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Energy policy by beauty contests: the legitimacy of interactive sustainability policies at regional levels of the regulatory state

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Abstract

Background: To achieve the ambition of the energy transition in the built environment, Dutch local governments try to motivate citizens to participate as communities in policy processes. There is a general expectation that such an interactive approach will foster a more rational policy output and will create stronger support from citizens towards policy outcomes. The emphasis put on this output-outcome effectiveness should not eclipse another major criterion of government policy- and decision-making and implementation: the legitimacy of political authority. Major building blocks of such legitimacy are the principles of liberal democracy and of the rule of law. The aim of this contribution is to identify safeguards for a legitimate exercise of political authority in interactive regional governance initiatives.

Methods: The empirical data about 'Sustainable Community Overijssel' is gathered by document study, including research reports, policy plans, and project documents, and by studying recent publications and news items. The analysis uses Beetham's multidimensional approach of legitimacy as point of departure.

Results: Beetham's legitimacy dimensions are elaborated upon from a liberal democracy viewpoint and a regulatory state pragmatic choice between various institutional environments. From this, legitimacy dimensions of 'shared values' and 'consent' emerge as most sensitive to interactive policy-making, necessitating proper safeguards, safeguards with relevance to the legitimacy of initiatives such as Sustainable Community Overijssel.

Conclusions: Legitimacy is never a given standard, it may be designed into structures and ambitions, but it will still need to be achieved by proper practice. This is certainly the case in projects concerning sustainability challenges of which effective solutions are by no means clear and readily deployable. The Overijssel case should be seen as one of many interesting cases towards evidence-based effective and legitimate policy practices.

Keywords: Energy transition; Interactive governance; Legitimacy; Regulatory state

Background

Ever since the publication of the 'Fourth National Environmental Policy Plan,' the term 'energy transition' is used in the Netherlands to refer to the interventions by government, possibly together with private partners, to become less dependent on fossil energy and accomplish a shift to a sustainable and efficient energy supply system [1].

From the outset, the formulation of long-term policy plans to realize a sustainable and efficient energy supply system was by no means an exclusive responsibility of governmental departments. In achieving a successful climate and energy policy, the Dutch government attached great importance to the contribution of private partners from the policy field [2]. This choice is in keeping with what is called, especially within public administration, the shift from government to governance [3]. This shift comes with increased interaction between public and private actors [4]. In realizing the energy transition in the Netherlands, central government also depends on the contribution of decentralized authorities, such as

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municipalities and provinces, as well as to the input of (for profit) businesses and (not for profit) interest groups. The idea is that their active involvement leads to the input of capital, technical expertise, entrepreneurship, and (social) support in the policy process [5]. This involvement can take many forms, ranging from public-private partnerships to *interactive governance* [5].

The Dutch province of Overijssel also considers the energy transition as its responsibility. In the program 'Energy pact Overijssel,' the province has presented its policy ambitions in the areas of climate and energy [6]. At first, this provincial policy was in tune with the European and national policy in the battle against climate change: a 30% CO₂ reduction in 2020 below 1990 levels [6]. Later, this policy goal was changed. The province committed itself to the effort of achieving the 30% CO₂ reduction as soon as 2017 [7]. According to the province, there are opportunities to achieve this enhanced ambition by setting up, with great speed and efficiency, sustainability projects throughout Overijssel [8]. One of the projects that are mainly focused on increasing decentralized energy production is the initiative 'Sustainable Community Overijssel.' In this project, the province applies an *interactive governance method* towards making villages and urban districts more sustainable [9]. We will elaborate on this method later.

In cases of interactive governance, ideally, citizens, private organizations, and governors have the positive expectation that their joint effort will result in *more rational* outcomes and that there will be *greater support* by citizens of the decisions taken, especially in comparison with policy- and decision-making in an hierarchical-unicentric setting [10]. The emphasis on such benefits is most relevant to policy effectiveness, but it should not eclipse another major criterion for policy- and decision-making by government: the legitimacy of political authority [11]. This contribution analyzes the *legitimacy* of interactive governance. Its aim is to identify safeguards for a legitimate exercise of political authority in interactive governance initiatives. We present the case of Sustainable Community Overijssel as a backdrop to our focus on more theoretical fundamental questions about such safeguards. Consequently, the main purpose of the description of the case is not to provide in-depth information about Sustainable Community Overijssel itself. The case is suitable as it provides a fine example of 'on the ground' involvement of groups and communities of citizens willing to invest in the collaborate exploration of new avenues of sustainable action. As in many modern states, the 'quality criteria' for political authority in the Netherlands are closely linked to the concept of the liberal state and, as such, with the concepts or principles of democracy and of the rule of law, the latter being referred to as the *Rechtsstaat* [12]. As we will show later

in this contribution, the liberal state as a 'democratic *rechtsstaat*' is not settled in stone and can be conceptualized in various ways. Typically, these ways have varied over time with shifts, from the nineteenth century minimal state, via the twentieth century welfare state, to the twenty-first century regulatory state [13]. Our analysis will show that these are not merely historic variations but also ideal-type conceptualizations of the liberal state, useful to an analysis and evaluation of legitimacy, as in the case of political authority in the Sustainable Community Overijssel project.

Methods

Our contribution is not of an empirical but rather of a theoretical-analytical nature. As mentioned before, the aim of our study is to identify relevant safeguards for a legitimate exercise of political authority in initiatives such as Sustainable Community Overijssel. In order to meet this aim, we present an outline of the case. To that end, empirical data is gathered by document study, including research reports, policy plans, and project documents, and also by studying recent publications and news items about the case. For the analytical approach, the framework of David Beetham is used as a point of departure in discussing the legitimacy of policy- and decision-making. Beetham's multidimensional approach on legitimacy, as described below, provides a useful format to structure different aspects of legitimacy relevant to our discussion about the match between public authority and interactive policy-making.

