and other representatives from the industry (see PEC 2002c).

[4] Unless indicated otherwise, all quotations in this chapter were translated from Dutch into English by the author.

In the early 1960s, Stewart Macaulay published a paper which would later become one of the most important studies of contemporary sociology of law. Inspired by Malinowski's (1926) classic anthropological field-study of the Tobriand Islanders *Crime and Custom in Savage Society*, Macaulay (1963; 1995) studied business practices in Wisconsin and found that a significant amount of business exchanges was done on a noncontractual basis. First, business agreements were frequently made without knowledge of the relevant rules of contract law. Moreover, disputes were frequently settled without reference to the contract or potential legal sanctions and law suits for breach of contract were rare. Macaulay argued that the key in understanding this practice, is the long standing relationship between businessmen. In this chapter, Macaulay's study will be used as our central frame of analysis. To what extent is Macaulay's account of the practice of Wisconsin businessmen similar to the practice in the Dutch construction industry?

After a brief introduction of the Dutch construction industry and the relevant legal framework, I will discuss two types of legal consciousness studies. The first type asks: How do people experience law? And the second type asks: What do people experience as law? Both perspectives demonstrate how Dutch contractors relate to antitrust law. Moreover, they show that the construction industry has its own internal legal order, with its own rules and its own system of rule-enforcement. Based on the outcomes of our case study, it will be argued that normative concerns are an important determinant for legal compliance. In the final section, the analysis of the Dutch construction industry will be used to draw several general conclusions about the interplay between state-regulation and self-regulation.

2. THE CASE OF THE DUTCH CONSTRUCTION INDUSTRY

The construction industry is a major contributor to the Dutch economy. 'The Dutch construction industry is characterized by many small firms and some large companies, by heterogeneity in the types of firm and by strong price competition in local markets.'(Bremer and Kok 2000, 99) In 2002 (at the time of the Parliamentary Enquiry) the industry had a yearly turnover of 15 billion Euros. With over 5 billion Euros in commissioned works, its most important client was the government. Moreover, 5% of all jobs in the Netherlands is provided by its construction industry. This chapter will focus on the roads and groundwork sector.

Self-Regulation in the Construction Industry

The TV-program 'Fiddling with Millions' showed that all major Dutch construction companies regularly met in secret just before an offer procedure in order to determine which company was cheapest and to increase its price offer. The winning company shared the increase in profitability by reserving compensation for the other companies. This practice goes back to the 1950s when the Dutch government stimulated an elaborated system of self-regulation in the construction industry (see Graafland 2004, 127).

In 1953, the so-called Wegenbouw Aannemers Combinatie (road construction building contractors combination, WAC) was founded. According to rules approved by the Dutch government, the WAC organized pre-consultations between the construction companies, in which companies communicated their prices. The cheapest company was elected and received the order and compensated the other companies for the calculation costs involved in their

offers. In 1963 a similar organization was founded for the entire construction sector (the union of cooperating price-regulating organizations in the construction sector, SPO) covering 28 cartels and 4000 companies in the construction sector. The Dutch government also approved of this organization.

In the early 1990s, however, after several decades of (government monitored) self-regulation, this Dutch practice was no longer considered legally and politically acceptable. In 1992, the European Commission prohibited the practice of pre-consulting, arguing that it violated Article 85, Section 1 of the EU Treaty. Consequently, the EU ordered the SPO to dismantle the cartel and imposed on its member organizations fines totaling several million Euros. Instigated by the EC, the Dutch government eventually decided to forbid the practice of ex-ante consultations as well. In 1998, this was also reflected in the new Dutch Competition Act and the establishment of the National Anti Trust Authority (NMa). Finally, in 2004 three government departments together with representatives of the construction industry established the so called 'Management Council' ('Regieraad Bouw'). This Council is aimed at promoting and monitoring a profound 'process of change in culture' in the construction industry, along the lines suggested by the Parliamentary Enquiry Commission.

Limited Impact of Anti Trust Laws

Although the Dutch system of pre-consultation has been prohibited since 1992 (and later again in 1998), the Parliamentary Enquiry and several other studies show that in practice these new legal rules were hardly complied with and most consultation meetings continued as they did before. The TV documentary contains a clear illustration of this. It shows a copy of the financial accounts of a large construction firm, in which all deals and agreements from pre-

consultation rounds were carefully recorded. Until 1992, all entries were registered automatically by computer. After 1992 the list of entries is simply continued, only now in handwriting.