An analytical framework for legitimacy

Legitimacy, of course, has been the focus of much attention in administrative-academic discourse. In turn, its legal-administrative appraisal is closely connected with the concepts of the *Rechtsstaat* or the *Rule of Law* and, generally speaking, strongly associated with the image of 'government' in a (sovereign) hierarchical-unicentric setting [5]. The value of legitimacy builds upon public law notions such as legality and the separation of powers, democracy, human rights, and legal protection [5]. Under the politico-legal doctrine of the *liberal state*, these underpinnings call for a strict separation of spheres and consequently in tasks, powers, and responsibilities between government and private parties. Consequently, the government shall not identify itself with the private interests of specific individuals and shall operate (only or primarily) on the basis of a democratic political mandate (preferably on the basis of representation) to best ensure its focus on the general/public interest [5].

In the case of interactive governance, both this strict separation (public versus private) and this political mandate (representative versus participative) seem problematic. Therefore, we analyze whether and, if so, how

‘policy- and decision-making *in* interactive governance’, such as Sustainable Community Overijssel, can fit in with the legitimacy of hierarchical ‘decision-making *by* government’ as (traditionally) prescribed (hierarchically) by public law. This perspective is chosen given the premise, as discussed above, that public authority has the effect that, although perhaps resulting from an interactive process, decisions taken are hierarchically (i.e., unilaterally) binding for the relevant external actors (also known as ‘regulatees’).

David Beetham has developed a cross-discipline perspective on legitimacy that lends itself well to build a connection between public administration and legal-administrative boundary conditions for the legitimate exercise of authority. He describes legitimacy as a ‘multi-dimensional’ concept, with three dimensions: (1) legality, (2) shared values, (3) consent [14]. Together they constitute the (cumulative) conditions for legitimacy, which can subsequently be tested empirically. Table 1 shows Beetham’s own schematic interpretation of this.

Dimension 1, *legality*, calls for a legal validation of the exercise of authority, as the ‘law stands’ - including unwritten rules [16]. Legal rules can support unilateral government regulation, not in the least because the government is subordinate to the law (i.e., ‘rule of law’).

Dimension 2, *shared values*, is about the requirement that the rules by which regulatees are bound are ‘intrinsically’ justified [17]. Such rules shall reflect the ‘normative principles’ that express shared value perceptions about the citizen-government relationship. Generally, justification follows upon acceptance of their origin (‘what is their source?’) and/or their content (‘what norms do they hold?’).

Dimension 3, *consent*, refers to the demand of some form of voluntary consent of the regulatee(s) with the political exercise of power by the dominant actor, [18] such as on the basis of democratic mechanisms.

Hierarchical-unicentric governance (i.e., government) can be regarded as legitimate if and when the exercise of political or, in more legal terms, public authority takes place by virtue of and within the limits of the law (‘legality’), when these requirements of lawfulness are in keeping with social perceptions (‘shared values,’ e.g., about distributive justice or proper public administration - as manifested in shifts from the minimal/night-watchman state, to the positive/welfare state, and to the, present,

regulatory state) [13] and when the government intervention is based on the (democratic) consent of citizens (‘consent,’ e.g., elections/representation, referenda, public participation) [5].

This appraisal of legitimacy concerns all three dimensions of legitimacy relating to just one particular type of public governance of societal interests, that of hierarchy by government. We name such type an ‘institutional environment’ as its mode of governance crystallizes empirically and normatively into a particular ideal-type interaction pattern. *Hierarchy* by government presents us with a top-down pattern of human interaction, which builds on the mechanism of ‘command and control’ of government against citizens. Alternatively, *market*, as an interaction pattern that builds on the mechanism of competition and exchange, and *network*, as the interaction pattern that shaped by the mechanism of cooperation and inclusion, are institutional environments with *ideal-type* patterns of behavior concerning societal governance, also carrying both an empirical and a normative side to them [19]. With each issue of societal interest, such as (promoting) sustainable energy, an analysis can be made both *empirically* (what types with relevance to the interest at hand are in place and how they are performing?) and *normatively* (what criteria of general acceptance and justice are relevant to fostering and safeguarding this interest in terms of patterns of distribution of rights, wealth, and powers and as regards proper role play of involved actors?).

As to the normative aspect, the above appraisal regarding hierarchy may be summarized as statutory allocation of power and checks and balances. Similarly, we may summarize the normative aspect of markets as fair competition and consumer protection, and social enterprise facilitation as regards networks. The fact that Beetham’s legitimacy focus is on political authority, which is most clearly present in the hierarchical environment, does not rule out the possibility of also elaborating (schematically; Table 2) on his ‘3D analysis’ to legitimacy of public governance through the institutional environments of markets and networks.

Together, the empirical and normative appraisals may provide a basis for assessing, in terms of possible market, network, or government *failures*, the public governance performance in terms of securing and fostering the concerned societal interest - or, for that matter, the assessment that one environment or mechanism holds more *promise* than others in being effective and legitimate in service of, for instance, (promoting) sustainable energy (production and use). In making this assessment, generally liberal states by default regard markets or civil society networks to be the most suitable environments in securing and promoting societal interests, as this fits best with the ideal of personal freedom. Consequently,

Table 1 The three dimensions of legitimacy according to Beetham (Table 1.1 in [15])

Criteria of legitimacy	Form of non-legitimate power
1 Conformity to rules (legal validity)	Illegitimacy (breach of rules)
2 Justifiability of rules in terms of shared beliefs	Legitimacy deficit (discrepancy between rules and supporting beliefs, absence of shared beliefs)
3 Legitimation through expressed consent	Delegitimation (withdrawal of consent)

Table 2 Legitimacy dimensions across institutional environments

Legitimacy dimension	Type of environment		
	Government hierarchy	Market	Network
Legality (focus)	<i>Rechtsstaat</i> /rule of law explicit legal powers	Fair competition and consumer protection; contract law	Freedom of association
Shared beliefs (main)	Public service in the liberal state	Private interest by efficient and consensual transactions	Common interest towards converging strategies
Consent (core concept)	<i>Voice</i> : representative and participatory democracy	<i>Exit</i> : exchanges in a competitive environment	<i>Loyalty</i> : voluntary cooperation by (com)pact

hierarchy by government is considered as a ‘mere’ alternative, if and in as much as markets and networks fail.