The PEC concludes that the illegal practice of pre-consultation was not limited to a handful of businesses, but covered the entire Dutch construction industry. Nearly every single company was involved. Or, in the words of a senior manager of a major road building company:

> 'The system [of pre-consultation] simply continued after 1992 the same way as it did before.'(public hearing 28, 537)[5]

In a public hearing before the PEC, he explains this practice in the following terms:

> 'This system has been passed on from father to son, from director to son, etc… I guess you could say: we will switch off the lights on December 1, 1992… But this system continued throughout the years. You don't get out of it easily, it is a circuit, you don't just step out of it.'(public hearing 28, 544)

Other contractors paint a similar picture. The former secretary of one of the price-regulating bodies in the construction industry gives the following account:

> 'Everybody did it and everyone knew that it was no longer allowed. In 1992 there was a temporary pause, but soon afterwards we picked up our old habits again. Those

[5] Throughout this chapter, these numbers indicate the order and the page numbers of the public hearings, as they were published in the official proceedings (see PEC 2002c).

former senior executives from large construction businesses, who now claim that these practices did not exist in their own companies, are simply not to be believed.'
(cited in Vulperhorst 2005, 27)

Finally, this picture is also confirmed by the following exchange between a member of the PEC and a contractor:

- *'So, you knew this was not according to the rules?*
- Sure.
- *But you continued, nevertheless?*
- We didn't continue, it has always been like this and it has it stayed this way.'
(cited in PEC 2002a, 92)

After the publication of the final report by the PEC in 2002, many politicians and public officials were confident that from now on the Dutch construction industry would act in accordance with the law. The industry has, no doubt, adopted many changes in recent years. And it seems as if most major construction companies are no longer structurally involved in illegal practices. There are, however, several strong indications that the practice of pre-consultations has still not yet completely disappeared. For example in 2004, two years after the PEC report, the Dutch media revealed the existence of yet another set of 'black accounts' in the construction industry (see Van Bergeijk 2007, 118). Moreover, a recent survey among businessmen in the Dutch construction industry suggests that – in some places – the system of pre-consultation is still alive (Foekema and Nikkels 2008). More than half of the respondents thinks that not much has changed in the industry and several companies admit that they are still occasionally approached to participate in illegal bid-rigging. Similarly, in the Winter of

2009 the Dutch media reported that five construction companies were being prosecuted for illegal price-fixing and other cartel activities. Although all these companies were concentrated in the south of the country, the Chair of the National Anti Trust Authority (NMa) suspects that there may still be many more similar cases like these:

> 'We have received several signals that, although there have been drastic changes in the construction industry, these cartel practices continue to exist throughout the country. That is something that we are now looking into.' (cited in Dohmen and Van der Steen 2009)

What does this tell us about the system of self-regulation in the industry? Unlike most previous studies, this cannot be fully explained by focusing on issues of legal compliance or by a lack of enforcement by the authorities, but we also need to look at the Dutch construction industry through the lens of 'legal consciousness'.

3. FROM LEGAL COMPLIANCE TO LEGAL CONSCIOUSNESS[6]

On a cold winter's day, anyone who takes a walk outside immediately senses the impact of the wind-chill factor. This is the temperature that a person feels because of the wind. For example, a thermometer may only read minus 2 degrees Celsius outside. But when the wind is blowing at 45 kilometers per hour (km/hr), the wind-chill factor causes it to feel like it is minus 10 degrees Celsius. For a good understanding of the local weather conditions we should therefore take into account both objective and subjective elements. The same holds

[6] This section has been adapted from Hertogh (2004).

true for law. If we want to understand the social significance of law, we should not only focus on the law in the books, but also on the way that people experience law. This 'legal wind-chill factor' plays a central role in recent legal consciousness studies.

Legal Consciousness Studies

Using a popular definition, legal consciousness could simply refer to 'all the ideas about the nature, function and operation of law held by anyone in society at a given time' (Trubek 1984, 592). Yet, under this general heading various researchers have applied the term in many different ways. Legal consciousness can refer both to: aptitude, competence or awareness of the law; and to perceptions or images of law. Most empirical studies in the first category date back to the 1970s. In these studies levels and degrees of public knowledge and opinion about law are treated as social facts to be discovered and recorded. In this approach, which has come to be called the KOL (knowledge and opinion about law) literature, attitudes are seen as measurable data, which can be compared with the content or policy of legal provisions. Using large statistical surveys, many KOL studies point to low levels of legal knowledge and considerable variations in attitude to law and the legal system. More recent studies argue that, contrary to the central belief of much of the KOL research, legal systems are not simply 'social facts acting upon society' (law and society). Instead, law is the label given to a certain aspect of society (law in society). This has led researchers of legal consciousness in more recent years to focus more on 'images of laws and legal institutions that people carry around in their heads and occasionally act upon' (Engel 1998, 119). Unlike the early KOL studies, the fieldwork involved in these more recent examples is often detailed descriptive ethnography. As I have argued elsewhere, we can differentiate between an 'American' and a 'European' conception of legal consciousness (Hertogh 2004).