As to hierarchy, the above legitimacy appraisal also holds a reference to ‘shifts from the minimal/night-watchman state, to the positive/welfare state, and to the, present, regulatory state.’ These are politico-legal conceptualizations of the liberal state as mentioned above (also known as liberal democracy under the rule of law), which builds on the notion of autonomous private liberties and a clear divide between the public and the private realms, i.e., between state and society. The conceptualizations focus on the tasks that are considered the core responsibility of government and desired type of interaction between government and the society and the accompanying ‘equilibrium’ between the public and the private realm from a governance perspective. Each conceptualization holds a particular politico-legal perspective on good public governance, fitting with the overall liberal state doctrine, and with the aim of providing long-term societal stability [20]^a. As such, we need to consider that these models not only express shared beliefs or values concerning the place of government but inescapably also relate to the relevance of markets and networks in a public governance perspective.

In the *minimal or night-watchman state* model, government only safeguards societal interests of peace, safety, and security, so that private freedom and equality are secured and may flourish in markets and in networks. The *welfare state* model places government in a more active position, securing and fostering citizens’ freedom and equality, as matters of societal interests not only in terms of formal rights but also in wealth - and markets and networks must adjust and supplement. Finally, in the *regulatory state* model, eclecticism and remediableness rule the choice of proper institutional setting to secure and foster societal interests - with government generally taking a more ‘meta-public’ position [13,21,22]^b.

Although we prefer an analytical understanding of these conceptualizations, we can also frame a historical narrative. From the wake of the liberal state (with the American and French revolutions), we see how, from societal interest governance primacy of markets and networks (in the minimal state - end of the eighteenth until end of the nineteenth century), there is a shift via

primacy of government (in the welfare state - end of the nineteenth until end of the twentieth century) to the absence of any primacy (not even of networks - if even these could carry such primacy) and ‘remediableness’ (in the regulatory state - end of the twentieth century until today). We have to recognize, however, that the three conceptualizations are presently active in an overlapping or intertwined way. In some matters, government still provides the typical minimal state safeguards (as regards peace, safety, and security) and has a primacy over safeguarding a minimal and equal share in wealth (as regards social security). At the same time, government seeks to empower actors within markets and civil networks and improve the workings of these environments (e.g., consumer protection in markets) and may also enter into contracts and collaborations with market and network parties involved (e.g., PPP), securing or fostering societal interests (as regards not only sustainable energy projects but also infrastructure, public transport, health, environment, and culture).

In saying that government is taking a more meta-public position in the regulatory state, we purport that government still holds a position with an overall or systemic public governance responsibility. There are three important aspects to such a remark.

Firstly, government is less an actor that is expected to *row*, as in itself performing operational activities in providing public service, and more an actor that chooses to *steer* [23], especially by regulation, the workings of markets and networks and activities of actors involved, so as to secure legitimate and effective governance, proper to societal interests. Thus, government will more often limit its involvement to an (hierarchical) *identification* of a public interest in terms of a regulatory definition of relevant objectives (i.e., ‘steering’) and leave the actual *execution* of public services to private parties in markets and networks (i.e., ‘rowing’ - as by the delivery of goods and services). In practice, as the history of privatization shows, there is often an iteration between identification and execution, with changing and intertwined roles, whereby private actors may also have a say in identification (as in co-regulation) [24], while conversely government may still take all or at least some control in the implementation.

Secondly, and in line with the latter observation, although our image of the regulatory state may suggest otherwise, in this era of governance, government can no longer act as an 'unmoved mover' deciding on fitness of a particular institutional environment in the service of specific societal interests. It may still have a systemic responsibility to influence the choice of 'arena,' but it will mostly have to do so in an interactive way. This certainly applies to the fact that under multilevel governance, we witness a '*decentring of the state*' (also referred to as the 'new or post-regulatory state') as private and inter-, supra-, and transnational regulations play an increasingly more important role in public policy-making [24].

Finally, government steering may either be about matters of *actual* public interests (e.g., safety, social security, energy) or matters of *meta*-public interest (i.e., improving the workings of markets, civil networks, and governments as such) [25]^c. Given both the difference in nature and in discretion of powers involved, government interventions need to be clear on whether addressing a specific failure or possible improvement in service to a particular actual public interest (e.g., electricity reliability) or a meta-public concern (e.g., fair competition). This is especially important in view of private party certainty (whether businesses or non-governmental organizations (NGOs)) about their operational scope of opportunities and risks.

As our contribution is about the relation between public authority and interactive policy-making, somehow the above dimensions of legitimacy of public authority need to be matched with the essential characteristics of interactive policy-making, without infringing upon them. Based on this, the notion of coupling different institutional environments may be of relevance. If and how this is feasible will be discussed below.

Results and discussion

Before entering in this feasibility discussion, we want to first present an outline of the policy choices that were made in the Sustainable Community Overijssel project. Next, we will consider its interactive policy approach in terms of possible legitimacy critiques on two separate issues of interactiveness: 'the public (i.e., government) influencing the private (i.e., free societal discourse)' and 'the private (i.e., a private jury) influencing the public (i.e., taking administrative decisions).' In the final analysis, we will place these critiques and issues in the context of Beetham's legitimacy dimensions, especially shared values and consent, as these reflect relevant politico-legal orientations, as we already saw in different conceptualizations of the liberal state. Subsequently, we will present a critical - but constructive - analysis of the design of legitimacy in projects such as that of Overijssel's sustainable communities.

The case of Sustainable Community Overijssel

In 2010 and 2011, the province of Overijssel organized a contest, which was called Sustainable Community Overijssel. The citizens were challenged by the province to formulate plans for a sustainable local environment with a focus on sustainable energy production [9]. The communities that participated in the contest aimed at becoming eligible for financial support (in different amounts, varying from 50,000 euros to 1.5 million euros) by the province, to accomplish their ambitions and have a chance at winning the title of 'the most sustainable community in Overijssel' [26,27].