An 'American' Conception

Most of the contemporary literature on legal consciousness originated in the United States. Merry (1990), for example, studied litigation and mediation among working-class Americans in two New England towns. In her book she looks at the ways people, who bring personal problems to the courts, think and understand law and the ways people who work in the courts deal with their problems. Similarly, Nielsen (2000) examined the legal consciousness of ordinary citizens concerning offensive public speech. Drawing on observations in public spaces in three California communities and in-depth interviews with subjects recruited from these places, she analyzed variation across race and gender groups in attitudes about how offensive public speech should be dealt with by law. According to Nielsen, the legal consciousness of ordinary citizens is not a unitary phenomenon, but must be 'situated' in relation to particular types of laws and to race and gender. Finally, in their book, Ewick and Silbey (1998) develop an empirically based theory of legal consciousness. In over 400 in-depth interviews they asked New Jersey residents general questions about their lives and the problems they face in their schools, workplaces, and communities, allowing respondents to elaborate whether and how they thought of law's role in these spheres. Based on their interviews, Ewick and Silbey identify three predominant types of legal consciousness. Subjects can be 'Before the Law', impressed by its majesty and convinced by its legitimacy; 'With the Law', utilizing it instrumentally and generally understanding law as a game, and 'Against the Law', cynical about its legitimacy and distrustful of its implementation.

These studies by Merry, Nielsen, as well as Ewick and Silbey are three representative examples of an 'American' conception of legal consciousness. The primary focus of this conception is: *How do people experience (official) law?* In these three studies 'law' is

considered an independent variable. The definition of 'law' is provided by the researcher and is not part of the empirical enquiry itself.

A 'European' Conception

In his review of the current literature, Engel (1998, 139) has argued that 'studies of legal consciousness have sometimes forgotten important lessons from the past'. A prominent example of this is that, although decades of law and society research have convincingly demonstrated that '[d]ifferent groups have different kinds of law', most studies still focus almost exclusively on 'official' law. Yet, law is not necessarily an instrument of state power and its connection with the state is 'a problem to be studied rather than a fact to be assumed'. Moreover, '[e]ven if one focuses on "official" law, one still finds a significant dependence on unofficial or customary rule structures to determine norms of reasonableness or fairness'. Engel therefore calls for a view on legal consciousness 'from below'. The basis for such a view can be found in the European tradition of the sociology of law, most notably in the work of the Austrian legal theorist Eugen Ehrlich (see Hertogh 2009).

In 1912, Ehrlich presented a unique research project aimed at studying the 'living law' of the peoples of the Bukowina, where Armenians, Germans, Gipsies, Jews, Hungarians, Romanians, Russians, Ruthenians, and Slovaks lived side by side. To study the legal consciousness of these people, Ehrlich wanted his project to register those ideas and personal histories that were typical for their own ideas of law (*Rechtsauffassung der Leute*). To Ehrlich, the law is a notion (*Gedankengebilde*) that lives in people's heads and which can be identified on the basis of people's attitudes.

Legal consciousness in this sense essentially refers to people's own ideas about law, regardless of any 'official' laws. Law is considered a dependent variable; the definition of law is not provided by the researcher, but is part of the empirical enquiry itself. I will refer to this as a 'European' conception of legal consciousness. This primary focus of this conception is: *What do people experience as 'law'?*

Both approaches to legal consciousness will now be applied to study the way in which businessmen in the Dutch construction industry relate to law.

4. HOW DO DUTCH CONTRACTORS EXPERIENCE LAW?

Although Macaulay did not use the term 'legal consciousness' himself, this approach is very much at the heart of his study of how Wisconsin businessmen relate to contract law. Most of them are very critical about law. In their experience, law is often far too inflexible to apply in their every business dealings. Moreover, they consider law as a threat to the necessary level of mutual trust among businessmen.

Law is Inflexible

According to Macaulay, businessmen often consider law to be very inflexible. By putting everything down in writing, the much needed flexibility for doing business is lost. One of the respondents in Macaulay's study, a lawyer with many industrial clients, explains this in the following terms:

> ‘Often businessmen do not feel they have “a contract”- rather they have “an order”. They speak of “cancelling the order” rather than “breaching our contract”.(…) There is a widespread attitude that one can back out of any deal within some very vague limits. Lawyers are often surprised by this attitude.’(cited in Macaulay 1963, 57)

Similar views are also dominant in the Dutch construction industry. The chairman of a national organization of employers in the building industry puts it like this:

> ‘Lawyers are very respectable people. Yet building is first and foremost a technical job that has to take place on one particular site and where you cannot simply take the products from the shelve. You have to prevent a situation in which you have to record all conditions and all possible exceptions in a contract, while – as soon as things slightly go wrong – you have to take the case to court...’(public hearing 55, 1072)

In the public hearings before the PEC, some builders also emphasize that preparing a bid is often a very complicated job with many different calculations. As a result, it is easy to make mistakes. By putting everything into legal terms, some feel their margin for error becomes very small. According to one respondent, this is an important reason why he preferred the old situation of pre-consultations:

> ‘If you had made a mistake, you had to the right to withdraw from a bid. It frequently happened that we made a big mistake. At the time there were no computers yet.’ (public hearing 27, 511)

The idea that a large emphasis on formal legal rules makes doing business too inflexible and too slow is also reflected in a more recent survey among members of the Dutch construction industry (Foekema and Nikkels 2008). According to this survey, a large majority of builders (93%) – in principle – supports the prohibition of cartels and the promotion of more competition. There is, however, considerable less support for the way in which this general idea has been translated into law. Their major point of criticism is, that this has simply produced too many unnecessary rules. Most respondents (87%) feel that, generally speaking, 'there are too many government rules that we have to comply with' and nearly two thirds of the respondents (62%) is 'getting tired from all those government rules related to a procurement'.

Law Corrodes Trust

In Macaulay's study, many businessmen also emphasize that you can only do business based on mutual trust. In their view, this is why the use of official contracts is usually not necessary. Moreover, they claim, contracts can have all sorts of negative side-effects. One businessman expressed a common business attitude when he said:

> 'If something comes up, you get the other man on the telephone and deal with the problem. You don't read legalistic contract clauses at each other if you ever want to do business again.'(cited in Macaulay 1963, 61)

Many people in the Dutch construction industry feel the same way. They, too, emphasize the value of mutual trust and they feel that the use of law may corrode this trust. 'Legalism

produces all sorts of bad mechanisms', according to a former senior manager. And he continues:

> 'If fear and overly legal thinking take over in a relationship between two parties with a unique product, this will turn into a disaster… If lawyers would take charge in business, there will be no more deals.'(cited in Camps 2002)

The senior manager of another major Dutch construction industry supports this claim:

> 'Imagine that three lawyers have to be present before we can sign a contract! There has to be some basic level of trust. We have to be sure about what we're involved in.' (public hearing 21, 398)

Discussion

This perspective on legal consciousness provides an interesting account of how the Dutch construction industry relates to law. Using Ewick and Silbey's (1998) typology, it is clear that very few contractors are 'before the law'. Generally, they are not convinced by the legitimacy of antitrust law. Instead, they criticize the law because it is inflexible and it corrodes the level of trust among businessmen. As a result, the law is not being used instrumentally by most contractors and there are no clear examples of a 'with the law' legal consciousness either. Overall, the Dutch construction industry seems to be rather cynical about the legitimacy of law and distrustful of its implementation. This makes 'against the law' the most dominant type of legal consciousness.

It should be stressed, however, that this type of legal consciousness is typical for their attitude towards antitrust law, but is probably not representative for their attitude towards 'the law' in general. Thus far, there have been no signs that the Dutch construction industry frequently ignores or breaks other aspects of private or criminal law. This seems to suggest that, with regard to fields of law other then antitrust law, the legal consciousness of the construction industry can be more accurately described as 'before the law' or 'with the law'. This is one of the reasons why a frequently made comparison between the Dutch construction industry and criminal organisations (like the mafia) (see Vulperhorst 2005, 200) does not hold.

After this analysis, some important questions are still left unanswered. It appears that the way in which contractors relate to antitrust law also depends on their own normative ideas about doing business, about competition, and about the way in which conflicts should be dealt with. But what exactly are these ideas? This requires us to shift our focus from the goals and ambitions of the legislator and law enforcement agencies (top-down) to the values, norms and internal rules of the construction companies themselves (bottom-up).