To make Sustainable Community Overijssel a success, the province applied an interactive governance approach. The starting point was that inhabitants of local communities, such as villages and urban areas, would identify their own societal problems within the areas of climate and energy and formulate their own policy solutions to them [9]. The objective behind this approach was to overcome the 'wicked problem' of climate change by focusing on a limited number of coherent, well-supported, and (thus) manageable local policy issues and solutions [9,27].

During the contest, the inhabitants of villages and districts had to show what efforts they already made on sustainable development. Furthermore, they had to explain their concrete plans towards becoming a model sustainable community [9]. These plans were presented in the so-called *bid books*. The ideas of the communities had to relate to the themes of (1) energy, (2) mobility, (3) water, (4) food, and/or (5) waste [28]. The groups of citizens or communities that wanted to submit a plan also had to explain how they would strike a balance between the dimensions of people, planet, and profit [28]. Within these boundaries, the participants had room to formulate their own ideas [9]. The project approach resulted in many submissions, ranging from installing solar panels on a community center to the introduction of an electric 'community car.'

Prior to the contest, the province constituted a 'jury of experts,' including an ex-politician (the chairman of the jury), an ex-astronaut/professor of sustainable technology, and two directors of related interest groups [26,29]. It was this jury's task to determine which community would be the winner of the contest and would thus qualify for a provincial subsidy. In taking a decision with the latter consequences, clearly the legitimacy issue is at stake - if only when we consider Beetham's emphasis, concerning the dimension of consent, on democratic mechanisms as a basis of the exercise of political authority [11]. In the Sustainable Community Overijssel case, it is not a public agency under democratic control that decides on the use of public funds, but it is a private committee that decides 'who gets what.' In terms of the ultimate impact of subsidizing, there are also other legitimacy concerns, especially relating to the dimension of

shared values and the extent to which government 'interactively' exerts influence on public discourse.

Possible legitimacy criticism regarding interactive energy transition policy

The interactive governance approach presented above builds upon private involvement and commitment, not only on the ground in the plans that communities formulate and to which they commit themselves but also in the allocation of public benefits (i.e., subsidies) to facilitate the execution of such plans.

The private initiative on the ground may be considered a voluntary matter, but the fact that it is a 'bid' and thus extends to the possibility of public means being used to support one and not all private initiatives more than suggests a regulatory government effort towards behavioral change. This element of orchestrated or 'public-private voluntarism' begs the question of the legitimacy of government organizing and facilitating such support. The fact that the decision about allocation of public means towards such support is left to a private committee (of experts, of sorts) brings in the second element of 'private-public administration,' which calls for reflection upon the legitimacy of the binding consequences this brings.

In a provocative stance, it could be said that the issue of public-private voluntarism raises the question if government is in fact propagating a political agenda under the cover of spontaneous private initiative, thus infringing on society's free communicative action or discourse, and if so, by what mandate? Similarly, the issue of private-public administration raises concerns on whether and, if so, how the publicness of government, as a matter of its actions and their effects being solely for the purpose of the public good (in accordance with the aforementioned principle of non-identification and effective public service), is safeguarded against a scenario where the aforementioned committee places its members' private interests before the public interests involved.

Such a critical approach poses a total opposite to a possible positive appraisal of the Overijssel case, emphasizing that any mode of policy-making has democratic backing, by the representations involved (i.e., the provincial council), that breathes public participation both in shaping initiatives (on the ground) and in deciding on their financial support (by a private committee of experts), simply cannot be bad or at least is intrinsically better than a 'mere' top-down (if not command and control) policy execution.

If we regard both these legitimacy issues, as exemplified in the Sustainable Community Overijssel initiative, from the viewpoint of traditional government activity, given that the government is basically hierarchically involved as a provider of subsidies, then our analysis (and possible evaluation) should focus on principles of liberal

democracy and of the rule of law. These can be framed in terms of Beetham's three dimensions of legitimacy and, subsequently, as a mere example, compared with the setup of the Overijssel case. We should be careful, however, to not only regard the initiative merely as a matter of traditional public authority but to also understand its significance in the shift from government to governance [3] and how this challenges the typical liberal state public-private divide and views on the role of the state and that of government - especially as a matter of shared values and consent.

Before going into this, however, let us first voice some of the possible legitimacy critiques concerning both public-private voluntarism and private-public administration, so as to more clearly set the stage for debate and then present a perspective on how legitimacy of governance (of sustainability) may be designed, especially in our case in point.

Legitimacy critiques regarding public-private voluntarism

This on the ground issue evokes several critiques, which could be broadly alluded to as a matter of public governance morality and which relate especially to Beetham's dimensions of shared values (e.g., private freedoms and the non-identification principle) and consent (e.g., free debate and equal political participation rights). To name but a few critiques may suffice to frame this legitimacy issue.

Firstly, one may pose a *Habermasian* critique concerning the influence that government exercises over free *communicative action* within the society [30]. Is the community contest in fact a system by which government actively structures societal debate and private initiative, thereby favoring and facilitating some strands of political thought above others?

Secondly, a critique in line with *Foucault's* concept of 'governmentality' draws our attention to the acceptability of government - both by state and by non-state institutions and disciplines - involved in 'conduct of conduct,' as rational efforts of regulating private conduct towards specific political objectives, by determining what counts as truth and propagating accompanying knowledge through society, thereby molding citizenship to suit particular political ends [31].

Thirdly, the critique against the 'libertarian paternalism' following the currently popular 'nudging' approach to regulation, coined by Thaler and Sunstein [32], comes to mind. Supposedly combining libertarianism (i.e., people are free to do and choose what they like) with paternalistic intervention (i.e., legitimately influence people's behavior 'to make their lives longer, healthier, and better') [32], regulatory interventions are presented in a way that nudges individuals towards the desired behavior without *essentially* limiting their freedom of choice. The critique holds that libertarian paternalism is an oxymoron, whereby influence

presented as a 'nudge' (as in making electric cars cheaper) readily becomes a non-libertarian form of command and control (as when, shy of prohibition, fossil fuel cars are taxed beyond a reasonable price). Should we regard arranging for a sustainable community contest, as a shrewd architecture towards nudging communities (and the individuals in them) into a sustainable energy transition?