5. WHAT DO DUTCH CONTRACTORS EXPERIENCE AS LAW?

The final report of the PEC concludes that the system of pre-consultation played an important role in the Dutch construction industry. In this system, all the firms involved had an individual claim account. Adjustments to these claims were recorded through *phantom* book-keeping (Doree 2004, 149). When a project was open to offers, a special meeting would be arranged shortly before the contractors had to submit their bids. In this meeting, the contractors would resolve who would put in the lowest bid and how high this bid would be. The price to be

tendered by the successful bidder was decided upon and the 'unsuccessful' companies would submit higher tenders. To compensate the 'losing' companies, the 'winner' would transfer an agreed amount from its claim account to those of the other contractors. For the running of this system, they applied their own set of rules and they relied on their own internal mechanisms of rule enforcement. In this sense, the Dutch construction industry can be considered a 'semi-autonomous social field' with its own internal 'legal order' (Moore 1973).

Internal Norms and Rules

In his study of Wisconsin businessmen, Macaulay found that contract and contract law were often thought unnecessary, because there were many effective non-legal rules and sanctions (Macaulay 1963, 63). According to Macaulay, two internal norms were widely accepted: '1. Commitments are to be honored in almost all situations'; and '2. One ought to produce a good product and stand behind it.'

Similarly, the PEC found that the system of pre-consultation in the Dutch construction industry was based on 'a detailed system of agreements, and mutual rights and obligations'(PEC 2002a, 243). In some cases this internal system was highly institutionalized. While some contractors simply kept a small notebook or registered all their deals on their laptop, other firms used special registration forms with matching envelopes:

> 'It was just a regular form. You could fill in the number of bidders, the total sum and sometimes separate amounts reserved for "clearing" money. All this information was collected in one central place… I believe I had to keep the blue form and that a yellow form was sent out.'(public hearing 27, 519)

Underlying these systems of registration, was an elaborate system of internal norms and rules. Based on the public hearings before the PEC and other empirical material, it is likely that the following four rules were widely accepted in the Dutch construction industry:

a. 'Each Claim Should Be Compensated'

In the construction industry each claim needs to be compensated. When it is agreed that one contractor is allowed to put in the lowest bid; this immediately creates an obligation towards the other contractors participating in the pre-consultation round. The next time, he will step aside and one of his colleagues will be allowed to put in a bid. This emphasis on reciprocity is also reflected in the fact that most contractors record all their deals and their claims carefully (elaborate system of phantom accounts). Also, it is a general feeling among most contractors that they have a right to be compensated for all expenses related to the calculation of their bid (even if their bid was rejected).

b. 'All Bids Should Be Distributed Equally'

Within the closed circle of contractors participating in the system of pre-consultation, all parties have equal opportunities, provided that they act in accordance with the internal rules. As a result, small companies (who in a situation of open competition would probably not survive) are equally 'protected' as bigger companies. However, anyone who does not comply with the internal rules of the construction sector gets excluded. The 'insiders' will do anything possible to exclude 'outsiders' from 'their' business; and to prevent them from working as much as possible. It should be emphasized that this focus on equality is not related to the

promotion of some abstract socialist ideal, but was primarily aimed at increasing the predictability of a highly unpredictable market (Van de Bunt 2008, 137).

c. 'All Accounts Should Be Cleared Internally'

In the Dutch construction industry, contractors rarely exchanged real money (see Doree 2004, 14). A contractor's claim account would accrue over time but then reduced whenever a project was 'bought'. The individual contractors tried to keep their claim accounts balanced as much as possible. Occasionally, special meetings were arranged to smooth the accounts (referred to as 'clearings'). According to one of the participants, this meant: 'clearing 'til the bitter end.' Only in those rare cases in which this failed, real money would be exchanged.

d. 'Don't Talk to Strangers'

The fourth and final rule of the Dutch construction industry provides that the details of the internal system of pre-consultation should never be discussed openly. This rule not only applied to those contractors who participated in the system, but the rule was also followed by those contractors who were not involved in pre-consultations themselves. In a way, the importance of this rule is still reflected in a recent survey among Dutch contractors. In 2008, almost half of the respondents still admit they prefer not to talk about former price-fixing arrangements (Foekema and Nikkels 2008, 10).

Internal Rule-Enforcement

The PEC report shows that in most cases these internal rules were fully complied with. Moreover, there are very few reports of deceit or internal conflicts in relation to these rules and there are no documented cases of violence in the Dutch construction industry (see Van de Bunt 2008, 140). To secure this high level of compliance, the industry relied on two highly effective internal instruments: reputation and exclusion.

Both elements were also reported in Macaulay's study. According to Macaulay, two businesses who are involved in a business deal do not only want to do business with each other again, they also want to deal with other companies in the future. The way one behaves in a particular transaction or a series of transactions, will color his general business reputation. Macaulay (1963, 64) points to the highly effective informal sanction of 'blacklisting'. A similar mechanism is also at play in the Dutch construction industry (Van Erp 2008). Once it becomes known that one business does not comply with the internal rules (or tries to avoid the system of pre-consultation), it immediately becomes isolated by the other businesses. To sustain this system, contractors also tell each other stories about former colleagues. One contractor explains, for example:

> 'At this one company, they've tried to get out of it for over year. You're then immediately treated as an outcast. Those people never got any decent work again.' (public hearing 21, 390)

This also explains why the illegal system of price-fixing could be sustained for so long. Most contractors felt that it was impossible to step out of it. If they did, they were simply excluded

from the market. According to Doree (2004, 153), individuals could not break out of this system. Firms that tried to do so were cut off from new projects or resources and had to rejoin the system or face bankruptcy. One contractor describes this situation in the following terms:

> 'People were collectively and structurally captured in a system from which one did not want to or could not escape. To some extent, you were a prisoner of the system.' (cited in Van de Bunt 2008, 135)

Likewise, the director of a major construction company explains:

> 'As soon as your company decides to step out of it, you immediately seal the end of your business.'(public hearing 11, 193)

Finally, this highly effective internal system of enforcement also influences the way in which the construction industry thinks about the official enforcement agencies, like the National Anti Trust Authority (NMa). Consider, for instance, how the secretary of a board member of a major construction company talks about her work to the PEC:

> - *'How did people in the industry think about the NMa?*
> - I don't know; their name was hardly ever mentioned.
> - *Their name was hardly ever mentioned?*
> - Yes.
> - *So, it was not as if the NMa was held in very high regard?*
> - No.' (public hearing 8, 147)

6. LINKING LEGAL CONSCIOUSNESS WITH LEGAL COMPLIANCE

Why do people obey the law? Tyler (2006, 3) differentiates between an 'instrumental' and a 'normative' perspective. The instrumental perspective underlies the deterrence literature: 'people are viewed as shaping their behavior to respond to (…) incentives and penalties associated with following the law' and to judgments about the personal gains and losses resulting from different kinds of behavior. The normative perspective, on the other hand, focuses on 'people's internalized norms of justice and obligation'. In this view, people obey the law 'because one feels the law is just' (Tyler 2006, 4).

Both perspectives are also helpful in analyzing the case of the Dutch construction industry. Why did the illegal price-fixing in the Dutch construction industry continue, despite the fact that - since 1992 - it was illegal? The answer of this contractor reflects both perspectives:

> 'Why did this practice continue (…)? There are two explanations. First, the economic motive. (…) In the short run, the gains were bigger then the losses. Second, the ethical motive. The new legal norms were not supported by the common values of the industry.' (cited in Vulperhorst 2005, 110)

Thus far, the 'instrumental' perspective has dominated the literature on price-fixing in the Dutch construction industry. Economists have pointed to important structural characteristics of the industry which make it vulnerable to the creation of cartels. Moreover, lawyers and criminologists have argued that the illegal system of price-fixing in the Dutch construction industry can be explained by the fact that enforcement agencies were not as strict as they should be.

Tyler (2006, 64) has suggested that 'normative concerns are an important determinant of law-abiding behavior, in contrast to the instrumental concerns that have dominated the recent literature on compliance.' Our case-study suggests that this is also true for the Dutch construction industry. Seen through the lens of legal consciousness, this section discusses three reasons why Dutch contractors consider the new antitrust laws unjust.

a. 'Price-Fixing Was Always Supported by the Dutch Government'

First of all, it is considered unjust that something which has long been tolerated is now considered illegal. According to one contractor:

> 'All of a sudden, something that you've always done is suddenly considered fraud. I find this very strange.' (cited in Vulperhorst 2005, 100).

Moreover, the Dutch government itself has actively participated in a system of price-fixing in the construction industry for many years. In the eyes of many contractors, this should also be taken into account:

> 'You may argue, there is a double standard. People look at the events from the past with today's sense of justice.' (cited in Vulperhorst 2005, 70)

b. 'Antitrust Law Is Not Really Law'

The second reason why many Dutch contractors feel that the strict antitrust policies are unjust, is that they do not accept the normative status of these laws. In addition, they feel that they

can break the law, as long as this causes no serious harm to others. One manager explains this general attitude in the following terms:

> 'We from the construction industry always felt that we were only breaking traffic laws. This was not a real felony, because we didn't hurt anyone.' (cited in Vulperhorst 2005, 115)

The director of a major construction company makes a similar point, which he also considers a general characteristic of Dutch legal culture:

> 'Sometimes, the Dutch do something which is not allowed by law, but which doesn't directly harm others. All right, those agreements were illegal, indeed there was a breach of competition law, but no one suffered from this. It was in the sphere which wasn't really criminal. Builders did not live with the idea to go out and to commit an economic crime.' (cited in Vulperhorst 2005, 101)

c. 'Two Conflicting Sets of Values'

Finally, based on a great number of interviews, one researcher concludes that the Dutch government and the Dutch construction industry operated on the basis of two conflicting value-systems (Vulperhorst 2005, 98). Although both parties talked about the same events, their judgment of these events was completely different. There are, for example, important differences in how both parties think about the role of government, the role of law, and what should be the most appropriate remedy to prevent similar events from happening again.