Nudging is typically applied to *merit goods* (and services) [33], as in renewable energy, but also in health (care and food) and education. The discourse on merit goods, however, features economic regulation, such as subsidies or, conversely, taxation of demerit goods (such as non-renewable fuels). Clearly, nudging and social regulation (often depicted by a 'preach' but also by fostering community activities) may create the same positive effect. In the Overijssel case, the strategies of economic and social regulation are combined.

By analogy, critique voiced against forms of regulation by *code* or *architecture* seems relevant [34]. Typical examples of this type of regulation, which influences behavior through the design of a technical functionality, are a speed ramp or a device blocking the possibility of copying a DVD. In the context of this contribution, allowing for the possibility to connect 'smart grids' to the main energy grid comes to mind. Code as regulation can take influencing individual choices one step further than nudging - to an actual loss of freedom of choice, even without awareness of such loss. *Regulative code* leaves the option of choice open, such as by a warning that while browsing the Internet one is one click removed from pornographic content or by a smart meter which by default connects to green electricity, unless it is otherwise instructed. In *constitutive code*, undesirable types of behavior are 'simply' designed out, as by the 'smart meter' that will only connect to green electricity [35]. In *Brownsword's* view, designing out creates an amoral situation through the lack of awareness of what is good and what is bad behavior or of a push in one or the other direction (e.g., to only use green energy) and, consequently, making the proper 'choice' of behavior meaningless as actually there was no choice. Thus, he states: 'A fully techno-regulated community is no longer an operative moral community' [36].

As we list these possible critiques and identify fears of public-private voluntarism as illegitimate *intrusion*, we may also get a first glimpse of the possible *remedies* or *safeguards*, which may ensure legitimacy of regulation - whether this is of a social nature, command and control, competition-based, or code [37]. The core issue of such intrusion is that of a possible 'degradation' of citizens becoming policy tools and a 'perversion' of societal debate through public authority infringement upon the 'level communicative playing field,' due to government support of certain types of civil or community action. This touches

especially on Beetham's dimensions of shared values and consent. With respect to shared values, clearly, the public-private, state versus society divide characteristic of the liberal state (i.e., liberal democracy) may be at stake. The concept of public-private voluntarism raises concerns especially from the perspective of society and its individual private members. These individuals should be regarded as *free*^d [38] and so equally may enjoy autonomous rights (i.e., not given by the state and to be respected equally by the state) and may become challenged by interactive policies, which include and support only those who act in concert with government (or state) views. Thus, the main threat lies with (perversely?) influencing free or open societal discourse. As regards consent, the closely connected yet separate concern lies with the danger of exclusion from societal discourse following social exclusion from (benefits of) interactive policy-making, considering how state democracy rests upon the capacity within society to have all its individual members (able to) participate in public debate. At face value, the primary vital substantive remedies to this are *transparency*, making citizens know what interventions are deployed to influence their behavior; *respect*, allowing room for choice in as much as possible, so people can make their own moral choice; and *inclusion*, keeping those who do not voluntarily participate in interaction informed and if possible getting them involved [39]. We will return to possible remedies later, after having considered the critiques concerning private-public administration.

Legitimacy critiques regarding private-public administration

As to the public authority issue or the mandate of a private committee taking decisions under public law, the main 'dimension of shared values' critique again lies with the aforementioned characteristics of the liberal state but now with an emphasis on concerns from the perspective of the state and its individual citizens (as against society and private persons mentioned above). The primordial worry lies with the principle of non-identification (i.e., the government shall not act with the mere intention to foster private interests (or neglect those of only some) and with concern for the limits (in public focus and necessity) of government powers. This allocation of powers and determination of purpose relates to the 'dimension of consent,' as it must ultimately rest with the 'demos' of citizens who may equally participate in political debate and subsequent decision-making - positioning *political* sovereignty (or imperium) well away from *economic* sovereignty (or dominium) by avoiding any merger between private and public property as under royal (and even enlightened) despotism.

The element of *publicness* of any government purpose or undertaking expresses that government service is

limited to serving public interests (fully and) *only*: a regulation to subsidize green energy use is not intended to personally benefit individuals who use this type of energy, but to foster the use of this energy type by supporting members of the *class* of people willing to engage themselves or invest. In other words, government shall *not* provide personal favors and most certainly *not* to those running it.

Of course, running government is in itself the work of many private persons, but in the service of government, they are expected to operate as *public* representatives, *public* appointees, or *public* servants - acting in the *public interest*. The concept of the public interest should be well distinguished from the realm of *private* interests, the latter being either of a most individual nature (e.g., personal sentiments) or of a *societal* nature (i.e., shared by many, such as in proper energy services). Clearly, safeguarding societal interests is a concern to society as a whole. If the government concludes that societal interests are not adequately realized because markets and networks fail as suitable environments for the delivery of suitable goods or services, it may postulate a public interest under which it can be equipped with proper powers and take appropriate measures to safeguard and/or foster the underlying societal interest. These measures may only be of intended service to this societal interest as a public interest - so without (sole or selective) identification with private interests. In keeping with what was remarked earlier, it is generally regarded most in keeping with the liberal state doctrine if such a course of action is pursued only as an alternative, i.e., in case of failure by markets and networks - and that upon identification of a particular public interest, the government will first seek to involve markets or networks in the execution of the policy it has set out.

Then again, we should stress that under the liberal state doctrine, the mere fact of a government being endowed with the legal powers to pursue a particular public interest, with regulatory effect upon private freedoms and property rights, does by no means preclude private persons from taking their own actions on the same behalf. As private persons (not citizens) they may still, acting within markets or networks, make their own effort to foster or protect a societal interest (and related service, e.g., renewable energy) - even though this has become an object of public interest. There is no principle of non-identification that can be held against private individuals (other than when they act as government or as civil servants). In as much as public interest regulation allows, it remains a freedom of private persons to get involved as a matter of their private interest (as in privately investing in solar panels) or as a matter of privately felt concern for the involved societal interest (as in NGOs or communities making a joint sacrifice for

renewable energy as they think this is the right thing to do). In the Overijssel case, we witness that the private initiatives involved, albeit 'state incentivized,' voluntarily align with public interest policy-making, at least certainly those eligible for subsidy.