Arguably the most fundamental difference between both parties is how they see the relationship between individual contractors. The underlying idea of the EU directive and the new Dutch antitrust laws is to promote as much competition as possible. By contrast, one of the most important rules within the Dutch construction industry, is that all bids should be distributed equally among all participating businesses. This type of solidarity - which means that large, well-run and healthy companies are equally protected as small, badly-run and suffering businesses – clearly goes against the core of competition law.

These three arguments (previous support by the government; it is not really law; and conflicting sets of values) suggest that the normative support for antitrust law in the Dutch construction industry was not very strong. As a result, compliance with their own internal rules was considered far more important than compliance with the official rules. Or, in the words of a Dutch contractor:

> 'In the Netherlands, if we consider a law unjust, then we breach that law without any remorse. Our conscience is stronger than the law.'(cited in Vulperhorst 2005, 101)

This supports Tyler's central position, who argues that in addition to deterrence and self-interest, legal compliance is primarily a matter of legal consciousness. A recent study suggests that this mechanism is not limited to the Dutch construction industry (Couvret and Mulder 2008, 51). In a national survey among Dutch businesses, about half of them (48.5%) claims they never make a cost-benefit analysis (instrumental approach), 43.5% has made such an analysis only once and only 5% claims they frequently make a cost-benefit analysis. Moreover, when asked what or who motivates them the most to comply with the law, 73% answers 'myself, my own set of values and norms' (normative approach); and 43.5% says

'my company's reputation'. Only 13% of all businesses lists 'the potential penalty' as their principal motivation for compliance and 5% refers to 'my own personal gain'.

7. CONCLUSIONS

Why was the use of cartels and structural price-fixing so widespread in the Dutch construction industry? And why did these practices continue to the present day? In the late 1950s, and based on the advice of his father in law (an experienced businessman), Stewart Macaulay set out to interview Wisconsin businessmen on the role of contract law (see Macaulay 1995). He discovered that most of them usually did not act in accordance with the rules of contract law. Instead, they relied on their own informal rules and procedures. On at least three points, our case study of the Dutch construction industry shows a remarkable resemblance with Macaulay's findings.

First, and similar to most Wisconsin businessmen, Dutch contractors consider the rules of antitrust law much too slow and too inflexible to apply in their everyday business dealings. Moreover, they consider law as a threat to the necessary level of mutual trust among businessmen. Second, and much like the situation in Wisconsin, the Dutch construction industry has developed its own elaborate system of self-regulation. Their own internal 'legal order' includes both a set of internal norms and rules and their own system of enforcement, largely based on reputation and exclusion. Finally, and this point has remained largely implicit in Macaulay's study, the normative support for contract law and antitrust law is not very strong among businessmen in Wisconsin and among members of the Dutch construction

industry. As a result, they consider compliance with their own internal rules more important than compliance with the law.

This socio-legal case study highlights important elements of the interplay between state regulation and self-regulation. More similar studies are needed to establish if these mechanisms are equally important outside the specific context of the Dutch construction industry. In this chapter it was argued that these studies should include both objective and subjective elements. They should not only focus on whether people comply with law, but also on the variety of ways in which people experience law.

REFERENCES

Bremer, W and Kok, K (2000) 'The Dutch Construction Industry: A Combination of Competition and Corporatism' 28 *Building Research & Information* 2, 98.

Camps, H (2002) 'Joop Janssen neemt afscheid van de bouwwereld' *Elsevier*, 20 augustus 2002.

Couvret, E and Mulder, S (2008) *Stijlkeuzes in de handhaving: de rol van waarden bij burgers en bedrijven voor de keuze in handhavingsstijl* (Den Haag, Boom Juridische uitgevers).

Dohmen, J and Van der Steen, P (2009) 'NMa: fraude in bouw ook buiten Limburg' *NRC Handelsblad*, 29 januari 2009.

Doree, AG (2004) 'Collusion in the Dutch Construction Industry: An Industrial Organization Perspective' 32 *Building Research & Information* 2, 146.