So, the critique concerning private-public administration by the use of a private committee acting as a public jury essentially boils down to the risk of the private persons involved 'running off with the public interest' - that is, so as to *favor* either their own private interests or of those private persons they favor, or to act with a bias against those persons or groups that they privately dislike. On a more subtle level, the critique relates to general *requirements* of public office. These are the requirements that structure government, such as by the demand of proper checks and balances (e.g., oversight and/or judicial review) and of structural openness and transparency as well as the (legal) principles by which government is run (i.e., of making, taking, and executing decisions), such as impartiality, proper preparation, due process, equality, proportionality, fairplay and integrity.

If so, how so can these requirements be met in the Overijssel case? One may argue that, just as government is run by private persons acting as public actors, perhaps a similar position can be created with regard to the members of the private committee that make up the jury deciding on who gets a subsidy and who does not. Clearly, the individuals involved are not hired to decide upon private interest, but upon the capacities which are considered most suitable to delivering the expert opinion needed and which they hold (best). One may argue that in fact their discretion is not of a (broad) political nature, as the objectives of the program are generally clear, and they only require the determination of what, by comparison, is the most *effective* and *efficient* bid.

Elaborating on allocation of public rights

If, still on the issue of private-public administration, we take this positive line of reasoning, we need to consider first that the allocation of public rights, such as that of subsidies, is an issue that allows for various approaches, each having their own range of legitimate action. The requirements for decision-making need to be in tune with the criteria relevant to the exercise of the legal powers involved, and these criteria primarily build on the type and public purpose of the privately enjoyed public rights involved^e. Requirements also follow from the specific type of public rights. There are many such types, but a simple categorization presents four basic types: (a) *powers* (concerning the allocation of legal competences to bindingly determine legal relations, generally powers of government - clearly these are not relevant in terms of private enjoyment); (b) *liberties* or *immunities* (such as human rights, which can be privately enjoyed as within

the liberal state these are regarded as autonomous rights, against which government holds no power)^f; [40] (c) *privileges* (as privately enjoyed rights which purport a regulatory exception or exemption to a general prohibition or command, i.e., a permit or dispensation, as a privilege to neglect a general public prohibition or command because in the particular private instance the government has no claim to enforce either the prohibition or command); (d) *claims* (as a private claim to enjoy a service or benefit against a duty of government to perform - as in subsidies, grants, and welfare benefits, free-of-charge public services, and concessions).

Some of these public rights are of a personal character (*in personam*) and cannot be transferred, let alone by market transactions (as in the case of the Overijssel case subsidies); others have a property character (*in rem*) and can be transferred, possibly also on the market (as in the case of CO₂ allowances).

In many cases, the regulatory interest behind the allocation of such rights (b, c, and d) does not reach beyond the objective of orderly or proper operation. In many permit systems, for example, the 'prohibition unless permitted' rule only exists to organize a formal basis for conditioning certain activities as regards, for instance, their safety or fit with urban plans. Often, the allocation of the relevant public right (e.g., a permit) is a matter of equal treatment, against the backdrop of the 'first-come, first-served' procedure. This may even be the case with public rights concerning scarce resources, such as subsidies from limited funds, permits for limited parking spaces, or pollution space (as in allowances for emissions of CO₂). Scarcity, however, may also lead to using (economic) criteria for *best use* of benefits or exemptions. Then the principle of equality - through first-come, first-served - is often exchanged for one of two (competition-based) systems: the expert judgment (aka the 'beauty contest') or the market or price mechanism (aka 'auctioning').

Allocation by *auctioning* is especially apt for allocating public rights when the 'best use' of these rights properly translates in the most (static or dynamic) efficient use, for which the highest bid is often considered the best indicator (setting aside problems such as 'winners curse' [41]). Such bidding may be applied on auctioning for initial allocation (as a 'primary market') and/or for allowing a 'secondary market' for trading public rights once these have been allocated initially.

A 'beauty contest' is an interesting, alternative mechanism of allocating scarce public rights, especially when best use cannot readily be translated in clear or one-dimensional criteria, such as through an economic comparison between competing bids. Well-known examples are subsidies in the area of arts and culture.

Clearly, the mechanism of the beauty contest, of which the Overijssel case presents an example, stands away

from mechanisms where allocation of public rights (still) requires a weighing against each other of different and most likely incommensurable public interests (such as between energy, environment, health, and safety) [42]. In such case, a democracy-based political decision is generally called for (often preconditioned in general terms by a policy guideline). Beauty contests and auctions are concerned with (orderly, proper or best use of, or concern for) a singular relevant public interest, in our case that of sustainable energy, which nonetheless poses a policy challenge as it is an *ex ante* 'wicked' and 'ill-defined' problem. Major uncertainty about the best course of action (in the Overijssel case also as to how citizens can become effectively involved) exists when multiple solutions and various solution paths present themselves [43-45]. Adequate information, let alone a set of steps or decision algorithm by which to choose the best course of action, as with tame and/or well-defined problems, is lacking. Consequently, substantive expertise, based on context-specific or domain knowledge and knowledge-based heuristics, is a primary concern, preferably to be brought together in a multidisciplinary context of collaborative action - enhancing chances at success.

Given this concern, both the open invitation to enter community bids, as well as the setup of a jury which embraces various disciplines for judging proposals, may be regarded as a fitting beauty contest approach to organizing the necessary collaborative action both in terms of creative thinking about possible projects and in terms of proper selection and subsequent endorsement. As to concerns over the equality principle, we should consider that, apart from absolute exclusions (which qualify as discrimination - as on race, gender, sexual inclination, and religion), this principle 'merely' calls for proper relative criteria - relative to the purpose or objective of the scheme and government power involved. In the Overijssel case, this means that the private committee (bestowed with a public task and power) shall not discriminate between proposals or bids other than on the criteria, which are not absolutely prohibited (as discriminatory) and which are specifically relevant to enhancing sustainable community projects. In other words, in principle, every group or community has a shot at launching a successful bid, and to favor one bid above the other can only be legally justified by reference to criteria relevant to the objective of the scheme. In all other respects, bids should be regarded equal. The latter also means that if bids are equal and one is accepted, then the others need also be accepted.

The design of safeguards for a legitimate interactive energy transition policy

From the above discussion, we can conclude that legitimacy issues are relevant especially as regards transparency, respect, and inclusion, when we look at the public-private

voluntarism of on the ground influencing of opinion and behavior and the requirements of proper structuring of and due process in running government, as regards private-public administration through private committee decision-making. To secure legitimacy on these aspects, Beetham's dimensions of shared beliefs and consent are of paramount importance.

The challenge of shared values

It should be clear that although the Overijssel case has elements of social capacity building, which could be understood as a *meta-public* objective, the project is not (so much) about sustainability of communities as such, but about the role of communities in protecting and indeed improving the sustainability of the environment - as an *actual public* interest. Though citizens and private communities involved in the Overijssel case may be assumed to do so primarily as a matter of voluntarism, even for them, it is important to know what they may and may not expect from government in response to their proposals - time too can be spent only once.

The province of Overijssel's choice to call upon private persons' willingness to get involved in an actual public interest (of environmental sustainability) seems to be well in tune with the regulatory state concept of an eclectic approach to policy definition and policy implementation. Upon identification by government of a particular public interest (in this case sustainability), private actors (in the Overijssel case, civil networks) are facilitated to contribute both to further determination of this objective and especially of formulating and implementing actions towards these objectives. It is expected that this contribution will serve both effectiveness and legitimacy of policies towards this objective. From our above brief reference to ill-defined problems, we can understand how organizing collaborative commitment and creative thinking may be considered a necessary (if not indispensable) step in the sustainability policy challenge.

On the one hand, this approach calls on the mechanism of networking and particularly on (the capacity to organize) civil networks. As such, it leaves the choice of *modus operandi* within groups and communities to the participants themselves. The participants remain private persons, rather than that they become citizens (with public responsibilities), which seems vital to the shared liberal state value of a clear delineation between the public and the private sphere. This touches on the need for an open approach to the question of who to involve in an initiative and who not to - as well as on equality between and good faith of participants. It also includes giving room to private persons' *substantive* perspectives on the issue. Ideally, these are primarily underpinned by their collective private knowledge and skills, also at collaboration, but that is *not* to say that they will necessarily

align with provincial public interest preferences - and as such may trigger political debate.

The latter point is of course most relevant with respect to decision-making with respect to the regulatory instrument of the subsidy. Although of a *hierarchical* nature, the fact that decision-making is left to experts at arm's length from government can be taken to (at least attempt to) emphasize that government is not forcing its views upon these networks. As private participants are learning, so is the government.

The challenge of consent

So, we see that there is a regulatory state perspective that may provide legitimacy as a matter of *shared beliefs*, which accommodates the interactive policy initiative in case. The same regulatory state approach may also provide a framework by which to address Beetham's dimension of consent. In terms of institutional environments, it could be argued that *market* consent rests primarily with reciprocal '*willingness to be bound*' ('non-exit' by contract), as does network consent primarily with *stakeholder participation* ('loyalty' by association) and *government hierarchy* primarily by *election* (i.e., 'voice,' mediated by representatives).

Along those lines, one could reason that in the minimal state, consent concerning service to societal interests is considered (again) primarily as an outcome of a process of countless contractual market interactions (including those that do not lead to contracts) or voluntary civil network interactions (including those initiatives that do not lead to effective participative collaboration). If an interest is not served, the free market has and/or civil networks have spoken and we should not haste into calling this 'failure.' In the welfare state, consent about service to societal interests is primarily construed by a general or public interest perspective, identified by those who are elected to represent 'the people' (or at least those most involved). Upon the hierarchical determination of a public interest need, market or network performance may be judged as successful or a failure, and if the latter applies, subsequent action may be taken. Finally, under the eclectic regulatory state perspective, there is no primacy of one or the other type of consent - although an evaluation of success could start with assessing if markets and networks are - by default - performing successfully to a societal need. Consent becomes a matter of *proper design* in which sometimes it is construed along lines of markets, networks, or governments - across from identification onto execution - but in other cases, consent builds upon a joining of a hybrid plurality of elements or mechanisms of creating consent. This could be in a neat, two-stage complementary fashion, with identification (i.e., determination of a public interest) being a matter of hierarchical consent by representatives and execution

(i.e., implementation by delivery of goods or services) being a matter of contractual consent or stakeholder participation. However, when stages intertwine - as we explained earlier in this contribution - it becomes more likely that consent becomes a multifaceted joining of various mechanisms at the same time: voice and/or loyalty and/or exit. When energy policy objectives are set by government, we may find that the government may hierarchically state its position (as by or prior to government regulation), but in all likelihood, in doing so, it will try and build upon stakeholder consent, as through a gentlemen's agreement on general policy objectives and main strategies [46]^g. Similarly, but on a more tactical level of play, the Overijssel case combines hierarchical logic of consent, albeit through private-public administration through experts with a strict task, with network logic of consent. The latter is arranged by an 'open call,' expressed by interested groups or communities, in the stage of project initiative and, if supported by the province, in the subsequent project implementation phase. This of course means that the province, being the initiator, must be clear, equally to when governments privatize previously publicly rendered services, about the scope of its own responsibilities and, with that, the conditions under which it is willing to accept, from a standpoint of its own representative mandate, the decisions taken by private experts (upon bids), and the initiatives and actions taken by involved and subsidized groups and communities. This is by no means an easy balance to strike, and much will depend on the details of the actual arrangement, being consistent, transparent, respectful of interests, and inclusive to all (possible) stakeholders.