Engel, D (1998) 'How Does Law Matter in the Constitution of Legal Consciousness?' in B. Garth and A. Sarat (eds), *How Does Law Matter?* (Evanston, IL, Northwestern University Press).

Ewick, P and Silbey, S (1998) *The Common Place of Law: Stories from Everyday Life* (Chicago, University of Chicago Press).

Fleury-Steiner, B and Nielsen, LB (2006) 'Introduction: A Constitutive Perspective of Rights' in B. Fleury-Steiner and Laura Beth Nielsen (eds), *The New Civil Rights Research: A Constitutive Approach* (Aldershot, Ashgate).

Foekema, H and Nikkels, L (2008) *Cultuuromslag in de bouw* (Amsterdam, TNS NIPO).

Graafland, JJ (2004) 'Collusion, Reputation Damage and Interest in Codes of Conduct: The Case of a Dutch Construction Company' 13 *Business Ethics: A European Review* 2/3, 127.

Gupta, S (2001) 'The Effect of Bid-Rigging on Prices: A Study of Highway Construction Industry' *Review of Industrial Organisation* 19, 451.

Hertogh, M (2004) 'A "European" Conception of Legal Consciousness: Rediscovering Eugen Ehrlich' 31 *Journal of Law and Society* 4, 457.

Hertogh, M (2005) 'Van naleving naar beleving van regels: bouwwereld en bouwfraude vanuit een rechtssociologisch perspectief' in T. Barkhuysen, W. den Ouden & J.E.M. Polak (red.), *Recht realiseren: bijdragen rond het thema adequate naleving van* regels (Deventer, Kluwer).

Hertogh, M (ed) (2009) *Living Law: Reconsidering Eugen Ehrlich* (Oxford, Hart Publishing).

Lee, IK and Hahn, K (2002) 'Bid-Rigging in Auctions for Korean Public-Works Contracts and Potential Damage' *Review of Industrial Organisation* 21, 73.

Macaulay, S (1963) 'Non-Contractual Relations in Business: A Preliminary Study' 28 *American Sociological Review*, 55.

Macaulay, S (1995) 'Crime and Custom in Business Society' 22 *Journal of Law and Society* 2, 248.

Malinowski, B [1926] (1972) *Crime and Custom in Savage Society* (Totowa, NJ, Littlefield, Adams & Company).

Merry, SE (1990) *Getting Justice and Getting Even: Legal Consciousness among Working-Class Americans* (Chicago, University of Chicago Press).

McMillan, J (1991) 'Dango: Japanese Price-Fixing Conspiraries' *Economics and Politics* 3, 201.

Moore, SF (1973) 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' 7 *Law & Society Review* 4, 719.

Nielsen, LB (2000) 'Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment' 34 *Law & Society Review* 4, 1055.

PEC (Parlementaire Enquête Commissie Bouwnijverheid) (2002a) *De bouw uit de schaduw (Eindrapport)*(Den Haag, SdU).

PEC (Parlementaire Enquête Commissie Bouwnijverheid) (2002b) *Enquête bouwnijverheid. (Deelproject 1: Economische structuurkenmerken van de bouwnijverheid)* (Den Haag, SdU).

PEC (Parlementaire Enquête Commissie Bouwnijverheid) (2002c) *De bouw uit de schaduw* (*Verhoren*)(Den Haag, SdU).

Transparency International (2005) *Global Corruption Report: Corruption in the Construction and Post-Conflict Reconstruction* (London, Pluto Press).

Trubek, D (1984) 'Where the Action Is: Critical Legal Studies and Empiricism' 36 *Stanford Law Review*, 575

Tyler, TR (2006) *Why People Obey the Law* (New Haven, Yale University Press) (originally published in 1990).

Van Bergeijk, PAG (2007) 'On the Allegedly Invisible Dutch Construction Sector Cartel' 4 *Journal of Competition Law and Economics* 1, 115.

Van de Bunt, H (2008) 'Rekeningen vereffenen in de bouw' 50 *Tijdschrift voor Criminologie* 2, 130.

Van Erp, J (2008) 'Reputational Sanctions in Private and Public Regulation' 1 *Erasmus Law Review* 5, 145.

Van den Heuvel, G (2005) 'The Parliamentary Enquiry on Fraud in the Dutch Construction Industry: Collusion as Concept between Corruption and State-Corporate Crime' 44 *Crime, Law & Social Change* @, 133.

Vulperhorst, L (2005) *Verzwegen onderneming: ondernemers, overheid en het einde van het bouwkartel (2001-2005)* (Amsterdam, Van Gennep).