Conclusions

The challenge of sustainability is vital to the prosperity of humanity and other earth species. To find and implement policy solutions poses a wicked problem to policy-makers across the globe. In the age of governance, we find that governments, private organizations, and private persons *all* have a part to play in making the transitions necessary towards sustainability. Today's range of regulatory instruments and indeed the rise of the regulatory state reflect the shift to private involvement in the effort of achieving an effective and legitimate transition.

The province of Overijssel presents us with a fine example of on the ground involvement of groups and communities of private persons upon their voluntary willingness to invest in the collaborate exploration of new avenues of sustainable action - especially geared to climate and renewable energy objectives. This contribution took this case as an example of analyzing and discussing especially the legitimacy aspects of such interactive policy-making - assuming, for the moment, that the hopes at effectiveness will be fulfilled.

While applying especially Beetham's dimensions of legitimacy, we focused on the issue of support of the

instrument by shared beliefs and by consent. In doing so, a distinction was made between the element of influencing on the ground civil network relations (as public-private voluntarism, through subsidizing certain collaborative sustainability initiatives) and the element of having hierarchical government decisions taken by a 'private committee' of experts (as private-public administration). Although the provincial scheme is susceptible to major critiques on both elements, we have found that it carries elements that could provide a proper legitimacy basis. Reasoning both from the dimension of shared beliefs and of consent, we traced two normative strands of reasoning: one being about institutional environments representing patterns of interaction known as government, market, and civil network and the other being about politico-legal conceptualizations of the liberal state, known as the minimal state, the welfare state, and the regulatory state. From the relationship between these normative frames, it became clear that the Overijssel case presents a typically eclectic approach, which combines elements of government hierarchy with civil network involvement, using the private committee of private experts as 'go-between.'

We believe that such an arrangement can be successful (and measurable in empirical terms) in achieving legitimacy. Legitimacy is not *ex ante* given but must be designed into the arrangement *and* also upheld by involved parties acting upon a proper understanding of the role they may and/or shall play. The perspective of the regulatory state opens many possibilities of regulating society, but legitimacy of each and every possibility is not a matter of 'anything goes.' On the one hand, subsidizing voluntary private initiatives requires that government is optimally transparent on the how and reserved as to the extent to which it may influence the public discourse on societal interests, while on the other hand, there can be no doubt that decisions by the private committee of experts may be challenged by administrative and judicial review against administrative law principles such as proper preparation, equality and impartiality, and fair play.

Further, continuation or adaption of the scheme is, as a matter of ultimate consent, still well in the hands of democratically chosen and/or controlled representatives [40]^h.

Next, it will be of vital importance that the province and the private committee are most transparent about the objectives, procedures, and criteria of the scheme and the decisions taken under it. For private participants, individually and collectively, the appeal on their commitment must be fair but strong. Generally speaking, it is no exception for subsidized projects to not surface. This may not raise budgetary concerns if the subsidy is not paid out (or only to a minor extent), but the policy objectives remain unfulfilled. Under Dutch administrative subsidy law, governments often seek to

mitigate this policy risk by concluding a contract with the party subsidized, to legally commit to the proposed activityⁱ. Given the fact that groups and communities are social entities with uncertain dynamics, one may wonder if this is a serious option and whether the voluntaristic underpinning of collaborative projects is really fostered by such a formal obligation, also given the sensitivity as regards government influence on the societal discourse and the need to ensure that private persons inside and outside these projects stay reciprocally involved in the debate.

The legitimacy of public policies, such as in the realm of sustainability, depends not only on the choice of proper facilitating and constraining structures but also on the commitment to fair play and its follow-through. Not only is the effectiveness of the scheme uncertain, but the final evaluation of its legitimacy will also remain a dependent variable until the work is done. As was true under governance in the minimal state, it seems even more true under governance in the regulatory stage: legitimacy is never a given standard, it may be designed into structures and ambitions, but it will still need to be achieved by proper practice. This is certainly the case in projects concerning sustainability challenges of which effective solutions are by no means clear and readily deployable. The Overijssel case should be seen as one of many interesting cases towards evidence-based effective and legitimate policy practices.

Endnotes

^aSee Williamson's four levels of social analysis: belief systems as pointed out here would be at level L2 (time scale 10 to 10²).

^bThe concept of remediableness assumes that all feasible modes of organization are to some extent flawed and aims to identify the mode of organization that may be presumed to be efficient in the absence of any superior alternative capable of being implemented with, by comparison, net gains.

^cPurely on the functioning of these environments, without a particular actual public interest motive, such as improving consumer protection rules (markets), introducing new legal personalities for private community work (civil networks), improving procedures of judicial review against administrative acts (government).

^dConsider that under legal theory, freedom is the state of a 'bilateral legal toleration,' combining an 'absence of command' with an 'absence of prohibition' (in fact, a state of 'regulatory indifference').

^eThe term 'enjoyed' underscores that by nature 'public rights' are rights *in rem* and cannot be privately held as this suggests a 'property right' of a public right and a possibility to privately change the nature or scope of such a right. Public rights may however sometimes be

enjoyed *in rem* (against all other persons) - more on which in the main text.

^fA position of 'disability'.

^gRecently, the Dutch central government agreed on an 'Energieakkoord' (Energy Agreement) for Sustainable Growth, with major societal stakeholders (e.g., employer organizations, trade unions, environmental NGOs).

^hRemember the Hohfeldian difference between rights following rules of conduct (involving (no) duties versus (no) claims) and rights following power conferring rules (involving (no) power versus (no) immunity). The province retains its position of power to change or terminate subsidy rules.

ⁱSee Article 4:36 of the General Administrative Law Code (in Dutch, *Awb - Algemene wet bestuursrecht*).

Competing interests

The authors declare that they have no competing interests.

Authors' contributions

All authors contributed to this paper. MPTS and MAH collected and sorted the sources and information material and prepared the manuscript. EGPS and JFDBW provided critical revisions related to the description of the case. All authors read and approved the final manuscript.

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